

Case No. 06-20321

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

SCOTT YEAGER,

Defendant – Appellant,

Consolidated with,

Case No. 06-20593

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

REX SHELBY,

Defendant–Appellant,

Consolidated with,

Case No. 06-20691

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

JOSEPH HIRKO,

Defendant–Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, No. CR H-03-93-04

BRIEF OF APPELLANT JOSEPH HIRKO

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3. Joseph Hirko, Defendant-Appellant in Case No. 06-20691;
4. Rex Shelby, Defendant-Appellant in Case No. 06-20593;
5. Scott Yeager, Defendant-Appellant in Case No. 06-20321;
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15. Enron Corp.

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STATEMENT REGARDING ORAL ARGUMENT

This is an interlocutory appeal from the denial of Joseph Hirko's motion to dismiss certain indicted counts. The issue presented is whether, under collateral estoppel principles embodied in the Double Jeopardy Clause, acquittals on 14 counts at Hirko's prior trial preclude the government from retrying him on certain mistried counts. The collateral estoppel inquiry is record-intensive. It requires digesting the 13,000-page transcript of Mr. Hirko's three-month trial and closely examining the theories of prosecution and defense. Those theories, in turn, concern charges of wire and securities fraud, insider trading, and money laundering. Accordingly, Mr. Hirko respectfully submits that oral argument would be helpful.

We also ask that the time allotted for oral argument of Mr. Hirko's appeal not be divided with the consolidated appeals of Scott Yeager and Rex Shelby (Nos. 06-20321, 06-20593), but rather that each appeal receive a full complement of argument time. Unlike the other appeals, Hirko's appeal concerns the preclusive effect of an acquittal on a compound offense (*i.e.*, money laundering), where the defendant contested that offense *only* on the ground that he committed no predicate frauds (*i.e.*, wire fraud, securities fraud, or insider trading). The other appeals present their own discrete facts. To afford the Court and litigants a full and fair opportunity to address the issues, we respectfully ask that argument time not be split among the defendants.

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BRIEF FOR APPELLANT JOSEPH HIRKO

INTRODUCTION

The government proposes to retry Joseph Hirko for certain *predicate* offenses that a prior jury—having acquitted Hirko on *compound* offenses—concluded he did not commit. At the first trial, Hirko defended a series of money laundering charges *solely* on the ground that he did not commit any of the predicate acts of fraud that could have supported the money laundering charges. The jury acquitted Hirko on twelve counts of money laundering and two of the fraud predicates. Now the government seeks to retry a subset of the predicates that underlay the money laundering counts on which Hirko was acquitted. As we show below, this prosecution is barred by collateral estoppel, which *Ashe v. Swenson*, 397 U.S. 436 (1970), held applicable to criminal trials under the Double Jeopardy Clause of the Fifth Amendment.

Ashe bars the relitigation of facts necessarily found in a defendant's favor at a prior trial. Hirko was acquitted on charges of money laundering under 18 U.S.C. § 1957, which requires the government to prove only that the defendant (i) possessed proceeds (ii) that he knew derived from a predicate fraud, and (iii) thereafter engaged in a monetary transaction greater than \$10,000 with those proceeds. At trial, Hirko freely conceded elements (i) and (iii)—in particular, that he had engaged in monetary transactions (with the proceeds of stock sales) involving more than \$10,000. He

disputed—vigorously disputed—only one element of Section 1957: whether he had in fact committed the predicate frauds that the government now seeks to retry. The government alleged that Hirko did commit the predicate acts—by making misrepresentations at a January 2000 analyst conference and in press releases issued between January and May 2000, and by capitalizing on those frauds through insider trading during that same time period. Under the jury instructions, *any* of those predicates—securities fraud, wire fraud, or insider trading—would have supported a money laundering conviction.

During five days on the stand, Hirko repeatedly testified that he did not misrepresent his company’s capabilities to *anyone*, and thus did not commit *any* of the predicate frauds. In contrast to other *Ashe*-type cases—in which it can be difficult to tell what facts a jury “necessarily” decided—here, it is clear that the jury must have credited the only challenge Hirko made to the money laundering charges: he did not commit the predicate acts of fraud. Thus, the only possible meaning of Hirko’s acquittal on money laundering is that he cannot be retried on those predicates.

The district court denied Hirko’s collateral estoppel motion, but only by attributing to the jury a high degree of confusion and irrationality. The district court speculated that the jury might have: (1) misunderstood the instructions, which authorized conviction of money laundering based on *any* of the predicate offenses;

(2) disbelieved the government's undisputed evidence about the financial transactions alleged in the money laundering counts; or (3) completely ignored the only factual issue that was actually disputed at trial. The case law is clear, however, that such imputations of irrationality or lawlessness cannot be a valid basis for denying a collateral estoppel motion.

For all these reasons, the district court's order should be reversed and the case remanded with instructions to grant Hirko's motion to dismiss.

JURISDICTIONAL STATEMENT

Joseph Hirko appeals the denial of his pretrial motion to dismiss certain counts of two successive indictments.¹ The order of denial was entered on July 20, 2006 (Dkt. 1222 (RE:7)), and amended on August 31, 2006 (Dkt. 1244 (RE:8)), by the United States District Court for the Southern District of Texas.² It is appealable under 28 U.S.C. § 1291 and the collateral order doctrine. See *Abney v. United States*, 431

¹ Hirko sought to dismiss counts from both indictments because he could be prosecuted under either one. See *United States v. Stricklin*, 591 F.2d 1112, 1115 n.1 (5th Cir. 1979) (government may select either of two pending indictments as basis for trial).

² Citations to the record on appeal are in the following format: "Dkt." refers to the district court's docket number; "Tr." refers to trial transcript pages; and "GX" refers to government exhibits. Documents that are included in Hirko's Record Excerpts are also designated as "RE:[tab number]."

U.S. 651, 662 (1977). A notice of appeal was timely filed on July 26, 2006. (Dkt. 1223 (RE:2).)

ISSUE PRESENTED FOR REVIEW

Where a jury has acquitted a defendant on the compound offense of money laundering, and the defendant's sole defense at trial was that he did not commit any of the predicate acts of wire and securities fraud, is the government precluded by principles of collateral estoppel from retrying one or more of those predicate acts on which the jury failed to reach a verdict?

STATEMENT OF THE CASE

Following a three-month jury trial on the Fifth Superseding Indictment (Dkt. 468 (RE:3)), Joseph Hirko was acquitted on 12 counts of money laundering and two counts of insider trading (Dkt. 869 (RE:4)). Because the jury could not reach a decision on the remaining counts, which included certain insider trading, securities fraud, and wire fraud counts submitted as predicates to the money laundering counts, those counts were mistried. (Dkt. 847 (RE:5).) The government's Seventh Superseding Indictment re-charged some of the mistried counts, including the predicate frauds. (Dkt. 915 (RE:6).) Hirko filed a pretrial motion seeking dismissal, on collateral estoppel grounds, of the recharged fraud counts: specifically, Counts 2-6 of the Seventh Superseding Indictment. Hirko's motion also challenged Counts 2-6,

25 and 26 of the Fifth Superseding Indictment, which included the same charges and two predicate frauds that were *not* recharged in the Seventh Superseding Indictment.³

This appeal challenges the district court's denial of that motion.

STATEMENT OF FACTS

This case arises out of certain statements made by Joseph Hirko and others to analysts and to the public in early 2000 concerning a telecommunications network owned by a subsidiary of Enron Corporation ("Enron"). In 1997, Enron acquired Portland General Electric, where Hirko had worked for 17 years. (Tr. 10475, 10480.) Following the acquisition, Hirko became an executive with the Enron-owned company, later renamed Enron Broadband Services (hereinafter "EBS"), serving as its President and CEO from approximately July 1999 through July 2000. (Tr. 10470.) EBS was involved in developing a telecommunications network known as the Enron Intelligent Network ("EIN"). The trial, including the money laundering counts, principally concerned allegations that Hirko misrepresented capabilities of the EIN and certain network control software (known as the Broadband Operating System or "BOS").

³ For a chart comparing the challenged counts in the two indictments, see pages 22-23, *infra*.

A. The Indictment

The Fifth Superseding Indictment, on which Hirko was tried, charged that within a four-month period between January and May 2000 Hirko committed several related acts of securities fraud, wire fraud, and insider trading, and that he engaged in monetary transactions with the proceeds of those frauds. The charges challenged in Hirko's motion include Counts 2-6 and 25-26 of the Fifth Superseding Indictment. Count 2 charged securities fraud based on alleged misrepresentations at Enron's annual equity analyst conference on January 20, 2000 ("2000 Analyst Conference"). (Dkt. 468 ¶¶ 16-18, 37, 38 (RE:3).) Counts 3 through 6 charged wire fraud based on alleged misrepresentations in EBS press releases issued in January, March, April, and May 2000. (*Id.* ¶¶ 13-15, 39-40.) Counts 25-26 charged two acts of insider trading (a type of securities fraud) based on sales of Enron stock by Hirko in May 2000, at prices the government alleged to have been inflated by the prior frauds. (*Id.* ¶¶ 33, 45-46.) Counts 55 through 66 ("the 2000 Money Laundering Counts"), on which Hirko was acquitted, charged Hirko with laundering the proceeds of the predicate wire and securities frauds. (*Id.* ¶¶ 51-52.) The money laundering counts were brought under 18 U.S.C. § 1957, which does not require an intent to conceal or further the predicate crimes (unlike money laundering under 18 U.S.C. § 1956).

Hirko was also acquitted on Counts 23-24, which charged insider trading based on sales of Enron stocks by Hirko in February and April 2000. (*Id.* ¶¶ 33, 45-46).

