No. 16-235

In the Supreme Court of the United States

GARY SAMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In recommending that petitioner be sentenced to death, the jury at his first penalty-phase hearing did not unanimously agree that the government had proved two non-statutory aggravating factors beyond a reasonable doubt, instead checking a box on the special-verdict form that stated "1 OR MORE JURORS SAY NO." Petitioner's death sentence was subsequently vacated on collateral review for unrelated reasons, and the government thereafter filed an amended notice of its intent to seek the death penalty.

The question presented is whether the court of appeals correctly rejected petitioner's argument that the collateral estoppel component of the Double Jeopardy Clause prevents the government from alleging and attempting to prove at a second penalty-phase hearing the two non-statutory aggravating factors that the jury at the first penalty-phase hearing failed to unanimously agree had been proved beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 832 F.3d 37. The order of the district court (Pet. App. 27a-71a) is unreported. Prior opinions of the court of appeals are reported at 724 F.3d 150 (Pet. App. 99a-133a) and 486 F.3d 13.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2016. The petition for a writ of certiorari was filed on August 18, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of Massachusetts to two counts of carjacking resulting in death, in violation of 18 U.S.C. 2119(3). Pet. App. 2a. Following a penalty-phase hearing, a jury recommended that petitioner be

sentenced to death, and the district court sentenced him accordingly. *Id.* at 5a-6a. The court of appeals affirmed. 486 F.3d 13 (1st Cir. 2007), cert. denied, 553 U.S. 1035 (2008). The district court subsequently granted petitioner's motion to vacate his death sentence under 28 U.S.C. 2255, Pet. App. 6a, and the court of appeals affirmed that decision, *id.* at 99a-133a.

The government filed an amended notice of its intent to seek the death penalty, which, as relevant here, re-alleged two non-statutory aggravating factors that the first jury had not unanimously found proved beyond a reasonable doubt. Pet. App. 6a. Petitioner moved to strike those aggravating factors on double jeopardy grounds. *Id.* at 7a. The district court denied that motion. *Id.* at 27a-71a. The court of appeals exercised mandamus jurisdiction over petitioner's double jeopardy claim and affirmed. *Id.* at 1a-23a. On August 25, 2016, Justice Breyer denied petitioner's application for a stay pending this Court's disposition of his petition for a writ of certiorari. Petitioner's second penalty-phase hearing began on September 14, 2016.

1. In 2001, petitioner murdered three individuals over the course of one week. Pet. App. 3a. On July 24, 2001, he murdered Philip McCloskey, a 69-year-old who had picked up petitioner when he was hitchhiking. 486 F.3d at 18. Petitioner forced McCloskey to drive to a secluded area at knifepoint, attempted to restrain him with a belt, and, "[w]hen McCloskey resisted, * * * stabbed him multiple times and then slit his throat, nearly decapitating him." *Ibid.* Petitioner took McCloskey's wallet and tried to steal his car, which would not start. *Ibid.* Three days later, on July 27, 2001, petitioner murdered Jonathan Rizzo, a 19-year-old college student, by tying him to a tree, stuff-

ing a sock in his mouth, and stabbing him repeatedly with a knife. *Ibid.* Petitioner then stole Rizzo's car. *Ibid.* On July 30, 2001, petitioner murdered Robert Whitney by "t[ying] him to a chair, gagg[ing] him with a washcloth, and strangl[ing] him to death with a rope." *Ibid.* Petitioner stole Whitney's car and drove to Vermont, where he ultimately surrendered to authorities. *Ibid.*

On August 8, 2002, a federal grand jury returned a second superseding indictment charging petitioner with two counts of carjacking resulting in death, in violation of 18 U.S.C. 2119(3). Pet. App. 4a. In a Notice of Special Findings, the indictment alleged facts concerning petitioner's state of mind and the statutory aggravating factors that made him eligible for the death penalty. Superseding Indictment 3-6; see 18 U.S.C. 3591(a), 3592(c). On November 19, 2002, the government filed a notice of intent to seek the death penalty, as required by 18 U.S.C. 3593(a). Pet. App. 4a.

