No. 05-952

In the Supreme Court of the United States

SALVADOR MAGLUTA, AKA SAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's convictions for money laundering were barred by collateral estoppel.

2. Whether the district court correctly sentenced petitioner in part on the basis of acquitted conduct.

3. Whether the court of appeals correctly treated as abandoned petitioner's claim under *United States* v. *Booker*, 543 U.S. 220 (2005).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 418 F.3d 1166. An earlier opinion of the court of appeals (Pet. App. 32a-34a) is not reported. The order of the district court (Pet. App. 35a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 2005. A petition for rehearing was denied on September 30, 2005 (Pet. App. 40a-41a). On December 7, 2005, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 27, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to obstruct justice and disobey a court order (18 U.S.C. 371) (Count 1); conspiring to launder drug proceeds (18 U.S.C. 1956(h)) (Count 2); obstructing justice through witness bribery (18 U.S.C. 1503) (Count 6); obstructing justice through juror bribery (18 U.S.C. 1503) (Count 8); and on eight counts of money laundering (18 U.S.C. 1956(a)(1)(B)(i)) (Counts 34-41). The district court sentenced him to a term of 205 years of imprisonment, ordered him to forfeit $15 million and certain real property, and imposed a fine of $62,997,915. Gov't C.A. Br. 2. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded. Pet. App. 1a-31a.

1. Shortly after dropping out of high school, petitioner and a longtime friend, Augusto Guillermo Falcon, embarked on a joint drug trafficking and money laundering career of epic proportions. They ultimately became two of South Florida's most prolific and notorious drug traffickers. Beginning in the late 1970s, petitioner distributed tens of thousands of kilograms of cocaine. See Gov't C.A. Br. 3.

Petitioner and Falcon maintained their drug trafficking enterprise notwithstanding various run-ins with law enforcement officers. In 1980, petitioner and Falcon pleaded guilty to Florida state drug charges. They remained on bond pending appeal while they continued to distribute cocaine. In 1985, they were arrested on California state drug charges, but they absconded and hid in South Florida. See Gov't C.A. Br. 3.

After they exhausted their appeals, petitioner and Falcon were ordered to surrender in August 1987 to begin serving the sentences on their 1980 Florida convictions. When neither surrendered, arrest warrants were issued. Petitioner was finally arrested in 1988. Several days after his arrest, however, petitioner was erroneously released from jail and again became a fugitive. He later told longtime girlfriend Marilyn Bonachea that someone had returned a favor by releasing him from jail. As a fugitive, he rented luxury homes on Miami Beach, which he paid for with drug proceeds, and he continued to distribute cocaine. See Gov't C.A. Br. 3-4.

In April 1991, a federal grand jury returned a sealed narcotics and continuing criminal enterprise (CCE) indictment, No. 91-6060, against petitioner, Falcon, and eight associates. Shortly thereafter, the district court entered an order freezing approximately $2 billion in purported drug proceeds and requiring the defendants to obtain court approval before expending funds or dissipating assets, including those set aside to pay legal fees. See Gov't C.A. Br. 4.

In October 1991, agents captured petitioner and searched his home. They found, *inter alia*, more than $200,000 in cash and several day-timer books memorializing cocaine trafficking. The day-timers showed the distribution of 9367 kilograms of cocaine, worth approximately $149,520,000. See Gov't C.A. Br. 4.

While petitioner was a fugitive, and later an incarcerated defendant awaiting trial in No. 91-6060, an attorney and co-defendant, Mark Dachs, identified persons who were cooperating with the government in the case against petitioner. Petitioner enlisted the aid of his wife's brother-in-law, Eduardo Lezcano, to coordinate hitmen from Colombia to murder persons who might

testify against petitioner; the prospective victims included attorney Juan Acosta and six former drug associates. Acosta had set up offshore corporations for petitioner to use in laundering drug proceeds; Colombian hitmen murdered him in 1988, shortly before he was to appear before a federal grand jury to produce documents related to petitioner's offshore interests. Hitmen later murdered two of the six drug associates, and tried unsuccessfully to murder the other four. Petitioner later told Bonachea that he had directed the three murders and one of the unsuccessful assassination attempts. See Gov't C.A. Br. 5-6.[1]

While in jail and awaiting trial in No. 91-6060, petitioner recruited associates to bribe and discourage potential witnesses from testifying against him; he also recruited fellow prisoners to testify on his behalf against government witnesses. For their loyalty to petitioner, the prisoners or their families received large cash payments from drug proceeds. See Gov't C.A. Br. 7.

