No. 08-731

In the Supreme Court of the United States

SALVADOR MAGLUTA, 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.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is unreported. An earlier opinion of the court of appeals (Pet. App. 17a-51a) is reported at 418 F.3d 1166. Another earlier opinion of the court of appeals (Pet. App. 52a-54a) is unreported. The order of the district court (Pet. App. 55a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2008. A petition for rehearing was denied on August 5, 2008 (Pet. App. 60a-61a). On October 15, 2008, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including December 3, 2008, 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 (Count 1), in violation of 18 U.S.C. 371; conspiring to launder drug proceeds (Count 2), in violation of 18 U.S.C. 1956(h); obstructing justice through witness bribery (Count 6), in violation of 18 U.S.C. 1503; obstructing justice through juror bribery (Count 8), in violation of 18 U.S.C. 1503; and eight counts of money laundering (Counts 34-41), in violation of 18 U.S.C. 1956(a)(1)(B)(i). The district court sentenced him to 205 years of imprisonment, ordered him to forfeit $15 million and certain real property, and fined him $62,997,915. 03-10694 Gov't C.A. Br. 2. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded. Pet. App. 17a-51a. On remand, the district court sentenced petitioner to 195 years of imprisonment, reduced the fine by $250,000, and imposed the same forfeiture orders. 06-16473 Gov't C.A. Br. 4. The court of appeals affirmed. Pet. App. 1a-16a.

1. Petitioner and his longtime friend Augusto Guillermo Falcon were two of South Florida's most prolific and notorious drug traffickers. Beginning in the late 1970s, petitioner embarked on a lengthy cocaine trafficking career that resulted in the distribution of tens of thousands of kilograms of cocaine. See 03-10694 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 free on bond pending appeal and continued to distribute cocaine. In 1985, they were arrested on California state drug charges, but they absconded to south Florida. See 03-10694 Gov't C.A. Br. 3.

After exhausting their appeals for their 1980 Florida convictions, petitioner and Falcon were ordered to surrender in August 1987 to begin serving their sentences. Neither surrendered, warrants were issued, and petitioner was arrested in 1988. Several days after his arrest, however, petitioner was erroneously released from jail and again became a fugitive. He later told Marilyn Bonachea, his longtime girlfriend, that someone had returned a favor by releasing him from jail. As a fugitive, petitioner rented luxury homes on Miami Beach, which he paid for with drug proceeds, and he continued to distribute cocaine. See 03-10694 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 for legal fees. See 03-10694 Gov't C.A. Br. 4.

Petitioner was captured in October 1991. A search of his home uncovered more than $200,000 in cash and several day-timer books that memorialized the distribution of 9367 kilograms of cocaine, worth approximately $149,520,000. See 03-10694 Gov't C.A. Br. 4.

While petitioner was a fugitive, and later an incarcerated defendant awaiting trial in No. 91-6060, Mark Dachs, an attorney and co-conspirator, discovered the identities of certain persons who were cooperating with the government. Petitioner enlisted the aid of Eduardo Lezcano, his wife's brother-in-law, to coordinate hit men 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 hit men murdered him in 1988, shortly before he was to appear before a federal grand jury to produce documents related to petitioner's offshore interests. Hit men later murdered two of the six drug associates, and tried unsuccessfully to murder the other four. Petitioner told Bonachea that he had directed the three murders and one of the unsuccessful assassination attempts. See 03-10694 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. For their loyalty, the prisoners or their families received large cash payments from drug proceeds. See 03-10694 Gov't C.A. Br. 7.

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[1] The jury in this case acquitted petitioner of the witness tampering through murder offenses charged in Counts 3-5, but convicted him of the obstruction conspiracy charged 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, and 540 U.S. 928 (2003); see generally 03-10694 Gov't C.A. Br. 6 n.1.

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 Richard Martinez, a local attorney who was also petitioner's brother-in-law and co-defendant. Out of loyalty to petitioner and financial dependence on him, Bonachea falsely testified in No. 91-6060 by claiming that petitioner had stopped drug trafficking by 1980. See 03-10694 Gov't C.A. Br. 7-8.

