***United States v. Bravo-Fernandez***

The Dilemma of the Court and Collateral Estoppel

Applicant Number 120

Almost everyone knows that you can’t be charged with the same crime twice, but what exactly does that mean? Here’s a simple question: If an offender performs several criminal acts at the same time, should they get charged for each criminal act separately or combined? What if they were charged with three counts at once, acquitted for two, and the last count was a vacated conviction due to a mistrial? Should the government be able to litigate the exact same issue again, against the exact same defendant, even though they were acquitted for two of three related criminal charges?

Double Jeopardy is a clause within the Fifth Amendment that has been rooted in the United States court system since as early as 1776.1 Since then, the clause has been continuously refined with the increased complexity of this age. Double Jeopardy prohibits people from being subjected to punishment for the same offense twice.2 Incorporated into the Double Jeopardy Clause is the Doctrine of Collateral Estoppel, which states that an issue of ultimate fact may not be litigated twice, by the same parties, once the jury has determined this fact by a final judgment.3 These two principles of law form the basis of *United States v. Bravo-Fernandez*. 4

**Background Information**

**1. Statement of Facts**

In *United States v. Bravo-Fernandez*, a businessman and a Congressman, both from Puerto Rico were convicted with conspiracy, federal bribery, and violating the Travel Act.5 The events began in early 2005 when Bravo-Fernandez, “Bravo”, the president of a private security service firm, began advocating increased security in Puerto Rico to Martinez-Maldonado, “Martinez”, a senator assigned to the Public Safety Committee.6 Martinez initiated bills regarding the security industry that would substantially benefit Bravo’s firm. 7 In the meantime, Bravo planned a luxurious trip for Martinez, another senator named de Castro Font, and himself to see a boxing match in Las Vegas.8 Bravo financed all related expenses including first class airfare, three separate hotel rooms, and fine dining.9 The day after their return, Martinez and de Castro Font initiated an immediate voting for Martinez’s progressed security bills.10

**2. Procedural History**

In 2010, a grand jury indicted Bravo and Martinez with the following charges: 1) Conspiracy (18 U.S.C § 371) to commit federal bribery and traveling in interstate commerce to aid in racketeering11 2) violating the Travel Act (18 U.S.C. § 1952(a)(3)(A)) by traveling while intending to promote unlawful activity, specifically federal bribery, and 3) federal bribery (18 U.S.C. § 666).12 In addition, Martinez was indicted for tampering with a witness, victim, or an informant (18 U.S.C. § 1512(b)(3)), but was later acquitted on this charge.13

After a jury trial in 2011, Bravo and Martinez were convicted of federal bribery, referred to as the “standalone § 666 counts”, acquitted for conspiracy charges, and acquitted for violating the Travel Act, and were sentenced to two years of imprisonment and individual fines.14 Additionally, Bravo was charged with conspiracy to violate the travel act in aid of racketeering and with the intention to promote federal bribery, however, this was later reversed by the court of appeals due to the bribery laws being repealed before he was charged with the crime.15 On appeal, the federal bribery violations § 666 were vacated and remanded due to improper jury instructions.16

**3. The Line Order**

Upon remand, the district court entered a line order stating that both parties’ conspiracy charges and their standalone § 666 counts were acquitted. 17 Within hours, the government submitted an emergency motion reaffirming the appellate court’s decision to vacate and remand the § 666 counts, claiming the district court made an error in acquitting these charges.18 The district court immediately vacated the line order, asserting Bravo and Martinez’s § 666 charges were not acquitted, but rather vacated. 19 In other words, Bravo and Martinez were acquitted for conspiracy and acquitted for violations regarding the travel act, leaving only the standalone § 666 counts vacated for mistrial. 20Bravo and Martinez moved reinstate the vacated line order and also filed a motion for acquittal of the § 666 charges. 21 They argued that because the court previously acquitted them for conspiracy to violate the federal bribery laws and acquitted them for violation of the travel act in furtherance of federal bribery, they were precluded by the collateral estoppel prong of double jeopardy from relitigation of the federal bribery issues. 22 The district court’s denial of their motion for acquittal consequentially resulted in the review of the double jeopardy clause by the appellate court. 23

**4. Improper Jury Instructions**

The District Court gave the jury instructions related to Bravo and Martinez’s federal bribery charge.24 To be convicted of the 18 U.S.CA. § 666 counts, the jury must find sufficient evidence that the individual was an agent of the commonwealth of the Puerto Rican government, the individual solicited, demanded, accepted, or agreed to accept anything of value from another person, and did so with the intent to be influenced or rewarded with business or transactions.25 In other words, the individual charged must have given, offered, or agreed to give something of value before the time of the business transaction.26 This would be considered bribery under an exchange theory (quid pro quo, or “this” in exchange for “that”).27 However, a person can not be convicted for this charge under a gratuity theory.28

The United States Supreme Court has distinguished between bribes and illegal gratuities by examining the individual’s intent.29 To convict one of bribery, the individual must posses an intent “to influence” an official act.30 This “influence” is something of value that is given in exchange for an act.31 On the other hand, illegal gratuity may be present when an individual donates a “reward” for the public official’s “future act” or a “past act” that has already been performed.32 In this case, the jury instructions included the specific words, “or after”, which meant the individual charged must have given, offered, or agreed to give something of value before, at the time, *or after* the time of the business transaction.33 For example, the jury instruction to convict Bravo of federal bribery stated the government did not need to prove Bravo offered the trip to Las Vegas “*before*” Martinez performed an official act, but rather suggested that the trip could have been in exchange for the act (exchange theory) or could have been a reward for Martinez’s acts (gratuity theory).34 This choice of words allowed the jury to believe they could convict him of bribery under both the gratuity theory and the exchange theory, allowing them to erroneously convict him for a gratuity and not a bribe.35 Similar jury instructions were offered for Martinez’s federal bribery charge as well, stating that the government did not have to prove Martinez accepted the trip to Las Vegas before he started performing official acts (what would have been the exchange theory), but suggested that he could have taken the trip and then performed official acts as a gratuity.36 For the jury instructions to have been proper, they would have stated the bribe was in exchange for the official act and therefore, would not have included any suggestions of rewards or gratuity.37