Oscar Mas was one of the inmates recruited and paid to testify against government witnesses in No. 91-6060. Through associates, petitioner paid Mas $87,000 to testify falsely against government witness Pedro Rosello. Mas ultimately refused to lie at trial, despite being pressured by petitioner's brother-in-law and co-defendant, Richard Martinez. Out of loyalty to petitioner and fi-

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[1] In the instant case, the jury acquitted petitioner of the substantive obstruction of justice through witness tampering and murder offenses charged in Counts 3-5, but convicted him of the obstruction conspiracy in Count 1, which incorporated the same allegations. Lezcano was convicted separately. See *United States* v. *Ramirez*, 324 F.3d 1225 (11th Cir.), cert. denied, 540 U.S. 881, 928 (2003); *United States* v. *Lezcano*, No. 00-CR-376-ALL (S.D. Fla. filed May 11, 2000); see generally Gov't C.A. Br. 6 n.1.

nancial dependence on him, Bonachea falsely testified in No. 91-6060 by claiming that petitioner had stopped drug trafficking by 1980. See Gov't C.A. Br. 7-8.

Through associates, petitioner laundered drug proceeds to circumvent the protective order in No. 91-6060 and to pay legal fees, reward associates, witnesses, and inmates, and maintain the organization's assets. The laundering methods included transporting cash to Harry Kozlik in New York for deposit in overseas banks and subsequent transfer to the United States by wire transfers and checks from nominee accounts; transferring cash to Latin American exchange houses for the issuance of foreign third-party checks; delivering cash payments through Bonachea and co-defendant Jorge Hernandez; and delivering cash payments through Colombian couriers using false identification. While the protective order was in effect, petitioner paid approximately $19.5 million in laundered drug proceeds to attorneys and investigators representing members of his organization and other associates; he also paid several million dollars to inmates, associates, and family members through the same schemes. See Gov't C.A. Br. 8-9.

At the start of the trial in No. 91-6060, petitioner told Bonachea that long-time associate Jose Fernandez had recognized a female acquaintance on the jury panel and, for more than $1 million, had recruited her to vote for acquittals and to persuade other jurors to do the same. The jury's foreperson, Miguel Moya, a schoolmate of one of petitioner's lawyers and of petitioner's cousin, also accepted a bribe to perform the same functions during the jury's deliberations. See Gov't C.A. Br. 9.[2]

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[2] Moya was ultimately convicted of accepting a bribe, as well as conspiracy to commit that offense, obstruction of justice, money laun-

During those deliberations, which were sequestered, Moya insisted on acquitting and refused to deliberate, saying that he could remain sequestered indefinitely. Pressured by Moya and fearing retribution from petitioner and Falcon, the jurors favoring conviction relented and in February 1996 acquitted petitioner and Falcon of all charges. The district court lifted the protective order in March 1996. See Gov't C.A. Br. 10.

Following the verdict, a juror who favored conviction but yielded to petitioner's tactics reported his suspicions about Moya to the authorities. An investigation showed that during trial Moya had had extensive telephone contact with one of petitioner's associates, and that in the 27 months following the trial Moya and his relatives, all of whom were persons of modest means, made more than $330,000 in cash expenditures and bank deposits. Following the verdict, petitioner expressed concern to Bonachea that Moya's spending of the bribe money might attract the attention of law enforcement officers. See Gov't C.A. Br. 10.

In 1996, after his acquittal in No. 91-6060, petitioner was indicted in No. 96-341-Cr-Lenard (S.D. Fla.) on charges relating to the acquisition, possession, and sale of false identification documents. During the trial, he remained free on bond, but fled shortly before a verdict

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dering and conspiracy to commit that offense, witness tampering and conspiracy to commit that offense, and making a false statement in a tax return. He was sentenced to 210 months of imprisonment. See *United States* v. *Moya*, No. 98-CR-626-ALL (S.D. Fla. filed Aug. 18, 1998), aff'd, 252 F.3d 440 (11th Cir. 2001) (Table). Juror Gloria Alba pleaded guilty to obstruction of justice by accepting a bribe, and juror Maria Penalver pleaded guilty to conspiracy to commit that offense. *United States* v. *Alba*, No. 03-CR-20700-ALL (S.D. Fla. filed Aug. 27, 2003). They were each sentenced to five years of imprisonment.

was returned. In April 1997, deputy marshals arrested petitioner in Palm Beach. A search of his car yielded hand-written instructions to criminal associates to assist him in remaining at large by accessing large amounts of cash, supplying cars, finding hiding places for false identification documents, tracking media reports, and locating property suitable for establishing a compound. See Gov't C.A. Br. 10-11.

Petitioner stored over $50 million in drug proceeds to be used in funding his criminal enterprises with at least six associates. Approximately $15 million was hidden in garage floor safes on a property owned by Luis Valverde. In 1995, a fire erupted in the garage where the money was stored. Petitioner's associates salvaged the cash, dried it, and stored it in Valverde's home. A 1999 search of the home uncovered $6 million, some of which had been fire- and water-damaged. See Gov't C.A. Br. 11-12.