The indictment included a 33-paragraph statement of the facts from which all of the offenses arose. As the district court explained, “[e]ach of the Counts against Defendant Hirko incorporated” this factual statement. (Dkt. 1244 at 2 n.1 (RE:8).) Paragraphs 1 through 10 provided a background description of the parties and EBS. Paragraphs 11-33, entitled “SCHEMES TO DEFRAUD,” alleged false statements in press releases and at the 2000 Analyst Conference, and described “The Defendants’ Stock Trading.” (Dkt. 468 (RE:3).) The crux of those allegations was that Hirko and other defendants misrepresented, for personal benefit:

the technological capabilities, value, revenue and business performance of EBS. The defendants executed this scheme by, among other means: (i) causing Enron to issue materially false and misleading press releases; (ii) making and causing others to make materially false and misleading statements to equity analysts and others; (iii) using fraudulent means to generate revenue so that EBS and Enron could appear to reach publicly declared financial targets; and (iv) failing to disclose material adverse information about EBS’s poor business performance. During this same time period, defendants HIRKO, YEAGER, and SHELBY sold large quantities of Enron stock, generating millions of dollars for themselves.

(*Id.* ¶ 11.)

As the district court recognized, the indictment alleged a close interrelationship among the predicate securities and wire fraud charges. Each of those charges

“involv[ed] the same general topics, *i.e.*, allegedly overstating the developmental status or capabilities of the [BOS] and thereby overstating the current success of the business.” (Dkt. 1244 at 10 (RE:8).) There was also “a temporal link between the wire and securities fraud charges and the insider trading counts” in the indictment. (*Ibid.*) In particular, the indictment alleged that “[a]t a time when they and others at Enron were making materially false and misleading public statements about EBS, the defendants sold large quantities of Enron stock.” (Dkt. 468 ¶ 33 (RE:3).) The indictment thus traced Hirko’s stock sales to insider information consisting of his knowledge of the underlying securities and wire frauds.

The 2000 Money Laundering Counts, which concerned what Hirko did after capitalizing on the alleged frauds, alleged transfers of:

criminally derived property . . . derived from a specified unlawful activity, that is, wire fraud in violation of [18 U.S.C. § 1343], and fraud in the sale of securities in violation of [15 U.S.C. §§ 78j(b), 78ff, and 17 C.F.R. § 240.10b-5].

(Dkt. 468 ¶ 52 (RE:3).) Each money laundering count alleged a transfer date, source account, target account, and amount of funds involved. (*Ibid.*) Because the indictment did not tie the securities-fraud count or particular wire-fraud or insider-trading counts to particular money laundering counts (*ibid.*), *any* of the underlying

securities and wire fraud counts—Counts 2-6, and 23-26—could have been used by the jury as predicates for each of the 2000 Money Laundering Counts.

B. The Theory of Prosecution

From its opening statement onward, the government argued that Hirko committed wire and securities fraud for personal profit, and then laundered the proceeds of those frauds:

This case is about lying, lying for profit. The evidence will show that these five men seated over here lied to the public in order to make millions of dollars in profit. Not just for their company, but for themselves. . . . [T]hey portrayed [the] business as something it wasn't, namely a success. And they did it to pump Enron's stock price and to line their own pockets.

(Tr. 412.) The government asserted that the defendants “painted a phony picture of their business by getting their message out to the public,” noting that they had “lots of different ways of communicating with the public and with investors, including “press releases” and talking directly to Wall Street analysts. (Tr. 423-24.) The government also tied the supposed lies to the alleged insider trading, arguing that the defendants “did it because they wanted the stock price to go up.” (Tr. 425; see also Tr. 426-29 (“[T]hey repeated the lies in press releases . . . so that the huge jump in the stock price wouldn't go down and their lies wouldn't be uncovered.”).) Thus,

according to the government, “over the course of the lies,” the defendants profited by selling Enron stock at inflated prices. (Tr. 429.)

The government’s principal witness was Ken Rice, Hirko’s former co-CEO at EBS. The government asked the jurors to listen to Rice’s testimony “very carefully” because he had “shared the CEO title [at EBS] with Joseph Hirko,” and “[h]e’s chosen to admit his guilt and to tell you about his crimes, including those he committed with Joe Hirko and the other Defendants.” (Tr. 417, 427, 450.) Although Rice pleaded guilty only to securities fraud at the *2001* Analyst Conference—which took place approximately six months after Hirko had left EBS—he testified that, along “with Mr. Hirko” and others, he “misrepresented the status of our software and our network” at the *2000* Analyst Conference. (Tr. 1583.) Rice stated that Hirko had suggested “Let’s say we’ve already established” a superior broadband delivery network even though, according to Rice’s testimony, no such network existed. (Tr. 1757.) Rice also testified that, after the 2000 Analyst Conference, Hirko acknowledged needing “to make . . . happen” the capabilities “[w]e’ve told them . . . that we’ve got.” (Tr. 1852.) According to Rice, he and the other defendants intentionally issued press releases “talk[ing] about the capabilities of the EIN and of the [BOS] in the present tense while those capabilities were really only in development.” (Tr. 1951.)

Beyond identifying the alleged misrepresentations underlying the securities and wire fraud counts against Hirko, Rice's testimony supported the government's view of Hirko's motive. Rice stated that he had sought to "[g]et the stock price up" by convincing others "that we had a stronger business than we really did have." (Tr. 1401.) Truthful press releases, Rice claimed, "would have [had] a negative impact on the stock price" that "would [have] cost me money" when selling his shares of Enron stock. (Tr. 1951-52.) Rice likewise stated that, to profit from the pumped-up stock price and their inside knowledge, the defendants sold "[Enron] stock at a higher price than [we] otherwise would have been able to." (Tr. 1402.) "[T]he market believed our network was capable of doing more than it really was, and I helped lead them to believe that, and that was information that I had that the market did not have." (Tr. 1403.)

Finally, the government emphasized this same link again in closing arguments, contending that defendants told a false story at the 2000 Analyst Conference and in press releases, all "to pump up Enron stock price and line their own pockets by cashing in." (Tr. 13084.)

C. The 2000 Money Laundering Counts

The government called a certified public accountant, Maurice Whalen, to connect the alleged frauds (about which Rice and others had testified) to the 2000

Money Laundering Counts. (Tr. 6669-99.) Whalen’s testimony, assisted by a PowerPoint presentation admitted into evidence as a summary exhibit (GX 3155 (RE:9); see Tr. 6685, 6715), tracked Hirko’s “tainted” funds, which Whalen defined to include “funds . . . deposited into [Hirko’s brokerage] accounts” via sales of Enron stock through “allegedly insider trades” (Tr. 6674). Whalen testified that the four trades corresponding to Counts 23 through 26 generated net proceeds of “\$9,844,210” (Tr. 6689)—\$5,082,358.39 from the first two trades and \$4,761,852.53 from the second two trades (GX 3155 (RE:9))—which Hirko deposited into PaineWebber Account number E72449, later renumbered HM 01298 (“Account 72449”). Whalen also explained—and his exhibit showed in table format—that he calculated those net proceeds by subtracting from the gross sales price Hirko’s transactions costs: “[Hirko’s] costs of exercising the option . . . by which he obtained the stock, plus the taxes that needed to be paid relative to the exercise of that option, plus . . . the brokerage commission on the transaction.” (Tr. 6686; GX 3155 (RE:9).) The government presented no evidence—none—that Hirko somehow had the *gross* proceeds of his stock trades at his disposal when he engaged in the monetary transactions charged in the 2000 Money Laundering Counts.

Whalen also carefully described the overall composition of Account 72449. He indicated that the account contained not only the \$9,844,210.92 in net proceeds

from Hirko's stock sales but also approximately \$20,000 in interest on those proceeds. (Tr. 6696.) The account also contained "clean funds," which Whalen defined as "any funds other than funds arising from the sale of Enron stock," including interest on such funds. (*Ibid.*) Those "Total Clean Funds," according to a large-font slide in Whalen's PowerPoint presentation, were \$477,044.05. (GX 3155 (RE:9).) While that slide was on display, the district court asked Whalen to repeat where "the total clean fund, [\$]477 [thousand]" came from. (Tr. 6697.) Whalen explained that he arrived at the figure through "PaineWebber statements," taking into account "anything else that was deposited in the accounts" other than funds from sales of Enron stock. (*Ibid.*) Whalen's testimony and the exhibit concerning the \$9,844,210.92 in "tainted" funds and the \$477,044.05 in clean funds were not contradicted in any way during cross-examination. (Tr. 6739-58.)

Whalen testified that the \$9,844,210.92 in net proceeds were thereafter involved in 12 separate transactions, corresponding to the 2000 Money Laundering Counts. (Tr. 6689-6693.) Tracking his exhibit, he showed how the amounts allegedly laundered were transferred from Account 72449 into mutual funds, Bank of America accounts, or other PaineWebber accounts. (*Ibid.*) The amounts listed matched those appearing in Counts 55 through 66 of the Fifth Superseding

Indictment, and totaled \$9,861,519.49 (a figure that included interest on the tainted funds). (GX 3155 (RE:9); Dkt. 468 ¶ 52 (RE:3).)