**Court’s Holding and Rationale**

The main issue in this case is whether a vacated unconstitutional conviction can negate the preclusive effect of an acquittal under the collateral estoppel doctrine of the double jeopardy clause. The main “rules” or proceeding case law used to determine the answers to these questions are laid out in *Ashe* *v. Swenson* and *Yeager* *v. United States*, leaving an outline of what is and is not barred from retrial by collateral estoppel.38

The appellate court followed the decision in *Ashe v. Swenson* to serve as a guideline for *Bravo*-*Fernandez* holding the collateral estoppel rule; When an “issue of ultimate fact” is decided by a jury, and resulted in a final judgment, that issue can not be litigated again between the same parties.39 Deciding whether the issue of ultimate fact has been determined involves an issue preclusion inquiry that “must be set in a practical frame” which considers “all the circumstances of the proceedings.”40 This means the court must examine prior proceedings, pleadings, evidence, charges and any “other relevant matter” and determine the basis of a rational jury’s decision.41 If the jury *could have* based their verdict on any issue other than the issue that the defendant seeks to preclude, then collateral estoppel is nonexistent. 42  If the jury decided an issue of ultimate fact in their verdict, usually in the form of an acquittal, then the defendant would receive the benefit of collateral estoppel and the government could not relitigate that issue of fact, even in a trial for a different offense.43

**A. The “Practical Frame” of Issue Preclusion Analysis**

In *Ashe*, the United States Supreme Court outlined what it meant to view all proceedings, pleadings, evidence, charges, and related matter through an inquiry that is “set in a practical frame” in order to determine if an issue should be precluded from being retried due to the collateral estoppel segment of double jeopardy, also known as an issue preclusion analysis.44  In *Ashe*, the jury acquitted a defendant of robbing one victim, but then tried to prosecute the same defendant for robbing another victim during the same robbery event.45 The Court concluded that by acquitting the defendant of robbery in the first trial, the jury had decided that the defendant was not one of the robbers in this crime and thus could not be tried again for robbing another victim during the same event.46 Thus, the prosecution was collaterally estopped from relitigating the same issue of whether the defendant was the robber in another trial against a different victim.47

However, there is a limitation that the United States Supreme Court in *Powell* decided that is particularly relevant to this case at hand.48 The court held that if the jury returned inconsistent verdicts, including a conviction, the rule of collateral estoppel does not apply.49 Likewise, in *Bravo-Fernandez* the jury acquitted Bravo and Martinez for conspiracy (to violate federal bribery statutes) and travel act violations (traveling interstate to commit federal bribery), but then convicted them of federal bribery.50 This was an inconsistent verdict because the federal bribery charge was a predicate offense to the other acquitted charges*.*51They were charged with bribery but acquitted for charges founded on bribery.52 The acquittals should have precluded a retrial due to double jeopardy because, by acquitting the defendants of traveling interstate to commit federal bribery, the jury must have determined they did not commit bribery.53 Yet, they were convicted of bribery.54 That is exactly why Bravo and Martinez argued the rationale of Ashe, claiming that the acquittals for conspiracy and violating the travel act were founded on the jury finding that they did not commit federal bribery and therefore, they should have been acquitted for bribery.55

However, the appellate court took a different standpoint. Recall during the first appeal, the appellate court vacated the bribery convictions on improper jury instructions.56 Then, upon remand, the district court initially improperly acquitted their bribery charges, only to vacate the charges hours later.57 Thus, the “final” decision for Bravo and Martinez, going into their second appeal, were acquittals for conspiracy and violations of the travel act, and vacated charges for federal bribery due to improper jury instructions.58 The appellate court took a stance to practically analyze the record, as laid out in *Ashe*.59

They stated that they must take into account the acquittals and convictions, even if the convictions were vacated, claiming that a vacated conviction due to trial error does not equate to a final jury decision founded on the government’s case.60 Bravo and Martinez argued the contrary by claiming, upon remand, the district court acquitted their bribery charge, which was a final decision at the time the line order was published and thus, the court had no right to vacate the final acquitted decision.61 Furthermore, they also argued, under *Yeager*, that their vacated counts should have been treated as hung counts, and since hung counts constitute a “nonevent” but still treated as a final jury decision, double jeopardy should have precluded the hung counts from being subjected to a retrial.62

After rejecting Bravo and Martinez’s contentions, the court continued to explain their rationale to follow *Ashe* by stating if an issue of ultimate fact is determined by the jury’s acquittal, then the prosecution is collaterally estopped from litigating the same issue again.63 However, the court also noted a limitation to this rule, that any acquittals must be practically analyzed to conclude what issue the jury founded their decision on.64 The court then looked to *Powell* to further examine this limitation when the jury’s intent is unknown.65 *Powell* held that an inconsistent conviction is *not* abrogated by an acquittal when it is not possible to determine which of the inconsistent verdicts the jury “really meant” thus collateral estoppel is “impossible to apply”.66 This court in Fernandez believed that the defendants’ vacated convictions inhibited the collateral estoppel effect of their acquittals.67

The court also noted two requirements that the defendants had to prove in order to obtain collateral estoppel’s issue preclusion: the defendants had the burden of proof to show that their acquittals (on the travel act and the conspiracy counts) would have collaterally estopped the standalone 666 counts, and their now-vacated convictions did not inhibit the collateral estoppel effect of their acquittals.68 The court began by only examining the acquittals to see if they would have supported a collateral estoppel argument.69 The defendants argued that, in acquitting them, the jury decided that the government did not prove they violated the bribery statute based on the exchange theory.70 The court first noted neither of the two offenses, conspiracy nor the travel act, involved having to prove the predicate offense of bribery, but rather independent elements that were not related to collateral estoppel, thus, they suggested that the first requirement was not met.71