At petitioner's direction, Bonachea maintained a ledger documenting $7.7 million she had laundered for him while he was incarcerated. Following his release from jail in 1996, petitioner pressured Bonachea to return the ledger to him. In October 1996, officers stopped Bonachea as she drove to Martinez's office to deliver the ledger to petitioner. Officers seized the ledger and other documents related to petitioner, including his letters directing associates to hide and launder money for him. Petitioner then persuaded Bonachea to flee in order to prevent the authorities from locating her and compelling her to testify against him. Petitioner's associates delivered tens of thousands of dollars to Bonachea to keep her in hiding in upstate New York. See Gov't C.A. Br. 12-13.

In April 1998, agents located Bonachea and arrested her. She agreed to cooperate, and, in September 1998, she met with Jorge Hernandez while wearing a hidden recorder. During their second meeting, Bonachea expressed concern that the bribed female juror from No. 91-6060 might be exposed and endanger the organization. Hernandez assured Bonachea that the juror was "under control" and was not spending her bribe money ostentatiously. See Gov't C.A. Br. 13.

2. The indictment in No. 91-6060 charged petitioner with conspiring to import and distribute cocaine and operating a CCE from January 1978 to April 1991 (Counts 1-3) and substantive importation and distribution offenses from mid-1986 to April 1989. In February 1996, the jury acquitted petitioner on all charges presented to them. The indictment in the instant case charged petitioner with offenses involving obstruction of justice through tampering with witnesses, bribing witnesses and jurors, and committing murder, and money laundering. The money laundering conspiracy charged in Count 2 covered the period from January 1979 to April 2000, and the substantive money laundering offenses in Counts 34-41 were alleged to have occurred in September and December 1998. See Gov't C.A. Br. 16-17.

Petitioner moved to dismiss the money laundering charges on grounds of double jeopardy and collateral estoppel; he claimed that his acquittal on drug trafficking charges in No. 91-6060 established that he had not engaged in drug trafficking after 1980 and precluded the instant money laundering charges. The government countered that petitioner's corruption of the jury in No. 91-6060 by bribing its foreperson barred his challenges to the money laundering charges. In the alternative, the

government argued that because the jury in the earlier case had returned a general verdict and petitioner had raised multiple defenses, it was impossible to determine the basis for the jury's verdict, and in any event proof of petitioner's personal involvement in drug trafficking was not an essential element of the money laundering charges. See Gov't C.A. Br. 17.

After a hearing, a magistrate judge recommended that petitioner's collateral estoppel claims be rejected because petitioner had not shown by clear and convincing evidence that the jury at the earlier trial had necessarily determined that petitioner had completely ceased his drug trafficking after 1980. See Gov't C.A. Br. 17-18. The district court adopted the recommendation. See Pet. App. 36a-37a. Petitioner appealed, but the court of appeals refused to consider his evidentiary estoppel claims on interlocutory appeal. See *id.* at 33a-34a.

3. Petitioner renewed his collateral estoppel argument on appeal from the jury's verdict. See Pet. C.A. Br. 22-29. The court of appeals rejected the argument. See Pet. App. 3a-7a. The court acknowledged (*id.* at 4a) that the government had introduced evidence of criminal activity for which petitioner had been acquitted in the earlier case in order to show that the money petitioner was accused of laundering was the proceeds of "specified unlawful activity," an essential element of the money laundering offense, see 18 U.S.C. 1956(a)(1)(B)(i). The court then noted that "[c]ollateral estoppel 'bars a subsequent prosecution only where a fact or issue necessarily determined in the defendant's favor in the former trial is an essential element of conviction at the second trial.'" Pet. App. 5a (quoting *United States* v. *Brown*, 983 F.2d 201, 202 (11th Cir. 1993)). To apply the collateral estoppel doctrine, the court said, requires a two-

step analysis: first, a court must determine whether "the jury's verdict of acquittal was based upon reasonable doubt about a single element of the crime which the court can identify"; and, second, the court must determine "whether that element is also an essential element of the crime for which the defendant was convicted in the second trial." *Ibid.* (quoting *Brown*, 983 F.2d at 202).

The court of appeals assumed without deciding that petitioner was correct in his contention that the basis for his 1996 acquittal was his cessation of all drug trafficking activity in May 1980, and that the first step of the collateral estoppel test was thus satisfied. See Pet. App. 6a. The court, however, found that petitioner had not satisfied the second step because he had not shown that the elements of the drug offenses of which he was acquitted in the earlier trial were essential elements of the money laundering offenses of which he was convicted in this case. See *ibid.* The court reasoned that petitioner's personal involvement in, or guilt of, the criminal activity in the earlier case was not an element of the money laundering offenses he was convicted of in this case. See *ibid.* The government, the court said, had to prove in this case that petitioner, with the requisite knowledge and intent, had conducted a financial transaction involving the proceeds of some felony drug offenses; it did not have to show that petitioner had committed those felony drug offenses. See *id.* at 6a-7a. The court observed that "[a]s far as the money laundering statute is concerned, laundering someone else's illegal proceeds is just as bad as laundering your own—there is no help-thy-neighbor exception to § 1956(a)(1)(B)(I)." *Id.* at 7a.