Aside from eliciting Whalen’s testimony, the government mentioned money laundering only twice at trial. First, in its opening statement the government assured that “[w]e are going to talk about the specifics of [certain] charges,” such as money laundering, “more at the end of [the] case.” (Tr. 448-49.) The government’s discussion of those specifics consisted of mentioning, during closing argument, that the “money laundering counts . . . correspond[] with [Hirko’s stock] trades.” (Tr. 13121.) Significantly, the government did not dwell on the conceded elements of Section 1957 money laundering—the existence of proceeds and of monetary transactions greater than \$10,000. Rather, the government focused in its closing argument exclusively on whether Hirko had profited from predicate acts of fraud:

As I told you at the beginning of my closing argument, the huge grants of stock options that Hirko, Shelby, and Yeager received gave them a powerful motive . . . to lie, to paint a picture of success [at] EBS that simply wasn’t the case. Enron gave them the motive to get rich quick, then it gave them the tools to do it, the opportunity to speak to analysts and the investing public through an Analyst Conference and through press releases. And the evidence in this case has shown that’s exactly what they did. They abused their position of trust for personal gain.

(Tr. 13196.)

D. The Theory of Defense

Hirko had a single, well-focused defense: he did not commit the predicate frauds. Hirko's counsel emphasized that his client "did not lie, misrepresent, hype, or falsely t[ou]t the capabilities of his business." (Tr. 511.) The single defense to all charges, in short, was that "the statements [Hirko] made about the network and the software were true." (Tr. 453.) As defense counsel opened to the jury:

[Y]ou will hear that Hirko never said that the BOS was done. In fact, you will hear that the company carefully distinguished between current capabilities and its future capabilities, like the BOS, that weren't done.

The evidence will also show that [Hirko] honestly believed in the statements he made . . . because he had seen this technology work with his own eyes . . . [and] because the people who developed the technology reviewed the press releases that were issued and reviewed the slides that he used in giving the presentation at this 2000 analyst conference. . . .

(Tr. 454.)

As previewed by that opening statement, Hirko testified that he did not lie about EBS's capabilities. Hirko explained that he was extremely enthusiastic about EBS's efforts to build the EIN: "[T]o me, this really was focused on an unbelievable opportunity for the company. I mean, we were fixing the Internet, and I truly believed that. And the power of that, the strength of that was going to be a phenomenal opportunity for the company." (Tr. 10496.) Hirko further testified that

he “absolutely” believed EBS had a functional network, as well as functional network control software, because “I saw it work with my own eyes” (Tr. 10472); that he never sought to present any false or misleading information to analysts (Tr. 10744); that no one told him anything that undermined the accuracy of his statements at the 2000 Analyst Conference (Tr. 11545); that he was “very confident” that the press releases at issue in the wire fraud counts were accurate when they were issued (Tr. 10533); that no one told him that EBS could not execute on its plan to develop the BOS (Tr. 11544); and that, when he sold Enron stock, he was not aware of any negative material inside information not available to the public (Tr. 10908, 10942).⁴

Hirko also sought to rebut testimony from government witnesses. Disagreeing with two such witnesses, he testified that “[t]here was intelligence on the network.” (Tr. 10711.) Hirko likewise disputed testimony that he had discouraged another EBS executive from editing press releases for accuracy. (Tr. 10535.) And he repeatedly disagreed with Rice’s testimony. He denied telling Rice after the 2000 Analyst Conference that, in light of the capabilities they had represented already having to the analysts, “[n]ow [we’ve] got to make it happen.” (Tr. 1850-52, 10789.) Hirko also

⁴ Hirko testified that he sold stock for other reasons, such as his PaineWebber advisor’s “suggest[ion] that I needed to diversify, [because] I . . . had too much exposure to Enron. I sold the shares and then invested them with [the PaineWebber advisor] based on his recommendations” (Tr. 10907.)

denied “giving Mr. Rice a high-five” to celebrate a consultant’s presentation in which, according to Rice, the consultant had given EBS a high valuation. (Tr. 1563-69, 10725.) And Hirko “absolutely” disagreed with Rice that an August 1999 EBS staff meeting was a bankruptcy “workout”—*i.e.*, a signal that EBS was failing. (Tr. 10577, 1515-17.)

The testimony of other defense witnesses also showed that Hirko never misrepresented EBS’s capabilities. Witnesses testified, for example, that technical personnel reviewed the slides Hirko used during his presentation at the 2000 Analyst Conference, and that nobody ever informed Hirko that the slides were false or misleading in any way. (Tr. 8026-60, 8477-85.) Similarly, software engineers testified that the company in fact possessed the capabilities described by Hirko to analysts. (Tr. 8074-79, 8485-96, 9056-66.) Finally, public relations personnel involved in drafting the press releases charged in Counts 3 through 6 testified that those press releases were accurate and vetted in advance by technical personnel. (Tr. 7407-12, 7465-88, 7729-39.)

Neither Hirko nor any other defense witness, however, ever contested Whalen’s testimony concerning the remaining elements of the money laundering charges—*i.e.*, that he had engaged in monetary transactions, derived from his stock sales, that exceeded \$10,000. Nor did any witness dispute Whalen’s testimony that Hirko had

at his disposal only the net (not gross) proceeds of his stock sales. To the contrary, on cross-examination, Hirko agreed with the government's characterization that his "total net proceeds for the trades in 2000 that are at issue in this case are [\$]9.844 million." (Tr. 11373.)

Defense counsel's closing argument reiterated Hirko's position that "all of the statements that are contested here were true" (Tr. 13218) and that "Joe Hirko absolutely had a good-faith reasonable belief in the truth of every one of the statements that's charged in this case" (Tr. 13219). After arguing that Hirko's statements at the 2000 Analyst Conference and in the 2000 press releases were true (Tr. 13251-13304), Hirko's attorney briefly turned to the money laundering counts. His position could not have been clearer:

Very quickly, the money laundering counts, what does this mean? All it means is that if you have proceeds of *securities fraud or wire fraud*, you can't transfer them from one account to another, just doing that amounts to money laundering. But for the reasons we've talked about, there wasn't any proceeds of illegal activity here. As a result, there was no money laundering; and you should return a verdict of not guilty on those counts as well.

(Tr. 13307 (emphasis added).) The defense proffered no other basis for acquitting on the money laundering counts.

E. The Jury Instructions, Verdict, and Subsequent Motion to Dismiss

The jury trial began on April 18, 2005, and ended July 13, 2005. The jury instructions explained that Hirko was charged with laundering “funds generated through wire fraud and fraud in the sale of securities” (Tr. 13664), and that he should be convicted of money laundering if the jury found five elements:

First: That the defendant engaged or attempted to engage in a monetary transaction;

Second: That the monetary transaction involved criminally derived property of a value greater than \$10,000;

Third: That the property was in fact derived from a specified unlawful activity, that is, wire fraud in violation of Title 18 United States Code, Section 1343, and fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5;

Fourth: That the defendant acted knowingly, that is, with knowledge that the transaction involved proceeds of a criminal offense; and

Fifth: That the transaction took place in the United States.

(Dkt. 854 at 54; Tr. 13669.)

The jury instructions also made clear that the jury need not find that Hirko had committed both wire fraud and securities fraud to sustain a conviction for money laundering. On the contrary, all that was necessary was that the jury find that the

defendant knowingly possessed proceeds of “some” offense, which could be either wire fraud or securities fraud or both:

The Government must prove that the Defendant knew that the property involved in the monetary transaction constituted or was derived from proceeds obtained by some criminal offense. The Government does not have to prove that the Defendant knew the precise nature of that criminal offense or knew the property involved in the transaction represented the proceeds of *wire fraud or fraud in the sale of securities*.

(Tr. 13670 (emphasis added).)

The jury instructions also defined “criminally derived property” as “any property constituting or derived from the proceeds of a criminal offense.” (Tr. 13670 (emphasis added).) They also made clear that “[a]lthough the Government must prove that, of the property at issue, more than \$10,000 was criminally derived, the Government does not have to prove that all of the property at issue was criminally derived.” (Tr. 13670-71.) In addition, the jury was instructed:

Where a defendant is charged under Section 1957 with making a monetary transaction from an account containing money that is derived from criminal activity and money that is not derived from criminal activity, the Government must prove beyond a reasonable doubt that [1] there was more than \$10,000 of tainted money in the account and that [2] the Defendant transferred from the account an amount of money that exceeds the amount of clean money in the account by more than \$10,000.

When the aggregate amount withdrawn from an account containing commingled funds exceeds the clean funds, individual withdrawals may

be said to be of tainted money, even if a particular withdrawal was less than the amount of the clean money in the account.

(Tr. 13671 (emphasis added).)

On July 20, 2005, during the fourth day of deliberations, the jury indicated it had reached agreement on certain counts but was deadlocked on others. (Tr. 13711.) At 3:50 p.m., the district court sent the jury back, but directed it to take only “until the end of the day”—*i.e.*, “until 5:00 [p.m.]”—to decide whether additional deliberations could be helpful. (Tr. 13724.) After the prescribed 70 minutes had elapsed, the jury indicated it had not yet made additional progress; the court decided to “take their verdict” instead of asking the jury to return for a fifth day of deliberations. (Tr. 13725.) The jury then returned verdicts of acquittal on 14 of the counts against Hirko: the 2000 Money Laundering Counts (Counts 55 through 66) and the insider trading counts for stock sales on February 18, 2000, and April 20, 2000 (Counts 23 and 24, the “February and April 2000 Insider Trading Counts”). (Dkt. 869 (RE:4).) The remaining counts were mistried. (Tr. 13727-28.)