They continued to the second requirement to see if the two acquittals would have lost their collateral estoppel effect due to the vacated convictions.72 The court believed that they must have considered the vacated convictions as part of the collateral estoppel inquiry, under *Ashe*, because vacated convictions are “set[] aside” convictions73 that still must be accounted for when performing a practical analysis of the jury’s decision to determine what issues were decided.74 The court further analyzed the convictions by accounting for the fact that the conviction was only vacated due to trial error which is *not* a decision of not guilty or that the government failed to prove its case.75 Furthermore, the defendants relied on *Yeager* to suggest that vacated verdicts should have been treated like hung counts and disregarded when performing a practical analysis of the record.76 This court rejected the suggestion that *Yeager* supported vacated convictions being treated like hung counts.20 The court claimed vacated convictions still had to be taken into account because the vacated conviction would conflict with an acquittal, leading to inconsistency that results in an inability to determine what the jury decided, thus collateral estoppel would be excluded.78

Bravo and Martinez had a fallback argument in case the court rejected their previous argument. They stated the convictions, including the vacated bribery conviction, were consistent with the acquittals for offenses having the bribery as a predicate offense. 79 They further argued that the conviction of bribery (now vacated) was a result of the improper gratuity theory, making a conviction with improper jury instructions (that gave a conflicting definition of bribery) consistent with the other two acquittals, thus collateral estoppel would still apply.80 However, the court rejected this argument, stating the verdicts were inconsistent with respect to the bribery charge as a predicate offense because all three offenses, not just the bribery offense, relied on the jury’s acceptance of the erroneous gratuity theory.81 Ultimately, the appellate court decided that, due to the inconsistent verdicts, the jury must have rejected the exchange-theory of the bribery conviction jury instructions, and thus, similar to the ruling in *Powell*, the inconsistent verdicts, though possibly reached by mistake, still prevented collateral estoppel in this case.82

**B. The Line Order**

The defendant’s final argument was that the District Court’s line order, that was vacated shortly after it was issued, was a directed entry of a final judgment of acquittal for both defendant’s federal bribery, standalone § 666, counts.83 Since it was a final judgment, it was irreversible and any retrial of the charges would violate the Double Jeopardy Clause, which bars the retrial of a final acquittal, even if it was founded on court error.84 If the ruling “actually represents a resolution, correct or not of” the factual issues, the order constituted a final judgment.85 The appellate court held that the line order was *not* an acquittal because the district court did not evaluate the record but instead was an act of their efforts to follow the appellate court’s mandated instructions.86  Due to the previous reasons mentioned, the acquittal did not constitute a substantive or an intentional acquittal.87 A substantive acquittal may be bared from relitigation due to the Double Jeopardy Clause but the court’s line order did not constitute that, thus the Double Jeopardy Clause did not prevent the district court from relitigating, or even vacating, the standalone bribery charges.88

**Collateral Estoppel – Principle of Law**

**A. History of Collateral Estoppel**

As previously discussed, the Double Jeopardy Clause prohibits a person from being put in jeopardy for the same offense89 twice. Embedded in the Double Jeopardy Clause is the Doctrine of Collateral Estoppel, that prohibits an issue of ultimate fact to be relitigated between two parties once the fact has been previously decided by a jury, resulting in a final judgment.90 The doctrine provides that if the second prosecution involves the same parties as the first prosecution, both parties had a full opportunity to litigate the issue of fact, and the fact was previously decided in the first prosecution with a final judgment, then the issue of fact is barred from being relitigated to ensure justice.91 The general purpose of collateral estoppel is to “protect a man who has been acquitted from having to ‘run the gauntlet’ a second time.” 92In other words, if a person has already been found innocent guilty, or an issue of ultimate fact has been decided in an acquittal verdict, then they can not be prosecuted for that same crime again.93

Some courts use the “same evidence test” to determine if the second indictment is barred by collateral estoppel. The “same evidence test” has been used as early as 1796 and claims that an acquittal of the first indictment only bars a second indictment if the evidence used the second time would have convicted the offender the first time.94 In other words, if an individual would have been convicted in the first indictment by the same evidence and facts that were used in the second indictment, then an acquittal on the first would not bar the second, permitting one divisible crime to be separated into individual prosecutions. 95

For example, *Hoag v. State of N.J.* held that one could be tried and convicted for the same offense against a victim, following a previous acquittal to another victim on the same charge and arising from the same event, as long as the evidence was different.96 Hoag was convicted of robbing Yager, after being acquitted of robbery charges of Cascio, Capezzuto, and Galiardo, thus, prosecuting him for robbery again based on the same event in which he was already acquitted. 97 This was not considered double jeopardy because the New Jersey Rule states that double jeopardy only applies when the “same evidence” used during the first indictment would be used again in the second indictment. 98 Trying the defendant a second time was not unreasonable or oppressive as to deprive him of due process so long as the evidence presented was different.99 Since the jury found the state failed to prove the identity of the robber to be Hoag, the jury decided that Hoag was not the robber in the first trial; therefore, collateral estoppel would bar the redetermination of the essential fact that the jury already found in a previous trial.100 However, the court believed that the jury did not necessarily believe Hoag’s alibi of not being present at the time of the robbery, but rather that the jury *could have* believed the prosecution failed to prove that Hoag was the robber beyond a reasonable doubt.101 Thus, the New Jersey court allowed Hoag to be tried again after the witnesses failed to identify him earlier, which seems to create a “re-do” for the prosecutor’s witness preparation.102

The “best evidence” test was eventually replaced by the “same transaction test” which “encourages the joining of parties and charges” that arise from the same event or transaction into one trial in an effort to avoid double jeopardy.103 Recently other courts have used other tests, such as the “same conduct” test, which determines if the relitigation of one issue should be precluded by a previous trial.104

The general principle of collateral estoppel is to prohibit a person from being first *acquitted* of a crime and later being convicted of that same crime.105 However, collateral estoppel does not normally apply when a person has been *convicted* of an offense and is retried for the same conviction again due to court error. 106 Inconsistent verdicts related to the effects of collateral estoppel have been the root of discussion in court rooms for many years and decides the outcome of the case at hand.