The court of appeals also rejected petitioner's contention that because the jury, in a special forfeiture ver-

dict, had found $15 million to be the value of the funds he laundered, the district court was precluded from enhancing his sentence on the basis of a finding that at least $35 million was laundered. See Pet. App. 25a-28a. The court held that even if the district court had erred in calculating petitioner's offense level using an amount greater than the jury's special forfeiture verdict, the error was harmless because the district court had stated its intention to depart upward to a life sentence in the event it was found to have incorrectly calculated the amount of funds laundered. See *id.* at 26a.

The court of appeals noted that the district court had concluded that an upward departure was warranted because petitioner, "through his illegal conduct," had "escaped the punishment he deserved for the criminal conduct he was tried for in his 1996 trial." Pet. App. 26a-27a. The district court had stated that "the bribery of jurors, the bribery of witnesses, so goes to the heart of our criminal justice system * * * that the egregious nature of the offense here could only be recognized by an upward departure." *Id.* at 27a (quoting district court). The court of appeals acknowledged that it had overturned petitioner's conviction for obstructing justice by bribing the earlier jury because that conviction rested at least in part on inadmissible hearsay evidence of a bribed juror. But the court held that that reversal did not affect the validity of the district court's reliance on the bribery at sentencing, because "it is well-established that, in sentencing, a district court can consider hearsay even if it was not admissible in determining guilt, so long as there are sufficient indicia of reliability." *Id.* at 27a n.8. The court held that "[t]he tape-recorded statements of the juror * * * clearly have sufficient indicia of reliability." *Ibid.* Observing that an up-

ward departure would be reviewed for an abuse of discretion and that a district court's departure decision was entitled to substantial deference on appeal, the court of appeals concluded that it could not say that the district court had abused its discretion in upwardly departing. See *id.* at 27a-28a.

Finally, the court of appeals rejected (see Pet. App. 29a-30a) petitioner's claim that following this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), he was entitled to be resentenced under an advisory system of Sentencing Guidelines. The court reasoned that because petitioner did not raise his *Booker* claim until his reply brief, he had abandoned the argument. See Pet. App. 29a-30a. And according to the court, even if petitioner had not abandoned the argument, he could not prevail on it because it would be reviewed for plain error—a standard that petitioner could not satisfy because he could not show that he would have received a lesser sentence under an advisory Guidelines system. *Id.* at 30a.

The court ordered that the case be remanded, so that the government could decide whether to retry petitioner on the charge of obstructing justice by bribing jurors. Pet. App. 30a-31a. The court noted that, if the government does not retry petitioner on that charge, or if petitioner is acquitted after a retrial, "the district court shall, at its discretion, either reimpose [petitioner's] sentence but with a reduction of 120 months as a result of there being no conviction for count 8, or the court may resentence [petitioner] on all the other counts for which he remains convicted." *Id.* at 31a.[3]

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[3] The court of appeals also rejected petitioner's challenges to the sufficiency of the evidence supporting his money laundering convictions

ARGUMENT

1. The petition does not warrant this Court's review for the threshold reason that the Court generally awaits final judgment in the lower courts before exercising its certiorari jurisdiction. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). The court of appeals remanded this case for further proceedings necessitated by the reversal of petitioner's conviction on the count charging him with obstruction of justice by bribing a juror. See Pet. App. 30a-31a. The interlocutory posture of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari). The denial of certiorari at this time does not preclude petitioner from raising the same issues in a later petition, after the entry of final judgment. This Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). The practice of deferring review until final judgment promotes judicial efficiency by ensuring that, if the defendant's conviction and sentence ultimately are affirmed on appeal, all of the defendant's claims—or at

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(see Pet. App. 7a-12a); to the district court's denial of a motion to suppress certain documents (see *id.* at 20a-24a); and to additional aspects of his sentencing (see *id.* at 28a-29a). The petition for certiorari does not challenge those rulings.

least those that the defendant concludes are most meritorious—will be consolidated and presented in a single petition to this Court. See *ibid.*

2. Petitioner contends (Pet. 8-21) that this Court should grant review of the court of appeals' holding that the collateral estoppel doctrine of *Ashe* v. *Swenson*, 397 U.S. 436 (1970), does not require the reversal of his eight money laundering convictions. Under *Ashe*, a jury's acquittal of a defendant on one charge based on a finding that the government failed to prove a particular ultimate fact (*i.e.*, a fact that the government must prove beyond a reasonable doubt) precludes the government from basing a later conviction on a jury finding that the government had proved that same ultimate fact beyond a reasonable doubt. See *Ashe*, 397 U.S. at 443-445; *Dowling* v. *United States*, 493 U.S. 342, 347-348, 350-352 (1990).