Through associates, petitioner also 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 New York for deposit in overseas banks and subsequent transfer back 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-conspirator 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. See 03-10694 Gov't C.A. Br. 8-9.

After their co-defendants pleaded guilty, petitioner and Falcon proceeded to trial in No. 91-6060. At the

start of the trial, petitioner told Bonachea that his longtime associate Jose Fernandez had recognized a female acquaintance on the jury panel and had, for more than $1 million, 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. See 03-10694 Gov't C.A. Br. 9.[2]

The jury was sequestered during deliberations. 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 03-10694 Gov't C.A. Br. 10.

Following the verdict, a juror who favored conviction but yielded to petitioner's tactics reported his suspicions

[2] Moya was ultimately convicted of accepting a bribe, as well as conspiracy to commit that offense, obstruction of justice, money laundering 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 Judgment at 3, *United States* v. *Moya*, No. 1:98-CR-00626-001 (S.D. Fla. Mar. 10, 2000) (Docket entry No. 403), 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. Judgment at 1, *United States* v. *Alba*, No. 03-CR-20700-002 (S.D. Fla. Jan. 15, 2004) (Docket entry No. 101); Judgment at 1, *United States* v. *Penalver*, No. 03-CR-20700-004 (S.D. Fla. Jan. 15, 2004) (Docket entry No. 99). They were each sentenced to five years of imprisonment.

about Moya to the authorities. An investigation showed that Moya had extensive telephone contact with one of petitioner's associates during the trial. In the 27 months following the trial, Moya and his relatives, who were all 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 law enforcement attention. See 03-10694 Gov't C.A. Br. 10.

In 1996, after his acquittal in No. 91-6060, petitioner was indicted in the Southern District of Florida in another case 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 was returned. In April 1997, federal marshals arrested petitioner in Palm Beach. A search of petitioner's car yielded handwritten instructions to 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 03-10694 Gov't C.A. Br. 10-11.

Petitioner stored more than $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, a co-defendant and petitioner's long-time associate. 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 03-10694 Gov't C.A. Br. 11-12.

At petitioner's direction, Bonachea maintained a ledger documenting $7.7 million that she had laundered for him while he was incarcerated. Following his release from jail in 1996, petitioner pressured Bonachea to give the ledger to him. In October 1996, officers stopped Bonachea while she was in transit to deliver the ledger to petitioner. Officers seized the ledger and other documents related to petitioner, including letters directing associates to hide and launder money for him. Petitioner then persuaded Bonachea to flee in order to prevent the authorities from 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 03-10694 Gov't C.A. Br. 12-13.

Bonachea was arrested in April 1988. She agreed to cooperate, and, in September 1998, she met with co-defendant 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 03-10694 Gov't C.A. Br. 13.

2. The 24-count indictment in No. 91-6060 had charged that, between January 1978 and April 1991, petitioner had engaged in a CCE, in violation of 21 U.S.C. 848; conspired to import cocaine, in violation of 21 U.S.C. 963; and conspired to possess with intent to distribute cocaine, in violation of 21 U.S.C. 846. That indictment had also charged petitioner with seven counts

of importing cocaine, in violation of 21 U.S.C. 952, and 14 counts of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a), and had alleged that those offenses occurred between mid-1986 and July 1989. 03-10694 Gov't C.A. Br. 16 & n.5.

The indictment in this case charged petitioner with conspiracy and other offenses involving obstruction of justice at his trial in No. 91-6060 through tampering with witnesses, bribing witnesses and jurors, and committing murder. See Fifth Superseding Indictment 1-31. In addition, the indictment charged petitioner with conspiring to launder drug proceeds, in violation of 18 U.S.C. 1956(h); and 32 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). The money laundering counts alleged that petitioner engaged in financial transactions involving the proceeds of drug trafficking. The money laundering conspiracy charged in Count 2 covered the period from January 1979 to December 2001, and the substantive money laundering offenses were alleged to have occurred between September 1994 and December 1998. See Fifth Supeseding Indictment 25-26, 31-38.