On November 9, 2005, the government filed a Seventh Superseding Indictment (Dkt. 915 (RE:6)) “based on factual allegations similar to those asserted in the Fifth

Superseding Indictment” (Dkt. 1244 at 3 (RE:8)). The relevant charges appear below:⁵

<u>United States v. Joseph Hirko</u> (Cr. No. 03-0093-7) Conversion Chart for Counts Relating to Joseph Hirko	
5th Superseding Indictment <u>United States v. Hirko, et al</u> (Cr. No. 03-0093-5)	7th Superseding Indictment, <u>United States v. Hirko</u> (Cr. No. 03-0093-7)
1 (Conspiracy to Commit Securities and Wire Fraud)	1
2 (Securities Fraud: 2000 Analyst Conference)	2
3 (Wire Fraud: 1/31/00 Press Release)	(excluded from Seventh Superseding Indictment)
4 (Wire Fraud: 3/30/00 Press Release)	(excluded from Seventh Superseding Indictment)
5 (Wire Fraud: 4/11/00 Press Release)	3
6 (Wire Fraud: 5/15/00 Press Release)	4
23 (Securities Fraud: Insider Trading 2/18/00)	(Jury Acquittal)

⁵ (See Dkt. 1244 at 4-5 (RE:8); Dkt. 468 (RE:3); Dkt. 915 (RE:6).)

<u>United States v. Joseph Hirko</u> (Cr. No. 03-0093-7) Conversion Chart for Counts Relating to Joseph Hirko	
5th Superseding Indictment <u>United States v. Hirko, et al</u> (Cr. No. 03-0093-5)	7th Superseding Indictment, <u>United States v. Hirko</u> (Cr. No. 03-0093-7)
24 (Securities Fraud: Insider Trading 4/20/00)	(Jury Acquittal)
25 (Securities Fraud: Insider Trading 5/11/00)	5
26 (Securities Fraud: Insider Trading 5/12/00)	6
55-66 (2000 Money Laundering)	(Jury Acquittal)
172 (Securities Fraud: Insider Trading 1/23/01)	11
173 (Securities Fraud: Insider Trading 1/25/01)	12
174 (Securities Fraud: Insider Trading 1/26/01)	13
175 -76 (2001 Money Laundering)	(excluded from Seventh Superseding Indictment)

On December 8, 2005, Hirko filed a motion to dismiss on collateral estoppel grounds what we propose to label the “Securities and Wire Fraud Counts” (Counts

2 through 6 of the Fifth Superseding Indictment and Counts 2 through 4 of the Seventh Superseding Indictment) and the “May 2000 Insider Trading Counts” (Counts 25 and 26 of the Fifth Superseding Indictment and Counts 5 and 6 of the Seventh Superseding Indictment). (Dkt. 935.) Hirko contended that his sole defense to the money laundering charges in the first case was his flat denial that he had committed any predicate act of securities or wire fraud. As Hirko explained, the defense never “contest[ed] the other basic elements of money laundering.” (Dkt. 936 at 2.) Accordingly, Hirko argued, “the only rational basis on which the jury could have acquitted [him] on the 2000 Money Laundering Counts and the February and April 2000 Insider Trading Counts is by finding that he did *not* engage in the alleged misrepresentations and omissions that formed the common factual basis of the securities-fraud, wire-fraud and insider-trading counts in the Fifth Superseding Indictment.” (*Id.* at 5 (emphasis added).)

F. The District Court’s Order

Judge Gilmore denied the motion on July 20, 2006 (Dkt. 1222 (RE:7)), and issued an amended order of denial on August 31 (Dkt. 1244 (RE:8)). (All subsequent citations are to the amended order, hereinafter “Order.”) The court shared Hirko’s view of the government’s theory of prosecution, which, in the court’s words, was that Hirko and other defendants had “falsely portray[ed] the technological capabilities,

value, revenue, and business performance of [EBS],” with “the objective of . . . increas[ing] the price of Enron stock, so that the Defendants could personally enrich themselves through stock sales.” (*Id.* at 18.) The court also restated the government’s allegation that Hirko “sold large blocks of Enron stock, in order to take advantage of the rising stock price, which resulted from the overall scheme to defraud the investing public at the 2000 Analyst Conference and in press releases.” (*Id.* at 19.) Accordingly, in the court’s view, each money laundering charge depended on convincing the jury that Hirko had committed at least one of several “predicate offenses (e.g., wire fraud, securities fraud, or insider trading).” (*Id.* at 14.) And the court acknowledged Hirko’s defense that “he did not engage in the alleged misrepresentations and omissions that formed the common factual basis of the securities-fraud, wire-fraud and insider-trading counts.” (*Ibid.* (quoting Dkt. 936 at 5).)

Rather than focus on the theories actually litigated at trial, however, the district court denied Hirko’s motion by attributing to the jury two novel and highly implausible rationales. First, the court speculated that the jury might have concluded that there were not sufficient proceeds of criminal activity in the brokerage account from which the Section 1957 “monetary transactions” were made (PaineWebber Account 72449) to support a conviction on any of the money laundering charges.

(Dkt. 1244 at 15-17 (RE:8).) In particular, having acquitted Hirko on two of the insider trading counts (the February and April trades), the jury might have found that all of the proceeds of those two trades were “clean” funds that could not give rise to money laundering. (*Id.* at 16). The district court speculated that this finding could have permitted the jury to conclude that Hirko’s individual withdrawals from Account 72449 could not “be said to be of tainted money” because the government had not shown “that the defendant transferred from the account an amount of money that exceeds the amount of clean money in the account by more than \$10,000.” (*Id.* at 15-16 (quoting Dkt. 854 at 55-56).)⁶

But according to Maurice Whalen’s undisputed testimony and exhibit, the February and April trades generated only \$5,082,358.39 in net proceeds (Tr. 6689; GX 3155 (RE:9))—*i.e.*, the funds left over after Hirko exercised stock options and sold the resultant shares of Enron stock—yet the jury acquitted Hirko in Counts 55-66 of charges that he laundered \$9,861,519.49 in proceeds.⁷ To fill the gap, the district court hypothesized that perhaps the jury believed that Hirko’s monetary transactions

⁶ See *supra* page 20.

⁷ Specifically, Hirko was charged with laundering \$224,500 in each of Counts 55 through 58, \$336,784 in each of Counts 59 through 61, \$96,500 in Count 62, \$2,860,716.53 in Count 63, \$3,674,635.99 in Count 64, \$1,087,216.54 in Count 65, and \$234,068.43 in Count 66. (Dkt. 468 at ¶¶ 51-52 (RE:3).)

drew from the \$15,702,387.81 in *gross* proceeds from the February and April trades, instead of the \$5,082,358.39 in *net* proceeds that, according to Whalen’s undisputed testimony and exhibit, constituted the only proceeds of those trades that were ever at Hirko’s disposal.⁸ (Dkt. 1244 at 16, 17 (RE:8).) In the court’s view, “[b]ecause the aggregate amount of gross proceeds allegedly gained in Counts 23 through 24 [\$15,702,387.81] exceeds the total amount of money charged in the money laundering counts, the jury could have rationally reached the conclusion that the amount of clean funds in [Account 72449] exceeded any possible tainted funds.” (*Id.* at 17.)

The court also hypothesized a second but related rationale for the money laundering acquittals. To prove a Section 1957 violation, the court explained, the government was required to show that Hirko “knew that the property involved in the monetary transactions constituted, or was derived from, proceeds obtained by some criminal offense.” (Dkt. 1244 at 17 (RE:8).) Perhaps, the district court speculated, the jury concluded that Hirko did not actually *know* that “the money transferred from [Account 72449] involved proceeds obtained by some criminal offense.” (*Ibid.*) In

⁸ The district court also speculated that the jury could have acquitted on *some* of the 2000 Money Laundering Counts based on calculations involving the net proceeds of the February and April trades. (Dkt. 1244 at 16-17 (RE:8).) But the court acknowledged that it was “unclear” whether the jury rationally could have stretched those \$5,082,358.39 in net proceeds to support acquittals on *all* of the 2000 Money Laundering Counts. (*Id.* at 17.)

particular, having acquitted Hirko on the February and April Insider Trading Counts, the jury might have concluded that Hirko did not know that his monetary transactions involved the proceeds of a crime. Once again, the district court did not attempt to square this rationale with the jury instructions, which authorized conviction for money laundering if Hirko knew that Account 72449 contained proceeds of *any* predicate offense, including securities fraud and wire fraud. (See *id.* at 14.) “Based on the acquittal of Defendant Hirko on Counts 23 and 24,” the court held that the jury could have found that Hirko unknowingly made transfers involving the proceeds of his own prior frauds. (*Ibid.*)

SUMMARY OF ARGUMENT

I. The government is barred from retrying Joseph Hirko on the Securities and Wire Fraud Counts and the May 2000 Insider Trading Counts. Collateral estoppel principles elaborated in *Ashe v. Swenson*, 397 U.S. 436 (1970), preclude the government from relitigating facts necessarily decided in a criminal defendant’s favor at a prior proceeding. *Ashe* demands a realistic, common-sense review of the charges, including the theory of defense. Here the 2000 Money Laundering Counts required the government to prove that Hirko committed one or more specific predicate acts of fraud. Hirko’s *only* defense to those charges was that he did not commit any of those predicate frauds and, consequently, did not launder proceeds of “specified unlawful

activity.” Because that defense was the only rational ground for the money laundering acquittals, those acquittals necessarily resolved in Hirko’s favor the question whether he committed any of the predicate acts. The government is therefore precluded from retrying any of those predicates in the present case.

II. The district court’s contrary ruling is unsustainable. Instead of taking a common-sense view of the record—as *Ashe* requires—the district court impermissibly imputed lawlessness and irrationality to the jury. For one thing, the court speculated that the acquittals might have turned on theories and facts that were never presented to the jury. The district court also assumed that the jury might have mistakenly believed that insider trading was the only eligible money laundering predicate; it imagined testimony that Hirko’s monetary transactions involved the gross (as opposed to net) proceeds from his stock sales; and it speculated that Hirko could have first committed predicate frauds but then somehow transferred proceeds of those frauds without knowing he was doing so. No rational jury could have adopted any of these far-fetched explanations.