The two most defining cases that determine the laws regarding collateral estoppel are *Ashe* and *Yeager*.107 In *Ashe v. Swenson*, the United States Supreme Court gave district courts discretion to allow, or bar, relitigation based on their opinion of how the jury determined their decision of fact.108 *Ashe* also set the standard burden of proof of collateral estoppel on whoever desires to exercise the rights has the burden of proving the fact was previously determined in full; Furthremore, collateral estoppel is rarely granted because the burden of proving what exactly the jury decided is a noted as a difficult burden.109

In Ashe, six men were robbed during a poker game. Ashe was one of the suspect robbers who was charged with seven separate offenses; six robbery offenses and one theft offense for a car to leave the scene.110 Ashe was then tried for robbing one of the victims, Knight. After trial, a jury acquitted him of the robbery charge due to insufficient evidence. 111 Ashe was then retried for robbing another victim of the same crime, Roberts.112 During the second trial the same two witnesses testified, but with stronger testimonies regarding Ashe’s identity.113 These testimonies allowed the jury to convict Ashe for robbery during the second trial.114 Ashe appealed claiming the second trial should have been precluded due to the collateral estoppel prong of double jeopardy.115

The court then set out an approach to determine if a rational jury founded its decision on the same issue in both verdicts to decide if collateral estoppel would preclude the second trial.116 This approach was applied in a “practical frame” by examining the records of the prior proceedings, pleadings, evidence, and “other relevant matter” to account for all of the circumstances of the proceedings.117 Viewing the previous court’s proceedings and other matter, the United States Supreme Court ultimately decided that the first jury’s acquittal must have been founded on their determination of fact that Ashe was not present at the robbery, regardless of who the victim was.118 They further stated, as a general rule, that once an ultimate fact has been decided in a case, through a final judgment, that issue can not be tried again by the same parties in the future.119 Thus, a second prosecution of Ashe for robbery based upon the same event should have been precluded by collateral estoppel because his identity was previously determined to not be a robber in that crime and a second prosecution would allow for the retrial of that same issue that was previously decided.120 The court noted that during the second trial, the prosecution’s presentation of the evidence was refined to better suit his case, allowing for a re-do that was “precisely what the . . . [Double Jeopardy Clause] forbids.” 121

As previously mentioned, there is a case that applies a limitation to the *Ashe* rule. The United States Supreme Court in *Powell* held that if the jury returned inconsistent verdicts the rule of collateral estoppel does not apply. These inconsistent verdicts and how different courts apply them are discussed in further detail below.122

**B. Collateral Estoppel in Inconsistent Verdicts: Hung Counts, Acquittals, & Convictions**

One general rule concerning inconsistent verdicts and collateral estoppel is that an acquittal is not always a factual finding of innocence, nor the prosecution’s failure of proving their case.123 In addition, since consistency is not required, there is no basis for criticism on a conviction solely because there is inconsistency in the verdict. 124 In other words, a conviction accompanied by an acquittal will still allow for the conviction to be final and valid even though it might contradict the acquittal.125 There are many courts that hold different rulings based on distinctive reasons and are discussed in further detail below.

**1. Majority**

Many courts believe that a conviction is usually upheld regardless of any inconsistent accompanying charges. For example, in *United States v. Citron*, the defendant was indicted on nine counts of tax violations for three consecutive years.126 He was ultimately convicted of tax evasion for the second year, acquitted for all other counts except a conviction for false tax returns for the first and third years, which were later vacated and dismissed due to improper charts being admitted into evidence.127 On appeal, the court vacated the tax evasion conviction due to a mistrial and remanded it for a retrial.128 As a result, the defendant claimed the government could not retry him on that count due to collateral estoppel and the district court granted the issue preclusion in his favor by allowing a retrial, but only if certain evidence was excluded.129 The appellate court then ruled that the suppression of evidence was improper and that the issue of whether the defendant committed tax evasion was not necessarily determined by the previous trial, therefore collateral estoppel was also improper.130 Furthermore, the court held that even though the defendant’s convictions were vacated on appeal, they are still considered in the issue preclusion analysis to determine if collateral estoppel is proper because “collateral estoppel depends on the jury’s assessment of the facts in light of the charges as [they are] presented at trial.” 131

In regards to hung counts, some courts have held that an inconsistent verdict does not preclude collateral estoppel effects, while other courts have held that they do.132 The United States Supreme Court in *Yeager v. United States* further defined the holding in *Ashe* to state that inconsistency in a jury’s returned verdict involving a hung count does not preclude the collateral estoppel effects.133 In *Yeager*, the jury returned an acquittal on some counts and a failure to return a verdict, also known as a hung count or deadlock, on other related counts.134 The court held that the acquittal could still provide issue preclusion, through collateral estoppel, if the same issue to be retried had already been decided on the acquitted count.135 The court also commented that hung counts, even if declared as a mistrial, should not be included in Ashe’s issue preclusion analysis because the jury’s inability to determine a verdict is considered a “nonevent” and the court can only criticize the jury’s decisions, not their “failures to decide”.136 Furthermore, the court held that even if a verdict is based on an “erroneous foundation”, the verdict is considered final and should not be refuted.137

Some courts, such as the Ninth and Sixth Circuits, have held a ruling similar to but distinctive from *Yeager*, such as *United States v. Ohayon*.138 *Ohayon* held, similar to *Ashe*, that a hung verdict accompanied by an acquittal in the first trial should allow for issue preclusion, regardless of the inconsistent verdict, if the same issue would be litigated in the second trial and the jury could not have previously and rationally based their verdict on any other issue.139

Similarly in Georgia, *Harris v. State* held that it was indisputable that a defendant could not have been guilty for the present charge as well because the defendant was just acquitted for a charge that was so closely related to present charge, therefore, the issue of his guilt must have already been decided in his favor and he could not be charged twice due to the collateral estoppel doctrine.140