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 current 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. The government also argued that proof of petitioner's personal involvement in drug trafficking was not an essential element of the money laundering charges. See 03-10694 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 that the jury in No. 91-6060 had necessarily determined that petitioner had completely ceased his drug trafficking after 1980. See 03-10694 Gov't C.A. Br. 17-18.

The district court adopted the magistrate judge's recommendation. See Pet. App. 55a-59a. The court noted that petitioner's defense in No. 91-6060 had "three principal thrusts": (1) the charges were not supported by sufficient credible evidence; (2) petitioner had ceased any drug activity after 1980; and (3) if the drug distribution and importation activity occurred before April 10, 1986, the charges were barred by the five-year statute of limitations. *Id.* at 56a. Based on the record, the court agreed with the magistrate judge that it was "not clear which defense provided the basis for the acquittal." *Id.* at 56a-57a. Petitioner appealed, but the court of appeals refused to consider his evidentiary estoppel claims on interlocutory appeal. *Id.* at 52a-54a.

After a trial, the jury found petitioner guilty of conspiring to obstruct justice, as well some of the money laundering and obstruction charges. With respect to the money laundering charges, the jury found petitioner guilty on the conspiracy count (Count 2) and on eight

substantive counts involving financial transactions that occurred in October and December 1998 (Counts 34-41). See Verdict Form 2-3; Fifth Supeseding Indictment 36-37. The jury acquitted petitioner on the other 25 substantive counts (Counts 11-33, 42-43). Verdict Form 1-3. The jury also returned a special verdict finding that $15 million and certain real property were subject to forfeiture. Special Jury Verdict on Forfeiture 1.

At sentencing, the district court found that petitioner's Sentencing Guidelines range was life imprisonment, based on a total offense level of 43 and a criminal history category of V. Presentencing Report para. 274 (PSR). In calculating the offense level for the money laundering offenses, the court applied an 11-level enhancement under Sentencing Guidelines § 2S1.1(b)(2)(L) (1998) after finding that the value of the laundered funds exceeded $35 million. PSR para. 182. The court based that valuation on the laundered funds involved in the money laundering counts on which petitioner was acquitted as well as those counts on which he was convicted. The court rejected petitioner's argument that the special forfeiture verdict limited the valuation of the laundered funds to $15 million, which would have reduced his total offense level to 41. See 03-10694 Gov't C.A. Br. 57-59.

The district court imposed consecutive sentences totaling 205 years of imprisonment, to be followed by a three-year term of supervised release. See 03-10694 Gov't C.A. Br. 2. The district stated that, if its Guidelines calculations were erroneous, it would nonetheless upwardly depart from the guideline range under Guidelines § 5K2.0 to impose the same sentence because of

"the anomaly created by the obstruction in case 91-6060." 03-10694 Gov't C.A. Br. 63. The court 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." Pet. App. 46a (internal quotation marks omitted).

3. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded. Pet. App. 17a-51a. The court affirmed petitioner's convictions on the money laundering counts. Without addressing the government's argument that petitioner's corruption of the jury in No. 91-6060 extinguished his collateral estoppel claim, see 03-10694 Gov't C.A. Br. 18-21, the court rejected petitioner's argument that collateral estoppel barred those convictions, see Pet. App. 19a-24a. The court acknowledged (*id.* at 20a-21a), 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. 21a-22a (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 sin-

gle 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." *Id.* at 22a (quoting *Brown*, 983 F.2d at 202).

The court of appeals assumed without deciding that petitioner was correct 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. 22a-23a. The court found, however, 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. *Id.* at 23a-24a. The court reasoned that petitioner's personal involvement in the criminal activity at issue in the earlier case was not an element of the money laundering offenses of which he was convicted in this case. *Ibid.* The government, the court said, had to prove that petitioner had, with the requisite knowledge and intent, 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. *Ibid.* 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 24a.[3]

[3] The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence supporting his money laundering convictions. See Pet. App. 24a-30a.