III. The principles of *Ashe* are fully applicable even though the trial below resulted in a mixture of acquittals and mistried counts. With virtual unanimity, courts have applied collateral estoppel to partial verdicts of acquittal. The only *rational* explanation on this record for the money laundering acquittals was that Hirko did not

commit any of the predicate offenses. That there were some mistried counts does not authorize a court to adopt an *irrational* explanation for the acquittals. In this case, the mistrials—reached on only the fourth day of deliberations after a three-month trial—should be attributed to fatigue, impatience, or the pressure of the district court’s “until 5 p.m.” deadline. They do not justify requiring Hirko to contest, once again, fraud allegations that he has already overcome.

ARGUMENT

I. Standard of Review

“The preclusive effect of the jury’s verdict . . . is a question of federal law which [an appellate court] must review *de novo*.” *Schiro v. Farley*, 510 U.S. 222, 232 (1994); see also *United States v. Arreola-Ramos*, 60 F.3d 188, 191 (5th Cir. 1995).

II. Because Hirko’s Only Defense To Money Laundering Was That He Did Not Commit The Predicate Fraud Offenses, The Money Laundering Acquittals Preclude Retrying Those Predicate Acts

A. Collateral Estoppel Requires A Realistic Analysis Of The Record, Not One That Seeks Some Speculative Or Hypertechnical Ground For Denying A Defendant’s Collateral Estoppel Claim

Ashe v. Swenson, 397 U.S. 436 (1970), held that collateral estoppel applies to criminal trials as part of the Fifth Amendment’s guarantee against double jeopardy. That guarantee requires “that when an issue of ultimate fact has once been determined [in the defendant’s favor] by a valid and final judgment,” the government cannot

relitigate that issue in a subsequent prosecution. *Id.* at 443. “In assessing a collateral estoppel claim, a two-step inquiry is therefore required.” *United States v. Levy*, 803 F.2d 1390, 1398 (5th Cir. 1986). “[T]he court’s [first] task is to decipher exactly what facts have been or should be deemed to have been determined at the first trial.” *United States v. Lee*, 622 F.2d 787, 790 (5th Cir. 1980). The second task is to “assess whether the government is attempting to relitigate those facts in the second proceeding.” *Levy*, 803 F.2d at 1399. Taken together, these steps ask “whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” *United States v. Brackett*, 113 F.3d 1396, 1399 (5th Cir. 1997) (quoting *Ashe*, 397 U.S. at 444). *Ashe* “completely bar[s] a subsequent prosecution if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution.” *Id.* at 1398.⁹

Collateral estoppel serves “the double jeopardy clause’s policy against exposing a defendant to repeated risks of conviction for the same conduct.” *United*

⁹ This case actually involves direct, rather than collateral, estoppel because “[a] retrial cannot be ‘collateral’ if it is a ‘continuation’ of the first trial.” *United States v. Bailin*, 977 F.2d 270, 276 (7th Cir. 1992); see also *ibid.* (“Issue preclusion ‘within the confines of a single claim or cause of action’ is known as ‘direct estoppel.’” (quoting Charles A. Wright et al., *Federal Practice & Procedure* § 4418, at 169 (1981))). For the sake of convenience and consistency with the terminology in this Court’s prior decisions, however, the term “collateral estoppel” is used herein to encompass issue preclusion in collateral and direct proceedings.

States v. Nelson, 599 F.2d 714, 716 (5th Cir. 1979). Accordingly, “the Supreme Court [has] held that courts should take a nontechnical, commonsense approach in deciding whether an issue has been previously decided.” *United States v. Leach*, 632 F.2d 1337, 1339 (5th Cir. 1980). Under *Ashe*, “the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.” 397 U.S. at 444 (internal citations and quotation marks omitted). The fundamental goal is to “consider what makes the jury’s verdict coherent.” *United States v. Deerman*, 837 F.2d 684, 690 (5th Cir. 1988).

In light of these governing principles, this Court has cautioned judges not to “ignore the record and merely look to whether there is any technically possible means by which the jury could have acquitted.” *Leach*, 632 F.2d at 1340 n.7. Accordingly, a district court must “avoid . . . straining to postulate ‘hypertechnical and unrealistic’ grounds on which the jury could conceivably have rested its conclusions.” *United States v. Citron*, 853 F.2d 1055, 1058 (2d Cir. 1988).

B. Hirko Contested Only One Issue At Trial, And His Acquittals Conclusively Resolved That Issue In His Favor As A Matter Of Law

Courts make collateral estoppel determinations “[i]n light of the pleadings, evidence, charge to the jury, and arguments of counsel.” *De La Rosa v. Lynaugh*, 817

F.2d 259, 268 (5th Cir. 1987). Although in some cases the inquiry can be challenging, “[i]t is not difficult to discern the facts ‘necessarily decided’ by the jury in the first trial” where the defendant “staked his defense exclusively on [one] question.” *Brackett*, 113 F.3d at 1399.

That is unmistakably what happened here. Hirko offered a single, emphatic defense to the 2000 Money Laundering Counts—that he did not commit any of the “specified unlawful activity” predicates on which the money laundering counts were based. (Tr. 13664.) Both Hirko and other defense witnesses testified in detail that Hirko did not commit the wire and securities frauds that the government now seeks to retry. Because the only “fact” Hirko disputed in defending the *compound* offenses (the 2000 Money Laundering Counts) was whether he had committed any of the *predicate* offenses (the wire and securities fraud counts), the acquittals can be rationally understood only as a conclusion that he did not do so. Therefore, whereas collateral estoppel can sometimes be “a slippery concept,” *United States v. Mock*, 604 F.2d 341, 343 (5th Cir. 1979), here it is easy to grasp. The predicate frauds cannot be relitigated.

The first step in tracing Hirko’s defense is to identify the government’s theory of the case. “To prove the money laundering count[s] under § 1957, the government had to prove that [Hirko] knowingly engaged in . . . monetary transaction[s] in

criminally derived property of a value greater than \$10,000 and that the property was derived from specified unlawful activity.” *United States v. Freeman*, 434 F.3d 369, 377 (5th Cir. 2005). As the district court summarized it, the government’s theory was that Hirko derived proceeds from any one of several “predicate offenses (e.g., wire fraud, securities fraud, or insider trading)” (Dkt. 1244 at 14 (RE:8)), by “[selling] large blocks of Enron stock [insider trading], in order to take advantage of the rising stock price, which resulted from the overall scheme to defraud the investing public at the 2000 Analyst Conference [securities fraud] and in press releases [wire fraud]” (*id.* at 19).

The record plainly confirms that this was, in fact, the government’s theory. For instance, the Fifth Superseding Indictment alleged that Hirko “generat[ed] huge profits” by selling Enron stock “[a]t a time when [he] and others at Enron were making materially false and misleading public statements about EBS.” (Dkt. 468 ¶ 33 (RE:3).) Ken Rice supported that theory with his testimony. Likewise, the government emphasized that Hirko’s stock sales were tainted by the allegedly “phoney picture” painted in the 2000 Analyst Conference and in press releases (Tr. 423), and described the misrepresentations creating that picture as Hirko’s “tools” for converting Enron stock into illicit profits (Tr. 13196). And the jury instructions

reminded the jury that Hirko was alleged to have laundered “funds generated through wire fraud and fraud in the sale of securities.” (Tr. 13664.)

For his part, Hirko consistently—and exclusively—maintained that he did *not* commit fraud. (*E.g.*, Tr. 10472.) As the prosecution aptly noted, Hirko “tried to make this case a referendum on the BOS.” (Tr. 13560.) In contrast, the defense did not seek a “referendum” on any other element of the 2000 Money Laundering Counts. Those elements were established, without contradiction, through Whalen’s testimony. Whalen testified—and his PowerPoint presentation showed in detail—that the 2000 Money Laundering Counts concerned \$9,844,210.92 in net proceeds derived from Hirko’s sales of Enron stock; that those net proceeds and \$477,000 in other (“clean”) funds were deposited in PaineWebber Account 72449 (as well as some interest); and that funds from Account 72449 were then transferred elsewhere in 12 separate “monetary transactions” totaling \$9,861,519.49. (Tr. 6685-98.) Hirko disputed none of that evidence.¹⁰ Nor did Hirko contend that he might somehow have *unknowingly* possessed proceeds of frauds he committed. The 2000 Money Laundering Counts, therefore, boiled down to the one issue that dominated the entire three-month trial: whether, as the government put it, “to pump Enron’s stock price and to line [his] own

¹⁰ See *Neal v. Cain*, 141 F.3d 207, 211 (5th Cir. 1998) (holding, in determining the facts necessarily decided by a prior acquittal, that “the jury’s verdict could not have depended on” an issue about which “there was no dispute at trial”).

pockets,” Hirko had engaged in any of the predicate wire and securities frauds charged in Counts 2-6, and 23-26 of the Fifth Superseding Indictment. (Tr. 412)

Notably, the instructions did not affirmatively require that the jury unanimously agree on a particular fraud predicate before convicting on money laundering. (Dkt. 854.) Thus, not only was the jury authorized to convict Hirko of money laundering if it found that he committed *any* predicate fraud—*it could do so even if the individual jurors disagreed about which predicate Hirko committed*. On this record, then, the jury rationally could have acquitted Hirko on all 12 of the 2000 Money Laundering Counts only if each and every juror concluded that Hirko committed *none* of the predicate wire and securities frauds.