Under the money laundering statute, the government must show that the defendant "knowing that the property involved * * * represents the proceeds of some form of unlawful activity," conducts a financial transaction "which in fact involves the proceeds of specified unlawful activity," a term that includes drug trafficking. 18 U.S.C. 1956(a)(1). The government does not have to prove the particular drug transaction whose proceeds were laundered or the defendant's involvement in that transaction; it need only show that the funds were proceeds of some drug transaction. See, *e.g.*, *United States* v. *Phillips*, 219 F.3d 404, 415-416 (5th Cir. 2000); *United States* v. *Gabel*, 85 F.3d 1217, 1224 (7th Cir. 1996). Petitioner argues that the jury's 1996 acquittal established that he had not engaged in certain drug transactions, but that the "unlawful activity" whose proceeds were the subject of the money laundering counts

in this case were the same drug transactions. Petitioner contends (Pet. 6-7, 12-15) that the court of appeals erred in basing its collateral estoppel analysis on what the government was required to prove on the money laundering counts, rather than asking whether the government in fact met its burden by proving facts already decided against it by the 1996 jury. As petitioner states, "[u]nless 'a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration'" because it was already decided against the government in the prior proceeding, "the government's second prosecution is estopped." Pet. 11 (quoting *Ashe*, 397 U.S. at 444). Further review of petitioner's claim is unwarranted.

a. Under the collateral estoppel doctrine, a jury's acquittal of a defendant on one charge precludes the government from proceeding against him later on a second charge only if the first jury necessarily found a fact in the defendant's favor that is essential to the second charge (*i.e.*, a fact that the government must prove beyond a reasonable doubt). See *Ashe*, 397 U.S. at 443-445; *Dowling*, 493 U.S. at 347-348, 350-352. If the prior "acquittal did not determine an ultimate issue in the [second] case," there is no bar. *Id.* at 348; cf. *Yates* v. *United States*, 354 U.S. 298, 338 (1957) ("The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding."). Facts that are merely of evidentiary significance in the second case, but that the jury need not find beyond a reasonable doubt in order to convict, may be proved to the second jury, even if the jury in the prior case found that the government had failed to establish them beyond a reasonable doubt. See 493 U.S. at 348 (explaining that sec-

ond prosecution is impermissible if, "to have convicted the defendant in the second trial, the second jury had to have reached a directly contrary conclusion" to that of the first jury); *Dowling*, 493 U.S. at 348-349.

It is far from clear that the Eleventh Circuit has adopted the view, attributed to it by petitioner, that the government may "prove a crime using allegations a jury previously rejected, so long as it *hypothetically* could prove the charge with different evidence." Pet. 20. Petitioner focuses on a few sentences in the court's opinion that in his view suggest the "hypothetical facts" position. Pet. 4, 7, 12-13; see Pet. App. 6a-7a. The court of appeals, however, nowhere stated a rule that the application of collateral estoppel turns on hypothetical facts that the government in theory could have attempted to prove, rather than the actual facts presented to the jury. To the contrary, the court quoted and cited two of its prior cases—both written by Judge Carnes, who wrote the opinion for the court in this case as well—for the proposition that, for collateral estoppel to apply, "[t]here * * * has to be such *factual* identity of the issues that [t]he subsequent verdict of conviction [is] rationally inconsistent with the prior verdict of acquittal." *Id.* at 5a (internal quotation marks omitted, emphasis added, and brackets in original) (citing *United States* v. *Brown*, 983 F.2d 201, 202 (11th Cir. 1993)) and *United States* v. *Garcia*, 78 F.3d 1517, 1521 (11th Cir. 1996)).

In *Brown* and *Garcia*, the court made entirely clear that application of the collateral estoppel doctrine depends on whether the actual facts that the jury must find in order to convict the defendant at the second trial were found adversely to the government at the first trial. As the court explained in *Brown*, "identity of overlapping elements required for collateral estoppel must

extend beyond the legal definition of the elements" and "[t]here must also be a factual identity of issues to such an extent that a jury rationally could not have a reasonable doubt about * * * [the element] involved in the first trial without also having a reasonable doubt about * * * [the element] involved in the second trial." 983 F.2d at 204; see *ibid.* ("The subsequent verdict of conviction must be rationally inconsistent with the prior verdict of acquittal.") The court in *Brown* ultimately concluded, after conducting a detailed analysis of the actual facts that the government proved to support the conviction in the second case, that collateral estoppel did not apply,[4] while the court in *Garcia* reached the contrary conclusion.[5] Both cases, however, demonstrate that the

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[4] The court in *Brown* examined the basis for conviction at the second trial, 983 F.2d at 204-205, before concluding that collateral estoppel did not apply because "there were differences between the two financing schemes" such that the earlier acquittal did not preclude conviction in the second trial, *id.* at 205. See *id.* at 204 (noting that in *Ashe*, collateral estoppel applied "not merely because identity was the only element at issue" in both the first and second trials, but also "because the six hapless poker players were robbed by the same robbers at the same time, and there was no rational way to reconcile the second jury's finding that there was no reasonable doubt [the defendant] was one of the robbers with the first jury's finding that there was a reasonable doubt whether he was").