**2. Minority**

On the other hand, other courts have held contrary to *Yeager* and refuse to apply collateral estoppel and allow the retrial of hung charges when accompanied by acquittals solely because they believed if the jury acquitted one charge and honestly believed he was not guilty then they would not have failed to reach a verdict on a closely related count.141 These include the First, Eighth, and Fifth Circuits, who disagree with Yeager’s ruling and instead hold the contrary.142 For example, in *United States v. Howe*, the appellate court held that inconsistent verdicts, including both hung counts and acquittals, make the acquittals appear less final and make it “impossible” to decide, with certainty, what the jury determined in their verdict and thus the hung counts must bar issue preclusion and retrial of the hung counts are permitted.143

Similarly, *Powell* partially rejects *Ashe*’s rule that an acquittal could undermine a jury’s inconsistent conviction due to collateral estoppel, and instead, they applied a limitation by holding that a valid verdict of a conviction must stand despite an inconsistent verdict.144 The United States Supreme Court held that collateral estoppel applies when an acquittal and a conviction are held in the same verdict for related counts because there is no way to determine precisely what issues the jury decided.145 In *Powell*, the defendant argued that the returned verdict of an acquittal and a conviction on related charges were so inconsistent that the jury could not have logically or rationally decided that the defendant was guilty and the guilty verdict must have been overturned.146 The court rules that, regardless of any insufficient evidence or collateral estoppel argument, the rule provided in *Dunn* *v. United States*,147 must be upheld in circumstances where collateral estoppel would apply.148 In other words, when collateral estoppel applies, through the Ashe inquiry, a conviction should not be overturned solely because there is an illogical acquittal accompanying it in an inconsistent verdict.149 Ultimately, Powell held that an acquittal lacks collateral estoppel effect when it is truly inconsistent with an accompanying conviction because the inconsistency could be the result of lenity and should not be reviewable.150

**C. Collateral Estoppel and The Standard of Proof**

Some courts have also distinguished another limitation for *Ashe*’s rule regarding the standard of proof. 151 *Dowling* has held that a prior acquittal does not determine the ultimate issue of fact in a present case if there is a difference in the relative burden of proof.152 For example, an acquittal in a criminal case could mean that the jury was still led to believe that the defendant was guilty, but not guilty beyond a reasonable doubt, so the government is not precluded from relitigating an issue in a subsequent action governed by a lower standard of proof.153 In *Dowling*, the defendant was charged with bank robbery but the jury failed to return a verdict.154 He was then tried again on this count and convicted but the conviction was reversed on appeal.155 Immediately following the reversal, he was arrested for a separate burglary and acquitted in a completely separate trial.156In a third trial for bank robbery, he was convicted on most counts because the prosecutor was able to use evidence from the burglary case, specifically a witness’ testimony, to use the defendant’s identity characteristics to link the defendant to the bank robbery crime.157 Ultimately, if a defendant is acquitted for one crime with a lower standard of proof, collateral estoppel does *not* bar the introduction of that same crime in another trial of that defendant for separate crime with a higher standard of proof.158

**Conclusion**

*Bravo-Fernandez* has been granted certiorari to appear before the United States Supreme Court to decide the issue of whether, under *Ashe* and *Yeager*, a vacated, unconstitutional conviction can cancel out the preclusive effect of an acquittal under the collateral estoppel prong of the Double Jeopardy Clause.159

*Ashe* ultimately warns the courts that if prosecutors were given two chances to convict a man, more people would be convicted because the first “practice round” would allow them to hone their organization, preparation, and presentation to better suit their case for the jury.160 *Yeager* decided that acquittals in an inconsistent verdict that include hung counts may be given preclusive effect by the collateral estoppel doctrine because a hung count is a “nonevent” and should not be part of an issue preclusion analysis.161 In addition, though *Citron* is not binding to the United States Supreme Court, the case gives insight into how the court should rule in *Bravo-Fernandez* because it suggests that the defendants’ vacated convictions could be considered in the issue preclusion analysis to determine whether collateral estoppel is proper.162 Furthermore, *Powell* held that a previous conviction could not be overturned simply due to an irrational inconsistent verdict if the court can not determine a single issue as a foundation of the jury’s decision because consistent verdicts are not necessary and could have been reached through many different factors including mistake or lenity.163

Taking into consideration these precedent cases, Bravo and Martinez were originally convicted of federal bribery.164 Regardless of the improper jury instructions, the appellate court reversing the conviction, the district court vacating the conviction, or even the district court accidentally acquitting the conviction, the jury found Bravo and Martinez guilty for federal bribery.165 This alone should allow for a retrial because the only reason the conviction changed to an acquittal or a vacated conviction was due to court error, not a jury’s decision.166 Although, there is always the argument that this would give the prosecution a second chance to convict the same two defendants with a better prepared case, exactly like *Ashe* warns.167

1 Abraham Clark Freeman, The American State Reports: Containing the Cases of General Value and Authority Subsequent to Those Contained in the “American Decisions” and the “American Reports” Decided in the Courts of Last Resort of the Several States 277 (1903), https://books.google.com/books/about/The\_American\_State\_Reports.html?id=EKMzAQAAMAAJ (citing *Rex v. Duchess of Kingston*’s holding that the judgment of one court is a bar on the same issue in another court between the same parties); *Rex v. Duchess of Kingston*, 20 How. St. Tr. 355, 538 (1776);

2 Alex Kozinski, *Double Jeopardy*, 44 Geo. L.J. Rev. Crim. Proc. 522, 522 (2015) (discussing double jeopardy definition).

3 *Id.* at 544.

4 *United States v. Bravo-Fernandez*, 790 F.3d 41 (1d Cir. 2015).

5 *Id.* at 43; *United States v. Fernandez*, 722 F.3d 1, 7 (1d Cir. 2013).

6 *Fernandez*, 722 F.3d at 6-7.

7 *Id.* at 7.

8 *Id.*

9 *Id.*

10 *Id.*

11 18 U.S.C. § 371 (1994) (making unlawful two or more persons conspiring to commit any offense against, or to defraud, the United States or it’s agency for any purpose).