This Circuit has held repeatedly that where, as here, the defense and the prosecution have contested only one element in the offense, an acquittal *necessarily* turned on that element. In *Brackett*, for example, because the defendant “staked his defense exclusively” on *mens rea* and “did not deny” the other elements of the crime, the “only . . . rational explanation for the general verdict of acquittal” was that Brackett was unaware that his truck contained marijuana. 113 F.3d at 1399. Here, as in *Brackett*, Hirko staked his entire defense on a single element of the offense. Hirko “freely conceded,” *ibid.*, that the transactions at issue involved \$9.844 million in “total net proceeds” (Tr. 11373). And instead of positing some technicality that

would make it theoretically possible to acquit Hirko of money laundering even if the jury disbelieved his testimony about the frauds, Hirko’s counsel practically invited the jury to convict Hirko of money laundering if it believed he had transferred *any* “proceeds of securities fraud or wire fraud.” (Tr. 13307.)

Brackett is not this Court’s only case to hold that a single-element defense controls the collateral-estoppel inquiry. In *United States v. Griggs*, 651 F.2d 396 (5th Cir. 1981), this Court gave preclusive effect to a prior acquittal where the defendant had contested only one element of a charge of passing counterfeit bills. Like Hirko, Griggs did not dispute the government’s theory about *what was done* with the money—which, in Griggs’s case, was used to pay restaurant bills—but instead disputed that he had *behaved fraudulently*. Specifically, Griggs argued that he was “unaware . . . that the bills were counterfeit.” *Id.* at 398. Because the transactional elements of the counterfeiting charge were supported by “sufficiently specific” evidence, *id.* at 399, the court concluded that “the jury acquitted Griggs of the crime charged in Count I because he lacked knowledge that the fifty dollar bills were counterfeit,” *id.* at 400. Similarly, in *Leach*—yet another case applying the same rule—because “Leach . . . flatly denied any involvement in any part of the scheme[,] [t]he only way a rational jury could have acquitted Leach was by believing his

testimony, and that of his other witnesses, over that of . . . other government witnesses.” 632 F.2d at 1341 (footnote omitted).

Brackett, Griggs, and Leach align this Circuit with other federal courts and the logic of *Ashe*, which holds that when the trial theories place a “single rationally conceivable issue in dispute before the jury,” an acquittal resolves that issue in the defendant’s favor as a matter of law. *Brackett*, 113 F.3d at 1399 n.4 (quoting *Ashe*, 397 U.S. at 445).¹¹ Because the only disputed issue at Hirko’s trial was whether Hirko actually committed the particular *crimes* the government seeks to retry, *Ashe*’s application to this case is even more straightforward than it was in *Brackett, Griggs, and Leach*. The money laundering acquittals clearly and necessarily decided in Hirko’s favor the question whether, beyond a reasonable doubt, Hirko committed any of the predicate frauds. *Ashe* therefore bars the government from relitigating the

¹¹ See, e.g., *United States v. Brown*, 983 F.2d 201, 203, 204 (11th Cir. 1993) (where defendant “never denied” any elements of crime except *mens rea*, which was his “only defense,” “the only rational basis [the jury] could have had [in acquitting the defendant] is a reasonable doubt about whether Brown had acted willfully”); *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 226 (4th Cir. 1988) (rejecting government’s argument that acquittal on Sherman Act charge could have rested on finding that government failed to prove connection with interstate commerce, where “[t]he defendants’ sole defense was that no conspiracy existed” and “the defendants did not introduce any evidence on the interstate commerce issue”); *United States v. Bryant*, 697 F. Supp. 457, 465-66 (M.D. Fla. 1988) (where the defense’s “singular” approach had been to dispute “the government’s single theory of prosecution,” “[t]he only rational explanation for the verdicts of acquittal . . . is that the jury believed [the defense witnesses]”).

“fact” of those frauds, which means it cannot retry the Securities and Wire Fraud Counts or the May 2000 Insider Trading Counts.¹²

¹² Count 6 of the Fifth Superseding Indictment concerns a press release issued on May 15, 2000, a few days after the last of the four sales of Enron stock charged as insider trading. (Dkt. 468 ¶¶ 40, 46 (RE:3).) Thus, strictly speaking, that press release could not have affected the price at which those four stock sales were made.

But Count 6 should nevertheless be considered a “predicate” for the purpose of Hirko’s motion because its alleged misrepresentations were inextricably intertwined with those alleged in Counts 2 through 5 (the remaining wire fraud counts). The government argued that the May 15 press release contained “the same [allegedly fraudulent] language” appearing in the other press releases. (Tr. 13191; see also Tr. 13185 (stating that the allegedly fraudulent language in the press release charged in Count 2 “appear[s] in . . . the other charged press releases”).) Moreover, the government represented to the jury, and Hirko did not dispute, that Hirko’s May 2000 trades occurred on “the same day or very close to the day that the Warpspeed press release [charged in Count 6 was] issued.” (Tr. 13191.)

Similarly, Hirko’s defense to all of the wire fraud counts, including Count 6, was that he did not commit the misrepresentations allegedly common to each count. Therefore, neither the government nor Hirko provided any evidence that would have permitted the jury’s verdict on Count 6 to have diverged from its verdicts on the other wire fraud counts. See *Leach*, 632 F.2d at 1341 (“Neither the Government nor the defense offered such a theory or anything similar, however. We cannot look at what might have taken place if the trial had been handled differently . . .”). Accordingly, there exists no basis upon which the jury could rationally have acquitted Hirko on the money laundering counts without deciding in Hirko’s favor the question whether the “same language” appearing in all four press releases, including the May 15 press release, reflected fraud by Hirko.

III. The District Court Declined To Apply Collateral Estoppel Only By Attributing To The Jury Lawlessness, Irrationality, And Illogic

In denying Hirko's collateral estoppel motion, the district court hypothesized that the jury might have acquitted Hirko on the 2000 Money Laundering Counts based solely on the acquittals on the February and April 2000 Insider Trading Counts. First, the district court speculated that, having found that Hirko did not commit insider trading in February and April, the jury might have found that the proceeds of those two trades were untainted by any predicate fraud. Second and relatedly, the district court suggested that the two insider trading acquittals might have supported a finding that Hirko executed the monetary transactions without *knowing* that they involved the proceeds of a criminal offense. According to these hypotheses, the money laundering acquittals would not have resolved the *other* predicates (the Securities and Wire Fraud Counts and the May 2000 Insider Trading Counts).

Both hypotheses are fundamentally flawed and defy the primary rule of collateral estoppel case law—"to make legal sense of the jury's verdict." *Neal v. Cain*, 141 F.3d 207, 211 (5th Cir. 1998). First and foremost, both rationales rest on the supposition that the jury, having acquitted Hirko on two insider trading predicates, might therefore have concluded that Hirko was not guilty of money laundering—either because all of his proceeds were "clean" (Rationale 1), or because

he did not *know* that the proceeds were tainted (Rationale 2). But the jury was not authorized to acquit Hirko of money laundering simply because it acquitted him of insider trading (only *one* of several charged predicates). Rather, the instructions authorized the jury to convict on money laundering based on *any* of the predicate offenses.¹³ Those predicate offenses, the Order acknowledged, included “wire fraud, securities fraud, or insider trading” (Dkt. 1244 at 14 (RE:8))—each of which, if committed, would have tainted the proceeds of Hirko’s trades. The arguments of counsel referenced the point, reminding the jury that Hirko could be convicted of money laundering if he possessed “proceeds of securities fraud *or* wire fraud.” (Tr. 13307 (emphasis added).) And the law is well settled that a money laundering conviction may be based on *any* predicate act of “specified unlawful activity.” See *United States v. Tencer*, 107 F.3d 1120, 1130 (5th Cir. 1997). The jury therefore had no legal basis for acquitting Hirko of money laundering simply because it acquitted him of a single type of predicate—insider trading.

A court is simply not free to distinguish *Ashe* by attributing lawless behavior to the jury. “The ‘rule’—indeed the premise upon which the system of jury trials functions under the American judicial system—is that juries can be trusted to follow the trial court’s instructions.” *Parker v. Randolph*, 442 U.S. 62, 75 n.7 (1979)

¹³ See also *supra* pages 19-20.

(opinion of Rehnquist, J.). Although courts sometimes “recognize that a jury can act in an irrational manner,” such as by “ignoring the law or the Judge’s instructions in a blend of undecipherable mercy,” in the collateral estoppel context “we must proceed on the basis that the jury in the first trial acted in a legally correct manner.” *De La Rosa*, 817 F.2d at 267-68.¹⁴ “Otherwise, the ultimate issue of fact decided by any jury could be second guessed and we could never apply the principle of collateral estoppel.” *Id.* at 268. Consequently, the district court’s premise—*i.e.*, that the jury could have disregarded the instruction to consider the Securities and Wire Fraud Counts and the insider trading counts as specified unlawful activities—is simply “blocked by the jury instructions.” *United States v. Brown*, 983 F.2d 201, 203 (11th Cir. 1993).