[5] The defendant in *Garcia* was convicted of traveling in interstate commerce with intent to facilitate importation of cocaine following his earlier acquittal on conspiracy and substantive cocaine charges. The court found that the acquittal (on a Rule 29 motion) established "that [the defendant] was not knowingly involved in the charged [cocaine] conspiracy at any time during the specified period," 78 F.3d at 1521, while the later conviction, as the case was presented to the jury, rested on proof that he was. See *id.* at 1522 ("To accept the government's attempted reconciliation of the results of the two trials, we would have to believe it logical for [the defendant] to have travelled with the intent

law in the Eleventh Circuit is that a court applying the collateral estoppel doctrine must look beyond the abstract definitions of the elements to be proved and consider the actual facts that, if not found by the jury, would preclude a conviction. See *United States* v. *Bennett*, 836 F.2d 1314, 1316 (11th Cir.) ("To bar prosecution, a finding of fact must be inconsistent with a finding of guilt in a second trial. If, however, the jury could have based its verdict on something other than the issue to be barred, then collateral estoppel would not apply. This determination requires a practical and realistic assessment of what makes the jury verdict coherent.") (citations omitted), cert. denied, 487 U.S. 1205 (1988).

The court of appeals in this case relied on—and certainly did not purport to disagree with—*Brown* and *Garcia*.[6] Any tension within the Eleventh Circuit's decisions in this area would not warrant further review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

b. In any event, petitioner's claim of collateral estoppel would have to be rejected for two additional reasons, which renders this case an unsuitable vehicle for addressing the issue petitioner seeks to present.

First, petitioner rests his collateral estoppel claim on the argument that "the basis of his 1996 acquittal was that he had ceased all drug trafficking activities in May 1980," because that "was the only defense he put for-

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to promote the conspiracy, and then a few days later to have had no knowledge of that same conspiracy.").

[6] The court of appeals may have viewed this case as one in which the prior acquittal did not "determine an ultimate issue in the present case," *Dowling*, 493 U.S. at 348, but instead was relevant to what was at best a mere evidentiary fact in the present case—i.e., *who* was involved in the prior drug activity.

ward to the crimes alleged in his 1996 trial." Pet. App. 6a. As the district court explained, however, petitioner's acquittal on the 1996 charges could have rested on an alternative, statute-of-limitations defense, under which he could not be found guilty if his "narcotics importation or distribution activities occurred solely before April 10, 1986." *Id.* at 36a. Thus, "assuming the acquittal rested on the statute of limitations defense, * * * such finding would not preclude the finding that [petitioner] derived proceeds from [his] earlier trafficking activities" and that he engaged in the post-1986 money laundering transactions charged in this case using the proceeds of pre-1986 drug transactions. *Id.* at 37a.[7]

The district court found that "it is not clear which defense provided the basis for the acquittal." Pet. App. 36a. Accordingly, the district court found that petitioner had not established the predicate for his collateral estoppel claim: "that the cessation of [petitioner's] drug trafficking activities after 1980 was the sole rational basis for [his] acquittal" in 1996. *Id.* at 36a-37a. The court of appeals did not disagree with that ruling, but simply "assume[d] without deciding" that petitioner's prior acquittal did establish that he had ceased drug trafficking after 1980. *Id.* at 6a. The district court correctly ruled that the prior acquittal did not preclude the government from establishing that petitioner's pre-1986

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[7] In the 1996 prosecution, petitioner himself argued, with respect to the evidence that he had amassed considerable, unexplained wealth, that such wealth was the result of drug trafficking before 1986 and that the jury need not concern itself with his financial transactions. Gov't C.A. Br. 24. Accordingly, convictions on money laundering in this case are consistent with petitioner's own defense in the 1996 prosecution.

drug trafficking proceeds were laundered in the money laundering transactions charged in this case.[8]

Second, the 1996 verdict should not be given collateral estoppel effect in any event, because that verdict was the result of a process that has been determined to have been corrupted. Petitioner himself was convicted in this case of having obstructed justice through bribery of the jury foreperson with at least $300,000 in the 1996 case. See Pet. App. 13a n.4. Although the court of appeals reversed that conviction on the ground that the hearsay statements of the bribed foreperson were mistakenly admitted in evidence, the trial court independently found that petitioner had in fact bribed the jury foreperson when it adopted portions of the presentence report that related to it. See Presentence Report paras. 103-109; 1/16/03 Sent. Tr. 378;[9] see also Pet. App. 27a (noting district court's reliance on petitioner's bribery of prior jury to support upward departure, if neces-

[8] The court also discussed a third possible basis for the 1996 acquittal, under which there was a "lack of sufficient credible evidence to support each element of the charges in the indictment beyond a reasonable doubt." Pet. App. 36a. Insofar as the jury acquitted defendant of the substantive counts in the 1991 indictment, all of which involved post-1986 activity, based on that defense, the acquittal established only that the government had not proved petitioner's involvement in those particular drug transactions. Such an acquittal would not bar the instant money laundering counts, because the government did not have to—and did not in fact—tie the money laundering counts in this case to any particular drug transactions. Accordingly, that ground for acquittal too would not have a collateral estoppel effect on the money laundering counts on which petitioner was convicted in this case.