12 18 U.S.C. § 371 (1994); 18 U.S.C. § 1952(a)(3)(A) (2014); 18 U.S.C. § 666 (1994); *Fernandez*, 722 F.3d at 7.

13 *Fernandez*, 722 F.3dat 8.

14 *Id.* at 27.

15 *Id.* at 26-27.

16 *Id.* at 27.

17 *Bravo-Fernandez*, 790 F.3d at 45.

18 *Id.* at 45.

19 *Id.* at 44-45.

20 *Id.*

21 *Id.* at 45.

22 *Id.*

23 *Id.*

24 *Fernandez,* 722 F.3d at 16.

25 *Id.* at 17-19.

26 *Id.* at 17-18.

27 *Id.*

28 *Id.* at 18-19.

29 *Fernandez*, 722 F.3d 1, 19 (1d Cir. 2013) (quoting *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 494-05 (1999)).

30 *Fernandez*, 722 F.3d at 19.

31 *Id.*

32 *Id.*

33 *Id.* at 17-18.

34 *Id.* at 17.

35 *Id.* at 18.

36 *Id.* at 17.

37 *Id.* at 19-20.

38 *Ashe v. Swenson*, 397 U.S. 436 (1970); *Yeager v. United States*, 557 U.S. 110 (2009).

39 *United States v. Bravo-Fernandez*, 790 F.3d 41, 45 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (defining collateral estoppel).

40 *Bravo-Fernandez*, 790 F.3dat 46 (quoting *Ashe*, 397 U.S. at 444 (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)) (describing the collateral estoppel inquiry be set in a “practical frame”).

41 *Id.* at 46 (quoting *Ashe*, 397 U.S. at 445-46) (describing how to apply a “practical frame” to issue preclusion analysis of collateral estoppel).

42 *Bravo-Fernandez*, 790 F.3d at 46(quoting Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Verari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38-39 (1960)).

43 *Bravo-Fernandez*, 790 F.3d at 46.

44 *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (quoting *Sealfon*, 332 U.S. at 579).

45 *Ashe*, 397 U.S. at 438-439.

46 *Id.* at 445.

47 *Id.*

48 *United States v. Powell*, 469 U.S. 57 (1984).

49 *Powell*, 469 U.S. at 69.

50 *Bravo-Fernandez*, 790 F.3d at 43.

51 *Id.* at 44.

52 *Id.*

53 *Id.* at 48.

54 *Id.*

55 *Id.*

56 *Id.*at 49.

57 *Id.*

58 *Id.* at 44-49.

59 *Bravo-Fernandez*, 790 F.3d*.* at 49.

60 *Id.*

61 *Id.*

62 *Id.* at 50 (citing *Yeager v. United States*, 557 U.S. 110, 121 (2009).

63 *Bravo-Fernandez*, 790 F.3d at 50 (citing *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (quoting *Sealfon v. United States*, 332 U.S. 575, 579, (1948)) (holding a previous acquittal requires the court to “examine the record of prior proceeding, . . . pleadings, evidence, charge, and other relevant matter, and conclude . . .” what issue the jury founded their decision on to determine what issue was decided).

64 *Bravo-Fernandez*, 790 F.3d at 46-47.

65 *Id.*

66 *Id.* at 47(quoting *Powell*, 469 U.S. at 64, 68).

67 *Id.*

68 *Id.* at 47-48.

69 *Id.* at 48.

70 *Id.*

71 *Id.*

72 *Id.* at 49.

72 *Id.* at 49.

73 *Bravo*-*Fernandez*, 790 F.3d at 50 (stating a vacated conviction is nullified and is still relevant to *Ashe*’s issue preclusion analysis in determining the jury’s foundation for their verdict).

74 *Bravo*-*Fernandez*, 790 F.3d at 50.

75 *Id.* at 50 (citing *Fernandez*, 722 F.3d at 26-27) (emphasis added).

76 *Bravo-Fernandez*, 790 F.3d at 50 (citing *Yeager*, 557 U.S. 110, 121) (stating hung counts are “not . . . relevant” to the proceeding record and thus a hung count should not conflict with an acquittal).

77 *Bravo-Fernandez*, 790 F.3d at 50 (quoting *Yeager*, 557 U.S. 110, 121-22) (stating *Yeager* accounted for final verdicts as well as non-final, hung counts, verdicts to determine the effects on collateral estoppel and, furthermore, stating hung counts were not truly inconsistent verdicts because hung verdicts represent a jury’s failure to decide, not decision).

78 *Bravo-Fernandez*, 790 F.3d at 50.

79 *Id.* at 52.

80 *Id.* at 52-53.

81 *Id.* at 53.

82 *Id.* at 54.

83 *Id.* at 60.

84 *Id.* (quoting *Evans v. Michigan*, 133 S.Ct. 1069, 1074 (2013)).

85 *Id.* (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 563, 571 (1977)).

86 *Id.*; *see Evans v. Michigan*, 133 S.Ct. 1069, 1077 (2013) (quoting *United States v. Scott*, 437 U.S. 82, 98 (1978)).

87 *Bravo-Fernandez*, 790 F.3d at 61.

88 *Id.*

89 *See Block-burger v. United States*, 52 S.Ct 180, 182 (1932) (defining two offenses as the “same offense” when each violation of two distinct statutory provisions, in the same act or transaction, requires proof of additional facts); *see also* *Illinois v. Vitale*, 100 S.Ct. 2260, 2265-67 (1980) (suggesting that if all elements of offense had been proved as ultimate facts in a subsequent prosecution, the two are considered the same offense and the second is precluded).

90 Alex Kozinski, *Double Jeopardy*, 44 Geo. L.J. Rev. Crim. Proc. 522, 545 (2015).

91 *Id.* at 546.

92 *United States v. Prince*, 750 F.2d 363, 366 (5th Cir. 1985) (quoting *Ashe v. Swenson*, 397 U.S. at 446).