2. Petitioner pleaded guilty to both counts of carjacking resulting in death and the case proceeded to the penalty phase. Pet. App. 5a. At the close of the government's case-in-chief in the penalty-phase hearing, the district court determined that the government had presented sufficient evidence to submit the nonstatutory aggravating factors of future dangerousness and obstruction of justice to the jury. See *United States* v. *Sampson*, 335 F. Supp. 2d 166, 215-217, 225-226 (D. Mass. 2004).

At the close of the penalty phase, the jury unanimously recommended that petitioner be sentenced to death on both counts of conviction. Pet. App. 5a; see *id.* at 88a, 98a. For each count, the jury unanimously found on the special-verdict form that the government

had proved two statutory aggravating factors and several non-statutory aggravating factors beyond a reasonable doubt. *Id.* at 81a-84a, 91a-94a. In response to the question whether "each and every one of you find that the government has proven, beyond a reasonable doubt," the non-statutory aggravating factors of future dangerousness and obstruction of justice, however, the jury checked "1 OR MORE JURORS SAY NO." *Id.* at 84a-85a, 94a-95a; see *id.* at 5a n.4. The jury nevertheless unanimously found "that the government ha[d] proven, beyond a reasonable doubt, that the aggravating factor or factors found to exist sufficiently outweigh the mitigating factors found to exist to make death * * * the appropriate penalty." *Id.* at 88a, 98a.

The district court followed the jury's recommendation, as it was required to do under 18 U.S.C. 3594, and sentenced petitioner to death. Pet. App. 104a. The court of appeals affirmed petitioner's death sentence on direct review, 486 F.3d at 52, and this Court denied his petition for a writ of certiorari. 553 U.S. 1035 (No. 07-8441).

3. Petitioner moved to vacate his sentence under 28 U.S.C. 2255, alleging, *inter alia*, that three jurors had provided false answers to questions during voir dire. Pet. App. 104a. After an evidentiary hearing, the district court found that one of the jurors had lied repeatedly and intentionally about her ability to be impartial. *Id.* at 105a. The court vacated petitioner's death sentence and ordered a new penalty-phase hearing. *Ibid.*

The government appealed that decision, and the court of appeals affirmed. Pet. App. 99a-133a. The court held that petitioner "was deprived of the right to

an impartial jury and [wa]s entitled to a new penalty-phase hearing." *Id.* at 130a.

4. The government filed an amended notice of its intent to seek the death penalty, which re-alleged, *inter alia*, the two non-statutory aggravating factors of future dangerousness and obstruction of justice. Pet. App. 6a-7a. As relevant here, petitioner moved to strike those factors, contending that the renewed allegations violated the Double Jeopardy Clause. *Id.* at 7a.

a. The district court denied petitioner's motion to strike the two factors. Pet. App. 33a-38a, 50a. The court rejected petitioner's claim that the jury's failure to unanimously find the factors "constitute[d] an acquittal for purposes of double jeopardy." *Id.* at 33a. As the court emphasized, even though the jury had not unanimously found future dangerousness and obstruction of justice, it "nevertheless, lawfully, recommended a sentence of death." *Id.* at 36a. The court further held that petitioner could not satisfy the requirements for collateral estoppel that an issue be "determined by a valid and final judgment" and "essential to the judgment." *Id.* at 37a (quoting *Bobby* v. *Bies*, 556 U.S. 825, 834 (2009)). Because petitioner's death sentence had been vacated, the court was "persuaded" that there "was not a valid and final judgment" that could trigger preclusion. *Ibid.* (internal quotation marks omitted) (quoting *United States* v. *Stitt*, 760 F. Supp. 2d 570, 584 (E.D. Va. 2010)). And the failure to unanimously find the future-dangerousness and obstruction-of-justice factors, the court separately concluded, "was not essential to the judgment of death." *Ibid.*[1]

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[1] The court also stated that there could "be no preclusive effect" based on the first jury's verdict because that "verdict was tainted

The district court subsequently granted petitioner's application for a certificate of appealability to appeal the rejection of his double jeopardy argument. Pet. App. 72a-78a. The court treated its order rejecting petitioner's double jeopardy challenge as a "final order" for purposes of 28 U.S.C. 2253(c). Pet. App. 75a.

b. The court of appeals affirmed the district court's rejection of petitioner's double jeopardy claim. Pet. App. 1a-23a.