The court of appeals reversed petitioner's conviction on Count 8 for obstruction of justice through bribery in No. 91-6060. The court concluded that the conviction rested, at least in part, on inadmissible hearsay statements admitting the acceptance of the bribe made by the bribed jury foreman, Miguel Moya, to an undercover FBI agent two and one-half years after the trial in No. 91-6060. Pet. App. 30a-36a. The court found that the error was not harmless. *Id*. at 36a-38a.

As a result of the reversal of that conviction, the court of appeals remanded for resentencing. The court rejected, however, petitioner's claims that the district court had otherwise erred at sentencing. Pet. App. 44a-51a. The court of appeals found it unnecessary to consider the merits of petitioner's contention that the district court had erred in enhancing his sentence based on its own determination that the amount of the money he laundered was at least $35 million. *Id.* at 44a-48a. The court held that, even if the district court had erred in not using the $15 million figure reflected in 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 laundered funds. *Id*. at 47a-48a.

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. 46a. The court of appeals acknolwedged that it had overturned petitioner's conviction for obstructing justice by

bribing the earlier jury because that conviction had 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 * * * so long as there are sufficient indicia of reliability" and "[t]he tape-recorded statements of the juror to the undercover agent clearly have sufficient indicia of reliability." *Id.* at 47a n.8. The court of appeals also concluded that the district court had not abused its discretion in upwardly departing. See *id.* at 47a-48a.

The court of appeals 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. 51a. The court noted that, if the government did not retry petitioner on that charge, or if petitioner was acquitted after a retrial, the district court could, at its discretion, "either reimpose [petitioner's] sentence but with a reduction of 120 months as a result of there being no conviction [on the reversed count], or * * * resentence [petitioner] on all the other counts for which he remain[ed] convicted." *Ibid.*

Petitioner filed a petition for a writ of certiorari, which this Court denied. 548 U.S. 903 (2006) (No. 05-952).

4. On remand, the government decided not to retry petitioner on the reversed count. At resentencing, the district court observed that "none of the facts ha[d] changed," and again determined that petitioner's advisory Guidelines range was life imprisonment, based on

a total offense level of 43 and a criminal history category of V. 11/29/06 Tr. 57; see *id.* at 17. Consistent with *United States* v. *Booker*, 543 U.S. 220 (2005), the district court expressly considered the factors under 18 U.S.C. 3553(a) before imposing sentence, 11/29/06 Tr. 57-63, and it sentenced petitioner to a total term of 195 years of imprisonment, to be followed by a three-year term of supervised release. *Id.* at 62-64.

5. The court of appeals affirmed. Pet. App. 1a-16a. The court rejected petitioner's claim that the district court violated his Fifth and Sixth Amendment rights by enhancing his sentence based on acquitted, unproven, or uncharged conduct underlying the drug offenses charged in No. 91-6060, the obstruction of justice through jury bribery charged in the reversed Count 8, or its own determination that the value of the laundered funds exceeded $35 million. *Id.* at 2a n.1; see Pet. 31 n.13; 06-16473 Pet. C.A. Br. 55-58.[4]

ARGUMENT

1. Petitioner contends (Pet. 11-26) that the collateral estoppel doctrine of *Ashe* v. *Swenson*, 397 U.S. 436 (1970), mandates reversal of his money laundering convictions. That claim does not merit further review.

Under the collateral estoppel doctrine that is applied in criminal cases, a jury's acquittal of a defendant on one charge precludes the government from proceeding

[4] The court of appeals also rejected petitioner's claims that the district court incorrectly calculated the advisory Guidelines range, Pet. App. 5a-8a; that his 195-year sentence was procedurally and substantively unreasonable, *id.* at 8a-12a; and that the district court violated his Fifth Amendment privilege against self-incrimination, *id.* at 12a-16a.

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* v. *United States*, 493 U.S. 342, 347-348, 350-352 (1990). 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 *Dowling*, 493 U.S. at 348-349.