93 *Id.*

94 De Paul College of Law, *Criminal Law – Multiple Trials for a Single Transaction Involving Several Offenses Held Not Violative of Due Process*, 8 De Paul L. Rev. J. 104, 102-06 (1958), http://via.library.depaul.edu/law-review/vol8/iss1/11; *see* *Rex* *v. Vandercomb and Abbott*, 2 Leach 708, 168 Eng. Rep. 455 (1796).

95 *Ashe v. Swenson*, 397 U.S. at 451 (concurring opinion quoting *The King v. Vandercomb*, 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (Crown 1796)).

96 *Hoag v. State of N.J.*, 356 U.S. 464, 466 (U.S. 1958).

97 *Id.*

98 *Id.* at 467.

99 *Id.* at 469.

100 *Id.*

101 *Id.* at 474(emphasis added).

102 *Id.* at 479.

103 *Ashe v. Swenson*, 397 U.S. at 451.

104 *United States v. Aguilar-Aranceta*, 957 F.2d 18, 23 (1992) (referencing) *Grady v. Corbin*, 495 U.S. 508 (1990)); *Grady v. Corbin*, 495 U.S. 508, 522 (1990) (stating a mere alteration in evidence offered to prove the same conduct does not preclude the effects of double jeopardy and collateral estoppel. *Compare* *to* *Grady v. Corbin*, 495 U.S. at 526 (Scalia, J. dissenting) (disapproving the same conduct test for double jeopardy at \*526); *Dowling v. United States*, 493 U.S. 342 (1990).

105 *Ashe*, 397 U.S. at 444 (emphasis added).

106 *Id.* (emphasis added).

107 *Ashe*, 397 U.S. 436 (1970); *Yeager v. United States*, 557 U.S. 110 (2009).

108 *Ashe*, 397 U.S. at 437-48.

109 *United States v. Citron*, 853 F.2d 1055, 1058 (2d Cir. 1988) (quoting *United States v. Tramunti*, 500 F.2d 1334, 1346 (2d Cir. 1974)); *see United States v. Seijo*, 537 F.2d 694, 697 (2d Cir. 1976) (claiming defendant’s burden is “a heavy one”).

110 *Ashe*, 397 U.S. at 438.

111 *Id.* at 439.

112 *Id.*

113 *Id.* at 440.

114 *Id.*

115 *Id.*

116 *Id.* at 444.

117 *Id.*

118 *Id.* at 445.

119 *Id.* at 444.

120 *Ashe*, 397 U.S.at 446.

121 *Id.* at 447.

122 *United States v. Powell*, 469 U.S. 57, 62-63 (1984).

123 *United States v. Espinosa-Cerpa*, 630 F.2d 328, 332 (5th Cir. 1980).

124 *United States v. Powell*, 469 U.S. 57, 62 (1984) (quoting *Dunn v. United States*, 284 U.S. 380, 393 (1932); *Harris v. Rivera*, 454 U.S. 339, 348 (1981); *United States v. Price*, 750 F.2d 363, 365 (2d Cir. 1985).

125 *Id.*

126 *United States v. Citron*, 853 F.2d 1055, 1058 (2d Cir. 1988).

127 *Id.* at 1057.

128 *Id.*

129 *Id.* at 1058.

130 *Id.* at 1061.

131 *Id.* (quoting *Ashe*, 397 U.S. at 444).

132 *Compare* United States v. Citron, 853 F.2d 1055, 1058 (2d Cir. 1988) (holding defendant acquitted on some counts and convicted of tax evasion but later vacated due to mistrial could not be precluded from a new trial for previously convicted charge by collateral estoppel because the issue of whether the defendant committed tax evasion was not necessarily determined by the previous trial), United States v. Price, 750 F.2d 363, 366 (5th Cir. 1985) (holding collateral estoppel only applies to acquittals but does not apply to convictions, even if they are later reversed due to court error, to retry a defendant on a count that they were previously convicted regardless of the same evidence being used for both trials for separate charges), Evans v. United States, 987 A. 2d 1138, 1142 (D.C. Cir. 2010) (citing Yeager v. United States, 557 U.S. 110, 120 (2009)), United States v. Powell, 469 U.S. 57, 69 (1984) (distinguishing Yeager in that Yeager’s jury acquitted defendant on some counts and hung on others but there was “no inconsistent verdict of guilt . . . in opposition to . . . acquittals” whereas in Powell, defendant was convicted of felony murder but acquitted of burglary, thus there is an inconsistent verdict and a retrial for felony murder is permitted and not estopped by collateral estoppel), State of New Jersey v. Kelly, 201 N.J. 471, 492 (N.J. 2010) (holding a defendant convicted of murder and robbery but acquitted on related handgun possession charges could be retried after a mistrial due to the defendant’s witness’ perjured testimony because the court does not give preclude retrials after an “acquittal that may have been the product of lenity, compromise or mistake”, United States v. Bruno, 531 Fed. Appx. 47, 49 (2d Cir. 2013) (holding an acquittal accompanied by a conviction precludes collateral estoppel because the conviction “casts doubt” on any factual decisions that could have been inferred by the jury’s acquittal). *with* Yeager v. United States, 557 U.S. 110, 122-23 (2009) (holding acquittals in an inconsistent verdict with hung counts may be given preclusive effect by the collateral estoppel doctrine because a hung count is a “nonevent” and should not considered in an issue preclusion analysis), United States v. Aguilar-Aranceta, 957 F.2d 18, 23-25 (1d Cir. 1992) (abrogated in part by Yeager) (holding a deadlock decision that defendant knowingly possessed cocaine could be retried regardless of an acquittal for possession of cocaine with intent to distribute it because the jury could have found although defendant knew it was cocaine, she didn’t cause it to be imported, thus the possibility that the fact was determined, but not necessarily determined in the previous trial does not prevent re-examination of the issue) (emphasis added), *and* United States v. Ohayon, 483 F.3d 1281, 1289-90 (11th Cir. 2007) (holding a hung verdict accompanied by an acquittal should allow for issue preclusion if the same issue is to be relitigated).

133 *Yeager v. United States*, 557 U.S. 110, 122-23 (2009).

134 *Id.* at 114-15.