But there is more: The district court’s first rationale for the money laundering acquittals also defies the undisputed evidence at trial. The court held that, having acquitted Hirko on the February and April 2000 trades, the jury perhaps then reasoned that Hirko had available in Account 72449 insufficient tainted funds to justify a conviction on any count of money laundering. Relying on its mistaken premise

¹⁴ Cf. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (“The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant.”).

concerning the jury instructions, the court supposed that the jury might have deemed clean the \$5,082,358.39 in net proceeds from Hirko's February and April trades. But even if the jury did so, the clean funds in Account 72449 would have totaled at most \$5.58 million: the \$5.082 million from Hirko's February and April trades, plus the \$477 thousand in clean funds and approximately \$20 thousand in interest that constituted the remaining funds in the account. (Tr. 6696-97; GX 3155 (RE:9).) That amount would not have supported acquitting Hirko on all of the money laundering counts because Hirko was alleged to have transferred \$9,861,519.49 in total¹⁵—far more than \$5.58 million—and the jury was authorized to convict on individual money-laundering counts if the total transferred funds exceeded the total clean funds by merely \$10,000.¹⁶ Therefore, the jury could have acquitted on the money laundering counts only by concluding that Account 72449 contained well over \$9 million in clean funds—which naturally would have endorsed Hirko's defense that he possessed no launderable funds at all.

The district court offered tortured, inconsistent explanations in a bid to overcome this fundamental impediment to denying Hirko's motion. The court first suggested that the jury could have relied on the proceeds of Hirko's February and

¹⁵ See *supra* note 7.

¹⁶ See *supra* pages 20-21.

April trades to reach the first nine of the 12 money laundering acquittals, even if it was “unclear” whether the jury rationally could have reached the final three money laundering acquittals on that basis. (Dkt. 1244 at 17 (RE:8).) But in fact, it is more than unclear; as we have just shown, it is mathematically impossible for the February and April trades to account for all of the money laundering acquittals. Perhaps recognizing the problem, the district court abruptly changed course and imagined that the jury adopted a radically different explanation. It was possible, the court now surmised, that the jury acquitted Hirko on the final three money laundering counts because it found that he had at his disposal the *gross* proceeds from his February and April trades, which proceeds would have exceeded the total proceeds allegedly laundered in the 2000 Money Laundering Counts. (*Ibid.*)

There was not a speck of evidence, however, that *gross* (as opposed to *net*) proceeds were ever at Hirko’s disposal. The district court nevertheless hypothesized that the jury might have *thought* that they were because, according to the court, “Whalen’s demonstrative exhibit [showing that only net proceeds were available for the money laundering transactions] was not received in evidence.” (Dkt. 1244 at 17 (RE:8).) But the district court’s premise is false; Whalen’s demonstrative exhibit *was admitted* into evidence. (Tr. 6685, 6715; Dkt. 858 at 49; Dkt. 866.) And that exhibit unequivocally showed that Hirko’s trades generated \$9,844,210.92 in net proceeds,

thus ruling out the possibility that gross proceeds funded the \$9,861,519.49 allegedly laundered in the 2000 Money Laundering Counts.¹⁷ (GX 3155 (RE:9).) The district court also overlooked Whalen’s *testimony*, which explained what his exhibit depicted—specifically, “the number of Enron shares that were sold, the average sales price, the gross proceeds generated from the sale, the transaction expenses related to the sale[,] and the net proceeds that Mr. Hirko generated.” (Tr. 6686.) Like his exhibit, Whalen’s testimony “highlight[ed]” that Hirko netted “[\$]9,844,210 with respect to [Account 72449]” (Tr. 6688; GX 3155 (RE:9)) and that the money laundering charges concerned how those “net proceeds [were] expended out of the account” (Tr. 6689).¹⁸

Other evidence also ruled out the possibility that the final three money laundering transactions, which totaled \$4,995,920.96 and which occurred in May 2000, were done with the gross proceeds of the February and April trades. Hirko’s April 2000 account statement (GX D1676 (RE:10)), which was referenced during

¹⁷ The court also understated the \$9,861,519.49 Hirko was alleged to have laundered, referring to that total as \$7,003,662.96. (See Dkt. 1244 at 17 (RE:8).)

¹⁸ (See also Tr. 6689 (“The little red box at the top indicates that in Account 72449, as I indicated a minute ago, was initially deposited . . . \$9,844,210 that resulted from the first . . . four deposits I just referred to.”); Tr. 6696 (“[T]ainted funds . . . really consists of in the case of Hirko . . . the \$9,844,000 . . . plus an element of about \$20,000 of interest that was credited to those funds while it was in that account.”).)

Whalen's testimony and admitted into evidence (Tr. 6690; Dkt. 858 at 24), showed that by April 28, 2000, at most \$244,459.95—not \$4.996 million in gross proceeds—remained from the February and April trades.¹⁹ Likewise, Hirko *agreed* with the government's statement that the "total net proceeds for the trades in 2000 that are at issue in this case are [\$]9.844 million." (Tr. 11373.) And the Order itself acknowledged Whalen's testimony that the relevant stock sales "amounted to \$9,844,210.92 in *net proceeds* (gross proceeds - transactions costs)," and that "Hirko deposited the entire \$9,844,210.92 in *net proceeds* into [Account 72449]." (Dkt. 1244 at 16 (emphasis added) (RE:8).)

The district court had no basis for asserting that Whalen's exhibit was not received in evidence, or that the jury might have relied mistakenly on gross, not net, proceeds.²⁰ Those assertions only compounded the court's mistaken premise that the

¹⁹ The April 2000 statement shows that on April 28—after the February and April trades and the transfers charged in Counts 55 through 63 occurred, but before the May trades occurred—Account 72449 contained only holdings of unsold Enron stock, the mutual funds purchased in the transactions charged in Counts 55 through 58, and \$244,459.95 in a money market fund. (GX D1676 (RE:10).)

²⁰ The district court's second rationale, which tried to reconcile the money laundering acquittals with the mistrial on the May 2000 Insider Trading Counts, suffers from the same dependence on the incredible or irrational. The court speculated that the jury may have found that Hirko did not know that he was transferring tainted money because that money came from the February and April 2000 Insider Trading Counts, on which Hirko was acquitted. The jury could not have adopted that train of reasoning because, as we have just shown, the February and

jury ignored the jury instructions. *Ashe*, in contrast, requires courts to presume that juries “must have . . . reached . . . the only conclusion legally supported by the evidence presented to them.” *De La Rosa*, 817 F.2d at 268. If the law were otherwise, there would be nothing left of collateral estoppel doctrine:

If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering. . . . In fact, such [an approach] amounts simply to a rejection of collateral estoppel, since it is impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction.

April trades did not leave enough money to fund the final three transfers (charged in Counts 64 through 66) after the earlier transfers (Counts 55 to 63) had been made. Accordingly, the court’s second rationale presumes that the jury must have thought that Hirko did not know the funds used in the last three transfers were actually proceeds of insider trading on May 11 and May 12, as charged in the May 2000 Insider Trading Counts. (See Dkt. 468 ¶ 46 (RE:3).) That premise would require the jury to have found that Hirko could have thought on May 11 and 12 that he was trading on inside information “willfully, knowingly, and with the intent to defraud,” and then thought on May 17 (Count 64) and May 18 (Count 65) that he did not know where the proceeds came from. (*Id.* ¶ 52; Tr. 13660.)

With no explanation of how Hirko could have forgotten by Wednesday what he had known the previous Friday, the district court’s reconstruction of the jury’s thinking is so farfetched that this court must reject it. See *De La Rosa*, 817 F.2d at 266 n.13 (“where two crimes arise out of different times and places,” acquittal on one crime means that second crime can be retried only if “sufficient evidence exists for a rational trier of fact to find that the defendant’s state of mind did change between the criminal acts”); *United States v. Garcia*, 78 F.3d 1517, 1522 (11th Cir. 1996) (“To accept the government’s attempted reconciliation . . . we would have to believe it logical for Garcia to have traveled with the intent to promote the conspiracy, and then a few days later to have had no knowledge of that same conspiracy.”).

Ashe, 397 U.S. at 444 n.9.²¹

IV. The Jury’s Failure To Reach A Verdict On Some Counts Does Not Preclude Applying Collateral Estoppel

A. *Ashe* Applies To Partial Verdicts Of Acquittal

Merely because certain counts were mistried does not foreclose the preclusive effect of the acquitted counts. “[W]ith virtual unanimity, the cases have applied collateral estoppel to bar the Government from relitigating a question of fact that was determined in defendant’s favor by a partial verdict.” *United States v. Mespouledé*, 597 F.2d 329, 336 (2d Cir. 1979); *United States v. Bailin*, 977 F.2d 270, 276 (7th Cir. 1992) (“Circuit cases recognize issue preclusion in retrials of mistried counts, and the implications of related Supreme Court precedents, as well as the policies which underlie them, support those cases.”).²² This Circuit is no exception. While

²¹ See also *Pettaway v. Plummer*, 943 F.2d 1041, 1045 (9th Cir. 1991) (“[W]hen there is only one rational conclusion to be drawn from the first jury’s verdict, the Supreme Court has not allowed the possibility that the jury did not base the verdict on proper considerations to negate the collateral estoppel effects of the prior verdict.”), overruled on other grounds by *Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir. 1998) (en banc); *Ashley Transfer & Storage Co.*, 858 F.2d at 227 (“In summary, the government presented substantial evidence on the interstate commerce issue which the defendants did not even attempt to controvert. Consistent with the Supreme Court’s admonition in *Ashe*, we cannot say that the jury could have based its acquittal on its disbelief of the government’s evidence.”) (citation omitted).