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," conducted a financial transaction "which in fact involve[d] the proceeds of specified unlawful activity," a term that includes drug trafficking. 18 U.S.C. 1956(a)(1). As petitioner acknowledges (Pet. 15), 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 contends (Pet. 14) that the "unlawful activity" whose proceeds were the subject of the money laundering counts in this case was, in fact, the same drug transactions that he claims the jury's 1996 acquittal establishes that he did not commit. Petitioner argues (Pet. 9-10, 13-17) that the court of appeals erred in basing its collateral estoppel analysis on what the government was theoretically 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.

a. 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. 25. Petitioner focuses on a few sentences in the court's opinion that in his view suggest the "hypothetical facts" position. Pet. 14 (citing Pet. App. 23a-24a). 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 stated that petitioner's collateral estoppel claim "fail[ed] because [petitioner's] personal involvement in, or guilt of, the criminal activity charged in the earlier case [was] not an element of the money laundering charge he was convicted of in this case." Pet. App. 23a. In other words, the court 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 a

mere evidentiary fact in the present case—*i.e.*, *who* was involved in the prior drug activity. Under that view, the court's ruling would not rest, as petitioner contends (Pet. 14, 19), on wholly theoretical speculation that petitioner could have laundered the proceeds of someone else's unlawful activity.

In addition, the court of appeals' decision in this case quoted and cited two of its prior decisions—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." Pet. App. 22a (internal quotation marks omitted; emphasis added) (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 Eleventh Circuit made 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 (emphases added); see *ibid*. ("The subsequent verdict of conviction must be rationally inconsis-

tent with the prior verdict of acquittal."). The court in *Brown* ultimately concluded that collateral estoppel did not apply after conducting a detailed analysis of the actual facts that the government proved to support the conviction in the second case, see *id.* at 204-205,[5] while the court in *Garcia* reached the contrary conclusion, see *Garcia*, 78 F.3d at 1521-1522.[6] Both cases, however, demonstrate that the law in the Eleventh Circuit is that a court applying the collateral estoppel doctrine must look beyond the abstract definitions of the elements to

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[5] 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").

[6] 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 motion under Federal Rule of Criminal Procedure 29 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 to promote the conspiracy, and then a few days later to have had no knowledge of that same conspiracy.").

be proved and consider the actual facts that, if found by the jury, would preclude a conviction.

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

b. In any event, this case would not be a suitable vehicle for considering petitioner's collateral estoppel claim because that claim also fails for two other, and independent, reasons.

First, petitioner's collateral estoppel claim rests on the premise that "the basis of his 1996 acquittal was that he had ceased all drug trafficking activities in May 1980," on the theory that this "was the only defense he put forward to the crimes alleged in his 1996 trial." Pet. App. 22a-23a. 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 petitioner could not have been found guilty if his "narcotics importation or distribution activities occurred solely before April 10, 1986." *Id*. at 56a. 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 57a.[7]

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[7] Petitioner himself argued in the 1996 prosecution that his considerable, unexplained wealth was the result of drug trafficking in the early

The district court determined that "it [was] not clear which defense provided the basis for the acquittal." Pet. App. 56a-57a. 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 57a.[8] That ruling was correct, and the court of appeals did not disagree with it, but simply "assume[d] without deciding" that petitioner's prior acquittal did establish that he had ceased drug trafficking after 1980. *Id.* at 23a.

Second, the 1996 verdict should not be given collateral estoppel effect in any event, because it was the result of a process that has been determined to have been corrupted. The collateral estoppel doctrine rests on a determination of what "a rational jury" found. *Ashe*, 397 U.S. at 444; see *United States* v. *Powell*, 469 U.S. 57, 68

1980's and that the jury need not concern itself with his financial transactions. 03-10694 Gov't C.A. Br. 24. Accordingly, the convictions for money laundering in this case are consistent with petitioner's own defense in the 1996 prosecution.

[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. 56a. Insofar as the jury acquitted petitioner of the substantive counts in the 1991 indictment, all of which involved post-1986 activity, based on that defense, the acquittal would establish 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—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.