The court of appeals first concluded that, "whether or not [it] ha[d] statutory jurisdiction" over petitioner's appeal under 28 U.S.C. 2253, it "at least ha[d] and w[ould] exercise advisory mandamus jurisdiction." Pet. App. 8a. The court noted that advisory mandamus jurisdiction is reserved for cases "that present novel questions of great significance which, if not immediately addressed, are likely to recur and to evade effective review." *Id.* at 9a (citation and internal quotation marks omitted). The court concluded that petitioner's appeal satisfied the "stringent requirements" for mandamus jurisdiction because "the issue, as framed, is novel" and "of high public importance"; "an already significant legal question is even more so in the context of a capital case"; and exercising review before the second penalty-phase hearing "offer[ed] pragmatic benefits" because it could potentially avoid the need for a third penalty-phase trial. *Id.* at 9a-10a.

The court of appeals rejected the government's argument that the question presented would not evade review because petitioner could raise it after his resentencing. Pet. App. 11a. The court reasoned that "[p]ostponing review of the double-jeopardy challenge

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by a juror who lied about her ability to be impartial in th[e] case." Pet. App. 36a.

until after the second penalty-phase proceeding w[ould] frustrate the appeal's central assertion: that [petitioner] should not have to defend against these particular allegations again." *Ibid.* Accordingly, the court concluded, "[t]he claim would evade review because one of the most important protections of the Double Jeopardy Clause would be lost"—"not hav[ing] to defend once more against the two non-statutory aggravating factors at issue." *Ibid.*

On the merits, the court of appeals rejected petitioner's argument that the Double Jeopardy Clause barred the government's re-allegation of the future-dangerousness and obstruction-of-justice aggravating factors. Pet. App. 11a-23a. The court first concluded that the jury's failure to unanimously find those factors did not constitute an "acquittal" for double jeopardy purposes. *Id.* at 12a-16a. The court noted that "an 'acquittal' in the capital sentencing context turns on 'whether the sentencer or reviewing court has decided that the prosecution has not proved its case *that the death penalty is appropriate*.'" *Id.* at 12a-13a (internal quotation marks omitted) (quoting *Poland* v. *Arizona*, 476 U.S. 147, 155 (1986)). "The earlier penalty-phase jury's decision in [petitioner's] case [wa]s not an acquittal," the court noted, but rather "[q]uite the opposite" because "the jury found the death penalty justified, despite also finding that the government had not proven two non-statutory aggravating factors beyond a reasonable doubt to all members of the jury." *Id.* at 13a.

The court of appeals also rejected petitioner's collateral estoppel claim. Pet. App. 16a-23a. That claim, the court observed, "r[an] directly against" this Court's decision in *Bies*. *Id.* at 16a. There, this Court held

that collateral estoppel did not bar relitigation of the issue of the defendant's mental retardation, which the state courts had said "merit[ed] some weight in mitigation" but which was "clear[ly] * * * not necessary to the judgments affirming his death sentence." *Id.* at 17a (quoting *Bies*, 556 U.S. at 828, 835). The court of appeals observed that *Bies* had emphasized "that collateral estoppel requires a determination that is essential to the prior judgment" and "that '[a] determination ranks as necessary or essential only when the final outcome hinges on it.'" *Id.* at 17a, 19a (quoting *Bies*, 556 U.S. at 834-835).

Applying that analysis, the court of appeals concluded that "[t]here is simply no way the two non-statutory aggravating factors at issue here were essential to the first jury's death sentence." Pet. App. 20a. "Indeed, '[f]ar from being necessary to the judgment,' the jury's failure to find unanimously that the government proved the two non-statutory aggravating factors beyond a reasonable doubt, like the retardation mitigating factor in *Bies*, 'cuts against [the judgment] —making [it] quintessentially the kind[] of ruling[] not eligible for issue-preclusion treatment.'" *Id.* at 18a (brackets in original) (quoting *Bies*, 556 U.S. at 835). Accordingly, the court held that "[t]he Double Jeopardy Clause does not bar the government from alleging those non-statutory aggravating factors again at [petitioner's] new penalty-phase proceeding." *Id.* at 23a.

5. On August 15, 2016, petitioner sought a stay from the court of appeals pending this Court's disposition of his petition for a writ of certiorari. On August 16, 2016, the court of appeals denied the motion. On August 19, 2016, petitioner sought a stay from this

Court. On August 25, 2016, Justice Breyer denied that application.