[9] The district court found that the allegations that petitioner bribed the foreperson were "amply supported by the record beyond a reasonable doubt," before noting that "[f]or the purposes of this, I need simply to say by a preponderance of the evidence." 1/16/03 Sent. Tr. 378.

sary). Moreover, the foreperson and two other jurors were in any event themselves convicted in separate cases of obstruction, conspiracy, and bribery offenses in connection with the 1996 trial. See note 2, *supra*. Accordingly, even taking into account the reversal of petitioner's conviction of obstruction of justice through bribery of the 1996 jury, it has been established that petitioner corrupted the jury in the 1996 case, and it has been proved beyond a reasonable doubt that, regardless of who did it, that jury was in fact corrupted.

In those circumstances, the verdict in the 1996 case should not be given preclusive effect. In *Aleman* v. *Honorable Judges of the Circuit Court*, 138 F.3d 302, 308 (7th Cir.), cert. denied, 525 U.S. 868 (1998), the defendant bribed a judge at his first murder trial and then claimed that double jeopardy principles barred a second prosecution on the same charge. The state court ruled that, where a defendant has bribed a judge in a prior case, he was never truly in jeopardy in that proceeding such that he can assert an acquittal in that case as a bar to further prosecution. On the defendant's habeas petition, the Seventh Circuit affirmed that ruling as not "contrary to, or an unreasonable application of" this Court's precedent. 138 F.3d at 308. As the court explained, "[t]o allow [the defendant] to profit from his bribery and escape all punishment for the * * * murder would be a perversion of justice, as well as establish an unseemly and dangerous incentive for criminal defendants." *Id*. at 309. The same principle applies here.

c. Finally, the question presented by petitioner would not in any event warrant further review, because the collateral estoppel principle on which he relies rarely arises and is even more rarely litigated in federal court. Petitioner cites (Pet. 16-19) seven decisions of

five courts of appeals that in his view conflict with the court of appeals' decision in this case and establish that collateral estoppel applies to ultimate facts actually litigated in the second trial. The oldest of those decisions date from 1979, and all but one date from 1992 or earlier.[10] Petitioner has failed to show that the question he presents arises with any frequency, as shown by the age of the cases he cites. Further review is therefore unwarranted.

3. Petitioner contends (Pet. 21-24) that this Court should grant review to consider the permissibility, after *Booker*, of sentencing a defendant on the basis of alleged conduct for which the government tried and failed to obtain a valid jury verdict. In *United States* v. *Watts*, 519 U.S. 148, 157 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Petitioner's claim would therefore require overruling *Watts*.

The question whether *Booker* precludes courts from considering acquitted conduct for sentencing purposes was not squarely or timely presented below. Petitioner relied on collateral estoppel, not *Booker*, in his challenge to the district court's calculation of the amount of money involved in his money laundering offenses, see Pet. C.A. Br. 51-54, and he did not challenge the district court's reliance at sentencing on his conviction for obstruction of justice through juror bribery until his petition for rehearing, see Pet'r Pet. for Reh'g 12-13. This Court's "traditional rule * * * precludes a grant of certiorari"

[10] Similarly, of the six decisions of state courts of last resort cited by petitioner (Pet. 19-20), all but one date from the period from 1978 to 1992.

when the question presented was not pressed or passed on below. *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, further review to consider whether to overrule *Watts* would not be warranted. Petitioner cites (Pet. 22) three district court decisions that have expressed skepticism about the continuing vitality of *Watts* after this Court's decision in *Booker*, one of which was effectively overruled by a later decision of the court of appeals of that circuit.[11] Petitioner concedes, however, that four courts of appeals, including the court of appeals here, see, *e.g.*, *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 126 S. Ct. 432 (2005), have concluded that after *Booker*, as before, relevant acquitted conduct may be considered by a district court at sentencing. There is accordingly no conflict in the circuits, and further review is unwarranted.

The courts of appeals have correctly concluded that *Booker* does not bar consideration of acquitted conduct at sentencing. The opinions in *Booker* itself do not suggest that the continued validity of *Watts* is doubtful. See 543 U.S. at 240, 241 (constitutional opinion of Stevens, J., for the Court) (stating that the "issue we confronted [in *Booker*] simply was not presented" in *Watts* and "[n]one of [the Court's] prior cases is inconsistent" with *Booker*); *id.* at 251-252 (remedial opinion of Breyer, J.,

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[11] In *United* States v. *Vaughn*, 430 F.3d 518, 525-527 (2005), cert. denied, 126 S. Ct. 1665 (2006), the Second Circuit held that a court may consider acquitted conduct at sentencing after *Booker*. The court thereby overruled the district court's unreported decision in *United States* v. *Caravajal*, No. CR222AKH, 2005 WL 476125, at *4 (S.D.N.Y. Feb. 22, 2005), on which petitioner relies. See Pet. 22.

for the Court) (relying on *Watts* for proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found *unproved* (beyond a reasonable doubt)"); see also *United States* v. *Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005), cert. denied, 126 S. Ct. 1665 (2006).