²² See, e.g., *United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997) (A prior mistrial did not negate collateral estoppel because “[t]he inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not on why the jury could not

recognizing that “collateral estoppel ordinarily does not apply when the offense on retrial is the same offense on which the defendant was *convicted* in the first trial,” *United States v. Price*, 750 F.2d 363, 366 (5th Cir. 1985) (emphasis added), the Court has found the collateral estoppel argument “more convincing [where] the first jury simply mistried” the counts the defendant believes to be subject to collateral estoppel, *id.* at 365. *E.g., id.* at 366 (distinguishing *Mespouledé* because “Price, unlike Mespouledé, had been convicted for the offense for which he was retried”); *United States v. Nelson*, 599 F.2d 714, 716-17 & n.2 (5th Cir. 1979) (citing *Mespouledé* for the proposition that collateral estoppel will prohibit government from using, at a retrial of mistried count, facts determined against the government in the first trial).

agree on the deadlocked count.”); *United States v. Shenberg*, 89 F.3d 1461, 1478 (11th Cir. 1996) (“Although double jeopardy does not bar the government from re-prosecuting defendants on mistried counts, estoppel principles may nevertheless apply to preclude the government from relitigating certain issues on retrial.”); *United States v. Console*, 13 F.3d 641, 664 (3d Cir. 1993) (*Ashe* applies “to the retrial of a ‘hung’ count” when prior acquittal determined an ultimate fact in defendant’s favor.); *United States v. Jenkins*, 902 F.2d 459, 463 (6th Cir. 1990) (“Application of the collateral estoppel doctrine is premised on the assumption that the jury acted rationally and found certain facts in reaching its verdict, and can apply in cases such as this in which the jury acquits on some charges in a multi-count indictment but cannot agree on others.”) (citation omitted); *United States v. Bowman*, 609 F.2d 12, 19 (D.C. Cir. 1979) (barring retrial of mistried count of multi-count indictment, based on collateral estoppel effect of acquitted count); cf. *United States v. Dray*, 901 F.2d 1132 (1st Cir. 1990) (recognizing application of collateral estoppel in retrial following successful appeal of convicted verdicts).

There are two main reasons why courts have so consistently applied collateral estoppel to mistried counts. First, “a declaration of mistrial is not equivalent to a factual determination.” *United States v. Marszalkowski*, 669 F.2d 655, 661 (11th Cir. 1982) (citing *Nelson*, 599 F.2d at 716, and *United States v. Ballard*, 586 F.2d 1060, 1064-66 (5th Cir. 1978)). “Therefore, the ‘jury’s failure to reach a verdict [is] too inconclusive to qualify as inconsistent’ for the purposes of issue preclusion.” *Bailin*, 977 F.2d at 280. Second, even if a hung count could be regarded as inconsistent with an acquitted count—on the theory that a rational jury would have acquitted on the hung count as well—that inconsistency does not justify permitting a *new* jury to reach a guilty verdict in conflict with a prior acquittal:

Inconsistent simultaneous verdicts are permissible because the jury may have “properly reached its conclusion [on the conviction] . . . and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion” on the acquitted count. Inconsistent verdicts are thus the price of jurors’ inexperience, unanimity, and prerogative. This rationale does not apply to a retrial of mistried counts, because a new jury is impanelled for the retrial. “Allowing a second jury to reconsider the very issue upon which the defendant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause.” *Mespouledé*, 597 F.2d at 336-37.

Bailin, 977 F.2d at 277 (citing *United States v. Powell*, 469 U.S. 57, 63-64 (1984)).

Thus, “it hardly follows from the fact that a single jury in one trial is allowed to

render inconsistent verdicts that a Second jury in a Second trial should be permitted to rely on evidence rejected by the first.” *Mespouledé*, 597 F.2d at 336. This case perfectly illustrates these reasons for applying collateral estoppel to mistried counts.

B. The Best Explanation For The Mistrials Is Consistent With Applying Collateral Estoppel Here

Although in other cases a hung count might suggest that a prior acquittal rested on facts not at issue in the hung count, this is not such a case.²³ Because the government’s proof of the transactional elements of money laundering went un rebutted, the mistried counts do not imply that the jury “could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” *Brackett*, 113 F.3d at 1399.

The best explanation for the mistried counts is simply that, due to impatience or fatigue, the jury did not push through to acquittals on all of the fraud predicates. Not only does this explanation display fidelity to *Ashe*—because it avoids assuming that the “jury may have disbelieved substantial and uncontradicted evidence . . . on

²³ This Circuit, for example, held that a defendant’s acquittals for embezzling funds and falsifying records “must have rested elsewhere” than with a conclusion that he was not a member of a conspiracy, where the conspiracy count was mistried. See *United States v. Larkin*, 605 F.2d 1360, 1370 (5th Cir. 1979), withdrawn in part on other grounds, 611 F.2d 585 (5th Cir. 1980). But *Larkin* carefully “note[d] that the record [was] almost totally devoid of evidence linking Larkin in any way to the embezzlement and subsequent coverup in the union’s records and that, most likely, the acquittal occurred because of this insufficiency of evidence.” *Id.* at 1370 n.25.

a point the defendant did not contest,” *Ashe*, 397 U.S. at 444 n.9—it is also likely as a matter of fact. The jury deliberations regarding Hirko and his co-defendants ultimately resulted in 24 “not guilty” verdicts and zero “guilty” verdicts on the 176-count Fifth Superseding Indictment. (Dkt. 869 (RE:4).) When the jury indicated it was deadlocked on only the fourth day of deliberations, the district court understandably had difficulty “believ[ing] they came back . . . after four days on a case that took us three months to try.” (Tr. 13732.)²⁴ The jury’s brief deliberative period made it advisable, as well as permissible, “to insist that they deliberate further,” *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988), by giving the Fifth Circuit Pattern charge to “continue your deliberations in an effort to agree upon a verdict and dispose of this case,” *United States v. Nguyen*, 28 F.3d 477, 484 n.4 (5th Cir. 1994); see *Allen v. United States*, 164 U.S. 492 (1896). The district court did indeed give Hirko’s jury an *Allen* charge, but with a twist. The *Allen* charge concluded at 3:50 p.m. on the fourth day of deliberations, shortly before the jury’s usual 4:00 p.m. quitting time. (Tr. 13724-25.) But instead of requiring the jury to return for a fifth day of deliberations, the court asked the jury to deliberate only “until 5:00 [p.m.]” on that day—an unusual step, given that it takes time for a proper *Allen* charge to work.

²⁴ (See also Tr. 13717-18 (“[This] is not much time on this case. I clearly anticipated that they would be out a substantial amount more time than this.”).)

See *Lowenfield*, 484 U.S. at 240 (a verdict that closely follows an *Allen* charge “suggests the possibility of coercion”). By telling the jury, in effect, that it could preclude additional days of service simply by waiting out the clock for another 70 minutes, the charge likely entrenched, not dissipated, the deadlock. That the jury did not push through to additional acquittals during those final minutes of the fourth day of deliberations provides no basis to reject the preclusive effect of the acquitted counts.

C. Granting Hirko’s Motion Would Mitigate Precisely The Harms That The Double Jeopardy Clause Seeks To Address

Finally, granting Hirko’s motion would vindicate the Double Jeopardy Clause’s basic protections. The crimes of money laundering and fraud technically involve different elements—money laundering requires the possession of criminally derived property but does not require that the launderer be the one who generated the property—so Hirko “could be subject to numerous retrials simply because of the multiplicity of technically distinct (though factually overlapping) counts.” *Bailin*, 977 F.2d at 277. Although such retrials pose no “formal” double jeopardy problem under *Blockburger v. United States*, 284 U.S. 299 (1932), see *Bailin*, 977 F.2d at 277, denying preclusive effect to acquitted counts that overlap with mistried ones would afford the government “the opportunity to hone its presentation on those issues which

have already been decided against it,” *id.* at 277-78. Such an approach would provide ample reason to “fear that ‘the Government, with its vastly superior resources, might wear down the defendant, so that even though innocent he may be found guilty.’” *Id.* at 278 (quoting *United States v. Scott*, 437 U.S. 82, 89 (1978)).²⁵

The risk that the government will hone its strategy and wear down Hirko is already evident here. Because Hirko has already overcome the government’s argument that Hirko generated illicit proceeds through the Securities and Wire Fraud Counts and the May 2000 Insider Trading Counts, “‘the [government] with all its resources and power should not be allowed to make repeated attempts to convict [Hirko] for [those] alleged offense[s].’” *Bullington v. Missouri*, 451 U.S. 430, 445 (1981) (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)).

²⁵ See also *Ohio v. Johnson*, 467 U.S. 493, 498-99 (1984) (double jeopardy protections guard against “expos[ure] . . . to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence”).

CONCLUSION

For the foregoing reasons, defendant-appellant Joseph Hirko respectfully requests that the district court's opinion be reversed and this case remanded with instructions to dismiss the Securities and Wire Fraud Counts and the May 2000 Insider Trading Counts.

DATED this 20th day of November, 2006.

Respectfully submitted,

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Undersigned counsel hereby certifies that true and complete copies of the foregoing Brief for Appellant Joseph Hirko (along with an electronic version of the brief contained on a 3.5" diskette) were served via First-Class United States mail, postage prepaid, on the government's counsel of record and counsel for defendants-appellants at the following addresses this 20th day of November, 2006:

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Pursuant to Fed. R. App. P. 25(d)(2), undersigned counsel also certifies that the original and seven copies of the Brief for Appellant Joseph Hirko (along with an electronic version of the brief contained on a 3.5" diskette) were sent by First-Class United States mail, postage prepaid, to the Clerk's Office, 600 S. Maestri Place, New Orleans, LA 70130-3408, on this 20th day of November, 2006.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies on this 20th day of November, 2006, that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 13,115 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii). Undersigned counsel further certifies that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect 12.0 for Windows in 14-point typeface, Times New Roman style.

/s/ Matthew R. Segal
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