On September 14, 2016, petitioner's second penalty-phase hearing began in district court. Jury selection is anticipated to end on November 1, 2016, with the expectation that the jury will be sworn that day. Opening arguments are currently scheduled for November 2, 2016.

ARGUMENT

Petitioner renews his claim (Pet. 11-24) that the collateral estoppel component of the Double Jeopardy Clause bars the government from re-alleging the non-statutory aggravating factors of future dangerousness and obstruction of justice. That argument lacks merit. Collateral estoppel does not apply because petitioner has not established that the jury unanimously resolved any issues in his favor and because any jury findings on those factors were not essential to the jury's recommendation to impose a death sentence. The court of appeals' rejection of petitioner's double jeopardy claim is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

The procedural posture of this case also counsels against this Court's review. The court of appeals erred in exercising mandamus jurisdiction to resolve petitioner's claims. Moreover, the case is in an interlocutory posture and petitioner's second penalty-phase hearing began more than one month ago. Thus, petitioner's claim may become moot. And if it does not, petitioner can present the claim to this Court, along with any others that arise during his resentencing, in a single petition following a final judgment.

1. Petitioner is incorrect to contend (Pet. 11-14, 17-22) that the collateral estoppel component of the Double Jeopardy Clause prevents the government from realleging the future-dangerousness and obstruction-of-justice non-statutory aggravating factors. This Court's review of that claim is not warranted.

a. The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court interpreted the Clause to incorporate the principle of collateral estoppel, which "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443; see *id.* at 445. If a jury is the factfinder, it must act unanimously to decide an issue in the defendant's favor. See *Yeager* v. *United States*, 557 U.S. 110, 121, 125 (2009) (observing that "a jury speaks only through its verdict," such that "the fact that a jury hangs is evidence of nothing—other than, of course, that it has failed to decide anything"). The defendant bears the "'burden . . . to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided' in his favor" in the prior proceeding. *Schiro* v. *Farley*, 510 U.S. 222, 236 (1994) (quoting *Dowling* v. *United States*, 493 U.S. 342, 350 (1990)).

To trigger collateral estoppel, an issue that was decided in the defendant's favor must also be "essential to the judgment." *Bobby* v. *Bies*, 556 U.S. 825, 834 (2009) (quoting Restatement (Second) of Judgments § 27 (1982)). "A determination ranks as necessary or essential only when the final outcome hinges on it."

Id. at 835. Thus, "[i]f a judgment does not depend on a given determination, relitigation of that determination is not precluded." *Id.* at 834.

In *Bies*, this Court applied that analysis to conclude that a defendant who had been sentenced to death could not invoke collateral estoppel to preclude relitigation of an issue that had been given weight as a mitigating factor at the penalty phase but was "not necessary to the ultimate imposition of the death penalty." 556 U.S. at 836. The defendant in *Bies* sought federal habeas relief following this Court's decision in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment prohibits the execution of mentally retarded offenders. See *Bies*, 556 U.S. at 827-828. The district court vacated the death sentence, and the Sixth Circuit affirmed. Because the state court "had definitively determined, as a matter of fact, [the defendant's] mental retardation" as a mitigating factor, the Sixth Circuit believed that the Double Jeopardy Clause "barred any renewed inquiry into the matter of [the defendant's] mental state." *Ibid.*

This Court reversed, concluding that the Sixth Circuit had "fundamentally misperceived the application of the Double Jeopardy Clause and its issue preclusion (collateral estoppel) component." *Bies*, 556 U.S. at 828. As the Court explained, "issue preclusion is a plea available to prevailing parties"; it "does not transform final judgment losers, in civil or criminal proceedings, into partially prevailing parties." *Id.* at 829. Because the mental-retardation findings in the prior proceeding were "not necessary to the judgments affirming [the defendant's] death sentence" and in fact "cut against" those judgments, the Court concluded

that the defendant could not invoke collateral estoppel. *Id.* at 835 (citation omitted). The Sixth Circuit's contrary ruling, the Court explained, "conflate[d] a determination necessary to the bottom-line judgment with a subsidiary finding that, standing alone, is not outcome determinative." *Ibid.*

b. Under a straightforward application of this Court's precedents, petitioner cannot rely on collateral estoppel to bar the government from re-alleging the future-dangerousness and obstruction-of-justice non-statutory aggravating factors.