Moreover, as noted in *Duncan*, 400 F.3d at 1305, *Booker* itself suggests that sentencing courts may continue to consider relevant acquitted conduct. See 543 U.S. at 233 (constitutional opinion of Stevens, J., for the Court) ("when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant"). And as this Court recognized in *Watts* itself, such consideration is not unfair to a defendant because "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." 519 U.S. at 155 (quoting *Witte* v. *United States*, 515 U.S. 389, 401 (1995)); cf. 18 U.S.C. 3661 (at sentencing, no limitation on information about defendant's character, background, and conduct). The rationale of *Watts* —that an acquittal establishes only that certain facts were not proved beyond a reasonable doubt, while facts may be used at sentencing without satisfying that standard—remains valid after *Booker*.

4. Finally, petitioner contends that further review is warranted to consider whether "[w]hen an appellate court vacates and remands a sentence imposed prior to *United States* v. *Booker*, 125 S. Ct. 738 (2005), must the district court apply *Booker* when resentencing the defendant, even if the reason for the remand was not due

to *Booker* error." Pet. i. Further review of the question petitioner presents would be unwarranted.

First, the question presented by petitioner explicitly concerns the application of *Booker* to cases in which sentences were imposed before this Court decided *Booker* and the court of appeals later remands the case. Fifteen months after *Booker* was decided in January 2005, there are relatively few such remaining cases, and soon there will be none. Petitioner's question accordingly has very little continuing significance. In addition, an analogous question is unlikely to arise in cases in which sentence is imposed after *Booker*, because district courts now routinely apply *Booker* in sentencing proceedings in the first instance. On that basis alone, further review is unwarranted.

Second, this case does not present the question on which petitoner seeks certiorari. The court of appeals did not, as petitioner contends, "[tell] the district court that it did not have to apply *Booker* on remand" if a resentencing occurs. Pet. 25.

The court of appeals rejected all of petitioner's sentencing claims, Pet. App. 25a-30a, including petitioner's *Booker* claim, which was rejected on the ground that it had been abandoned because it was presented only in his reply brief, and, alternatively, that it had been forfeited and could not satisfy the plain error standard. *Id.* at 29a-30a. Petitioner does not argue that the court of appeals erred in reaching those conclusions. See Pet. 24-25. Petitioner contends, however, that the court of appeals ordered a remand and resentencing, but relieved the district court of the obligation to apply *Booker* when it conducts the resentencing. That contention is mistaken, because the court of appeals did not order a

resentencing and the court reached no conclusion on the applicability of *Booker* if such a resentencing were held.

Having reversed petitioner's conviction on one count and found nothing wrong with petitioner's sentence otherwise, the court of appeals first gave the government the opportunity to retry petitioner on the juror bribery count it reversed. Pet. App. 30a-31a. The court then ruled that, if no retrial occurs or defendant were acquitted after retrial on that count, the district court would have discretion *either* to enter a new judgment eliminating the consecutive sentence imposed on the reversed count *or* to resentence petitioner. *Id.* at 31a ("[T]he district court shall, at its discretion, either reimpose [petitioner's] sentence but with a reduction of 120 months as a result of there being no conviction for count 8, or the court may resentence [petitioner] on all the other counts for which he remains convicted."). The court of appeals' holding that the district court may be able to address the reversal of the conviction merely by modifying the judgment was correct, and it is not inconsistent with any case cited by petitioner.[12] Moreover, if the dis-trict court determines to resentence petitioner, nothing in the cou

rt of appeals' opinion suggests that *Booker* would be inapplicable at such a resentencing. Accordingly, this case does not present the question whether a court of

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[12] As petitioner notes, the decisions that he cites hold at most that *Booker* applies "even where remands *for resentencing* were not caused by a *Booker* error." Pet. 25 (quoting *Cirilo-Muñoz* v. *United States*, 404 F.3d 527, 533 n.7 (1st Cir. 2005)) (emphasis added). Each of them involved a remand for resentencing due to a sentencing error, and none of them has anything to do with reversal of a conviction that could result on remand in a modification of the judgment without resentencing.

appeals may order that a defendant, whose conviction was reversed on non-*Booker* grounds, be resentenced without regard to *Booker*. In any event, because petitioner's claim concerns the propriety of procedures to be followed by the district court on remand, this Court's consideration of that claim would be premature at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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