135 *Id.*

136 *Id.* at 122.

137 *Id.* at 122-23.

138 *United States v. Ohayon*, 483 F.3d 1281, 1289-90 (11th Cir. 2007); *see* *United States v. Romeo*, 114 F.3d 141, 142 (9th Cir. 1997) (holding the acquittal of a possession with intent to distribute charge, accompanied by a failure to return a verdict on importation charge, determined the jury’s acquittal was founded on the determination of the fact that defendant lacked knowledge of the substance’s presence, thus the lack of the essential element of knowledge estopped a retrial of the importation charge that was previously undecided by the hung verdict); *United States v. Frazier*, 880 F.2d 878, 885 (6th Cir. 1989) (holding an acquittal of misapplication of funds charge accompanied by a failure to return verdict on making false entries charge would bar retrial of hung count because the jury’s basis for acquittal must have been the defendant did not to willfully create false entries since they acquitted defendant on willfully misapplying funds).

139 *Ohayon*, 483 F.3d at 1292 (claiming if court would allow a retrial, the facts, argument, evidence and jury instructions would be the same in the second prosecution as in the first prosecution, thus the jury would conclude the same issue of fact common to both the acquitted offense and the hung count, baring the retrial for the related offense that was previously undecided); *see* *Sealfon v United States*, 68 S.Ct. 237, 240 (1948) (holding an acquittal in an earlier trial for a substantive offense can not be tried again, under collateral estoppel, with the identically same facts as in the first trial as a second attempt to prove an essential fact that the jury necessarily adjudicated in their first acquittal because collateral estoppel bars prosecution after an acquittal on related charges).

140 *Harris v. State*, 193 Ga. 109, 114 (1941); *see* De Paul College of Law, *Criminal Law – Multiple Trials for a Single Transaction Involving Several Offenses Held Not Violative of Due Process*, 8 De Paul L. Rev. J. 104, 102-06 (1958), http://via.library.depaul.edu/law-review/vol8/iss1/11.

141 *See United States v. White*, 936 F.2d 1326, 1329 (D.C. Cir. 1991) (holding a hung verdict for making false statements on an application for a U.S. passport would not have been accompanied by an acquittal of possessing an illegal birth certificate with intent to defraud the U.S. if the jury truly believed he was not guilty, thus the hung verdict was a mistrial and allowed for a second prosecution).

142 *Yeager*, 557 U.S. at 117 (holding hung counts accompanied with acquittals in same verdict makes it “impossible” to decide, with certainty, what the jury determined and therefore hung counts must bar collateral estoppel effects); *see* *United States v. Larkin*, 611 F.2d 585, 586 (5th Cir. 1980) (holding collateral estoppel not applicable for retrial on hung counts; an acquittal on counts for vicarious liability and hiding funds precluded a retrial for conspiring to embezzle funds and falsify funds in the manner alleged in acquitted counts, but remaining hung counts did *not* preclude retrial for conspiracy to embezzle and falsify on hung counts) (emphasis added); *United States v. Howe*, 590 F.3d 552, 560 (8th Cir. 2009) (holding there is no basis for collateral estoppel to bar a retrial for kidnapping and conspiracy after acquittals of felony murder and carrying a gun for violent crime charges); *United States v. Aguilar-Aranceta*, 957 F.2d 18, 23-25 (1d Cir. 1992) (abrogated in part by *Yeager*) (holding a hung verdict that defendant knowingly possessed cocaine could be retried regardless of an acquittal for possession of cocaine with intent to distribute because the jury *could have* found, although defendant knew it was cocaine, she didn’t import it, thus the *possibility* that the fact was determined, but not necessarily determined in the previous trial does not prevent re-examination of the issue) (emphasis added); *United States v. White*, 936 F.2d 1326, 1330 (D.C. Cir. 1991) (abrogated in part by *Yeager*) (holding double jeopardy improper in precluding a second indictment of related charges to an acquitted charge).

143 *Yeager v. United* States, 557 U.S. 110, 116 (2009); *United States v. Howe*, 590 F.3d 552, 560 (8th Cir. 2009).

144 *United States v. Powell*, 469 U.S. 57, 63-69 (1984) (upholding a jury verdict acquitting a defendant for conspiracy to possess cocaine and possession of cocaine accompanied by a guilty conviction of using a telephone to facilitate those previous two offenses).

145 *Id.* at 69.

146 *Id.* at 68.

147 *Powell* 469 U.S. at 59. (1984) (holding the *Dunn* rule that a defendant convicted by a jury on one count can not be able to “attack that conviction” solely because it is inconsistent with an acquittal and can not be rationally reconciled); *Dunn v. United States*, 284 U.S. 390, 394 (1932) (upholding a conviction because consistency in a verdict is not necessary when a defendant charged with of liquor nuisance, illegal possession of liquor, and illegal sale of liquor, was only convicted of liquor nuisance and acquitted for remaining two charges).

148 *Id.* at 64.

149 *Id.*

150 *Id.*

151 *See Dowling v. United States*, 493 U.S. 342, 348-49 (1990); *Charles v. Hickman*, 228 F.3d 981, 986-87 (9th Cir. 2000).

152 *Dowling v. United States*, 493 U.S. 342, 348-49 (1990).

153 *Id.*

154 *Id.* at 344.

155 *Id.*

156 *Id.* at 342-43.

157 *Id.* at 349.

158 *Id.* at 348-49 (emphasis added).

159 BallotPedia: The Encyclopedia of American Politics, http://www.supremecourt.gov/qp/15-00537qp.pdf (last visited July 8, 2016).

160  *Ashe*, 397 U.S. at 447.

161 *Yeager v. United States*, 557 U.S. 110, 122-23 (2009).

162 *United States v. Citron*, 853 F.2d 1055, 1058 (2d Cir. 1988).

163 *United States v. Powell*, 469 U.S. 57, 69 (1984).

164 *Bravo-Fernandez*, 790 F.3d at 43.

165 *Id.*

166 *Id.*

167 *Id.*; *Ashe*, 397 U.S. at 477.