At the outset, petitioner has not established that the jury in the first penalty-phase hearing unanimously found that the government had failed to prove the two factors and therefore actually decided those issues in his favor. The special-verdict form asked whether "each and every one of [the jurors found] that the government ha[d] proven" the factors "beyond a reasonable doubt," and the jury checked a box stating "1 OR MORE JURORS SAY NO." Pet. App. 84a-85a, 94a-95a; see *id.* at 5a n.4. While it is clear that the jury did not unanimously agree that the government had proved those factors, that does not mean the jury was unanimous in finding that the factors had *not* been proved. Rather than make any findings in petitioner's favor, the jury might have hung on those factors, with some jurors believing they had been proved beyond a reasonable doubt and other jurors (specifically, "1 OR MORE") reaching the opposite conclusion. Because a hung count does not have preclusive effect, collateral estoppel does not apply. See *Yeager*, 557 U.S. at 122 ("To identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide.").

In cases in a similar posture to this one, lower courts have concluded that collateral estoppel does not apply to a jury's consideration of an aggravating factor in death-penalty proceedings when "the jury did not affirmatively find that the aggravating factor did not exist," but rather "was unable to unanimously find that the factor did exist." *People* v. *Hipkins*, 423 N.E.2d 208, 212 (Ill. App. Ct. 1981); see, *e.g.*, *Harris* v. *Gramley*, 986 F.2d 1424, 1993 WL 55025, at *2-*3 (7th Cir.) (Tbl.), cert. denied, 510 U.S. 838 (1993); *Padgett* v. *State*, 717 S.W.2d 55, 56-58 (Tex. Crim. App. 1986); see also *Delap* v. *Dugger*, 890 F.2d 285, 318 n.43 (11th Cir. 1989) (citing cases), cert. denied, 496 U.S. 929 (1990), abrogated on other grounds by *Floyd* v. *Secretary, Fla. Dep't of Corr.*, 638 Fed. Appx. 909 (11th Cir.) (per curiam), cert. denied, No. 15-9911 (Oct. 3, 2016). In that situation, there is not a "conclusive decision by the jury on th[e] factual issue sufficient to act as a bar by way of estoppel." *Hipkins*, 423 N.E.2d at 212. So too here, petitioner cannot carry his burden of establishing that the jury unanimously rejected the two non-statutory aggravating factors and so actually decided that issue in his favor.

More fundamentally, even if the jury had unanimously found that the government failed to prove the two non-statutory aggravating factors beyond a reasonable doubt, those findings would not be entitled to preclusive effect because they were not necessary to the judgment sentencing petitioner to death. "[L]ike the retardation mitigating factor in *Bies*," the jury's failure to unanimously find future dangerousness and obstruction of justice "cuts against [the judgment]—making [it] quintessentially the kind[] of ruling[] not eligible for issue-preclusion treatment." Pet. App. 18a

(brackets in original) (quoting *Bies*, 556 U.S. at 835). Because petitioner's death sentence "d[id] not depend" on the jury's failure to find those factors, "relitigation of that determination is not precluded." *Bies*, 556 U.S. at 834; see *United States* v. *Stitt*, 760 F. Supp. 2d 570, 584 (E.D. Va. 2010) (concluding that, at a second penalty-phase hearing, collateral estoppel did not preclude relitigation of non-statutory aggravating factors that the jury had found were not proved at first penalty-hearing because those factors were not essential to the first jury's "ultimate verdict of a death sentence").

c. Petitioner's arguments that collateral estoppel applies here are unavailing.

Petitioner is wrong to contend (Pet. 18-19) that the essential-to-the-judgment requirement for preclusion should not apply to findings on aggravating factors in capital cases because "[s]uch a specific determination does not have 'the characteristics of dicta.'" Pet. 19 (quoting Restatement (Second) of Judgment § 27 cmt. h). This Court's decision in *Bies* forecloses that argument. The lower courts in *Bies* embraced an argument similar to the one petitioner presses, reasoning that findings on the mitigating factor of mental retardation had been necessary for the state courts to fulfill their "'mandatory duty' to weigh the aggravating and mitigating circumstances." 556 U.S. 835 (citation omitted). Even though the "subsidiary finding" on that factor did not qualify as dicta, this Court concluded that the finding was not entitled to preclusive effect because it was "not outcome determinative." *Ibid.*

Petitioner emphasizes (Pet. 17) that *Bies* involved findings in "appellate opinions" rather than jury findings at the penalty phase, but that factual distinction

does not alter the applicable legal rule. The findings of the state courts in *Bies* were made pursuant to a state statute that required the courts to conduct an independent weighing of aggravating and mitigating factors, see *State* v. *Bies*, 658 N.E.2d 754, 761 (Ohio 1996), and this Court did not question that such findings could be entitled to preclusive effect if the requirements for collateral estoppel were satisfied, see *Bies*, 556 U.S. at 834-836. In short, "the collateral-estoppel principle articulated in *Bies* makes no distinction between judge- and jury-made determinations, nor any distinction based on the procedure for making the determination—it focuses on whether the determination was necessary to the prior judgment." Pet. App. 18a-19a.

Petitioner also errs (Pet. 19-20) in suggesting that the essential-to-the-judgment requirement should not apply here because the requirement avoids giving preclusive effect to determinations that cannot be appealed but double jeopardy principles already prevent the government from appealing adverse verdicts in criminal cases. Under that reasoning, the essential-to-the-judgment requirement would have little if any application in criminal cases, in contravention of this Court's decision in *Bies*. And petitioner ignores that, far from relaxing the requirements of collateral estoppel, the government's inability to "correct errors" in criminal cases "strongly militates *against* giving an acquittal preclusive effect." *Standefer* v. *United States*, 447 U.S. 10, 23 (1980) (emphasis added). The court of appeals' decision was therefore correct and does not warrant further review.

2. Contrary to petitioner's argument (Pet. 14-17), the decision below does not conflict with the Eleventh

Circuit's decision in *Delap*. The defendant there was convicted at trial of premeditated murder, but acquitted of felony murder, and the Eleventh Circuit held that the acquittal precluded the State from seeking to prove a felony-murder aggravating factor at the sentencing phase. 860 F.2d at 314-316. In holding that collateral estoppel applied, the court recognized that the felony-murder acquittal must have been "a critical and necessary part of the final judgment in the earlier litigation," but it found that requirement "easily satisfied" because the determination "was essential" to the judgment, which based the defendant's guilt "only on premeditated murder and not felony murder." *Id.* at 314-315. The court concluded that "where a defendant has been acquitted of felony murder because there was insufficient evidence that he committed the felony, and where double jeopardy principles bar any subsequent prosecution for that felony murder, the defendant cannot then be charged in a [state] death sentence proceeding with the aggravating circumstance that the killing occurred while the defendant was engaged in committing the same felony for which he was acquitted." *Id.* at 316.

Here, in contrast to *Delap*, petitioner was not acquitted of any offense and double jeopardy principles do not bar any subsequent prosecution. Moreover, *Delap* emphasized that the defendant's "acquittal of felony murder occurred during the *guilt/innocence* phase," and it expressly declined to decide "what collateral estoppel effect, if any, would result had the jury *at the sentencing phrase* of [the defendant's] first trial concluded that he had not committed murder during the course of a felony." 890 F.2d at 318 (second emphasis added). Here, the jury's

failure to unanimously find the future-dangerousness and obstruction-of-justice non-statutory aggravating factors occurred at the sentencing phase and was not essential to the judgment imposing a death sentence. *Delap* did not address that situation and accordingly does not conflict with the decision below.

3. The procedural posture of this case also counsels against this Court's review.

a. The court of appeals exercised mandamus jurisdiction over petitioner's appeal, but the stringent standard for issuance of a writ of mandamus under 28 U.S.C. 1651 was not satisfied. The "remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr* v. *United States Dist. Ct. for the N.D. of Cal.*, 426 U.S. 394, 402 (1976). "As a means of implementing the rule that the writ will issue only in extraordinary circumstances," this Court has "set forth various conditions for its issuance," including that "the party seeking issuance of the writ have no other adequate means to attain the relief he desires, * * * and that he satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable." *Id.* at 403 (citations and internal quotation marks omitted; brackets in original); see *Cheney* v. *United States Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 380-381 (2004) (observing that those conditions "must be satisfied" because "the writ is one of the most potent weapons in the judicial arsenal") (citation and internal quotation marks omitted).

The requirements for mandamus are not satisfied here. The court of appeals erred in believing that petitioner's collateral-estoppel claim would evade effective review in the absence of mandamus jurisdiction. Pet. App. 11a. If petitioner is resentenced to

death, he will have an opportunity to challenge the future-dangerousness and obstruction-of-justice non-statutory aggravating factors, as well as any other claims arising from his resentencing, by filing a single petition for a writ of certiorari following a final judgment. Moreover, petitioner had no clear and indisputable right to relief, as evidenced by the First Circuit's denial of his claim and this Court's denial of his application for a stay pending the disposition of his petition for a writ of certiorari. Indeed, the commencement of the second penalty-phase hearing nullifies two reasons cited by the court of appeals for exercising mandamus jurisdiction—that postponement of review potentially risks a third penalty-phase hearing and "frustrate[s] the appeal's central assertion[] that [petitioner] should not have to defend against these particular allegations [of future dangerousness and obstruction of justice] again." *Ibid.*[2]

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[2] The court of appeals also lacked statutory jurisdiction over petitioner's appeal—an issue it declined to decide in favor of exercising mandamus jurisdiction. The district court issued a certificate of appealability under 28 U.S.C. 2253, but that provision requires a "final order." 28 U.S.C. 2253. No "final order" exists when all the court did was to allow the government to proceed on certain non-statutory aggravating factors at a penalty-phase hearing. Nor does petitioner's claim qualify as an immediately appealable collateral order. Although this Court has permitted immediate appeal of double jeopardy claims that challenge "the very authority of the Government to hale [a defendant] into court to face trial on the charge against him," *Abney* v. *United States*, 431 U.S. 651, 659 (1977), petitioner does not (and could not) contest the government's ability to hale him into court or to seek the death penalty. Thus, even if the lower courts had granted petitioner's motion to strike the future-dangerousness and obstruction-of-justice factors, that would not have resulted in dismissal of the amended notice to seek the death penalty; it would have prevented

b. In addition, the interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition for a writ of certiorari. *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 a writ of certiorari). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258. This Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 282-283 (10th ed. 2013).

Notably, petitioner's second penalty-phase hearing began more than one month ago, after this Court denied his application to stay those proceedings pending disposition of his petition for a writ of certiorari. If petitioner is not sentenced to death at the conclusion of his resentencing proceeding, or if the second jury does not unanimously find the future-dangerousness and obstruction-of-justice non-statutory

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the government only from presenting evidence and argument on those factors. See *United States* v. *Wright*, 776 F.3d 134, 144 (3d Cir. 2015) (rejecting interlocutory review even though "the collateral-estoppel rights at issue are founded in the Double Jeopardy Clause" because the defendants "concede[d] that they face retrial on all counts of conviction regardless of [the court's] ruling" on whether collateral estoppel barred some potential theories of liability). Because the denial of petitioner's motion to strike the two factors "merely affect[s] the course of the [second penalty] trial," it "remain[s] subject to review and redress through the traditional appellate process" and does not give rise to an immediately appealable collateral order. *Ibid.*

aggravating factors, his current claim will become moot. And if the claim does not become moot, petitioner will be able to raise it, together with any other claims that may arise from the second penalty-phase hearing, in a single petition for a writ of certiorari following a final judgment. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). Each scenario weighs strongly against further review at this time.

4. This case need not be held pending the Court's decision in *Bravo-Fernandez* v. *United States*, No. 15-537 (argued Oct. 4, 2016). The question presented in *Bravo-Fernandez* is whether, under the collateral estoppel component of the Double Jeopardy Clause, the jury's acquittal of the defendants on some counts bars the government from retrying the defendants on another count on which the same jury convicted them, when those convictions were subsequently vacated for legal error and the jury's verdict in the first trial was inconsistent. This case does not involve inconsistent verdicts, but rather a jury's failure to unanimously find that two non-statutory aggravating factors had been proved beyond a reasonable doubt, even though the jury nevertheless found a death sentence warranted without consideration of those factors. Because *Bravo-Fernandez* does not involve the requirement for preclusion that an issue be essential to the judgment in the prior proceeding, the Court's resolution of the question presented there is unlikely to affect this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2016