(1984) (collateral estoppel rests on "the assumption that the jury acted rationally"). Here, petitioner was convicted of conspiring to obstruct justice and obstructing justice through juror bribery in the 1996 case, which including paying the jury foreperson at least $300,000. See Pet. App. 30a 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 the relevant portions of the presentence report. See PSR paras. 103-109; 1/16/03 Tr. 378;[9] see also Pet. App. 46a-47a & n.8 (noting district court properly relied on petitioner's bribery of prior jury to support upward departure). Moreover, the foreperson and two other jurors were 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 these circumstances, where there is clear evidence that the process by which the jury reached its verdict was tainted, the verdict in the 1996 case should not be given collateral estoppel effect. In *Aleman* v. *Honorable*

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[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 Tr. 378.

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. *Ibid.* 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 with even greater force here, given that the collateral estoppel doctrine "is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct," *Standefer* v. *United States*, 447 U.S. 10, 23 n.18 (1980), and no such confidence can attach to a verdict secured by bribery.

c. The question presented by petitioner also does not 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. 19-23) 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 date

from 1997 or earlier. Similarly, of the six decisions of state courts of last resort cited by petitioner (Pet. 23-26), all but one date from the period from 1978 to 1992. Petitioner has failed to show that the question he presents arises with any frequency, as revealed by the age of all but one of the cases he cites. Further review of petitioner's collateral estoppel claim is therefore unwarranted for that reason as well.[10]

2. Petitioner contends (Pet. 26-34) that the district court erred in relying in part on conduct for which he was acquitted in No. 91-6060 in imposing sentence in this case. Specifically, petitioner asserts that consideration of acquitted conduct at sentencing "violates (1) the Fifth and Sixth Amendments in general; (2) the Fifth and Sixth Amendments at least when the sentence would be substantively unreasonable but for the truth of the acquitted conduct; or (3) the requirement in *United States* v. *Booker*, 543 U.S. 220 (2005), that sentences be 'reasonable.'" Pet. 26. Those contentions do not warant further review.

a. The district court did not err in considering acquitted conduct in imposing sentence. In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent

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[10] Petitioner suggests (Pet. 24 & n.10) that this case should be held if the Court grants certiorari in *Ohio* v. *Wade*, No. 08-585. The Court denied certiorari in *Wade* on January 12, 2009. See 129 S. Ct. 921.

There is likewise no need to hold this petition for a writ of certiorari pending *Yeager* v. *United States*, cert. granted, No. 08-67 (Nov. 14, 2008) (to be argued Mar. 23, 2009), which involves the very different issue of whether a jury's verdict of acquittal on some counts may collaterally estop the government from retrying the defendant on other counts on which the jury was unable to reach a verdict at the same trial.

the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157.[11] The Court noted that, "under the pre-Guidelines sentencing regime, it was 'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,'" *id.* at 152 (citation omitted), and that "[t]he Guidelines did not alter this aspect of the sentencing court's discretion," *ibid.* Although *Watts* specifically addressed a challenge to consideration of acquitted conduct based on double jeopardy principles, its clear import is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See *id.* at 157. That principle pre-dated the Sentencing Guidelines, see *id.* at 152, and it fully applies to the advisory Guidelines regime put into place by *Booker*.

This Court's decisions in *Booker* and subsequent cases confirm that there is no constitutional infirmity in a judge basing the defendant's sentence, within the statutory maximum, on conduct that was not found by the jury. That is true whether the conduct was not charged at all or whether it formed the basis of charges on which the jury did not find the defendant guilty. As the Court explained in *Booker*:

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[11] Petitioner's alternate assertion (Pet. 28) that a sentencing court may not "consider[] alleged conduct the jury refused to find" unless such conduct is "proved * * * beyond a reasonable doubt" is thus squarely inconsistent with *Watts*, and petitioner does not cite any court of appeals decison adopting such a view.

> We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. * * * For 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.

543 U.S. at 233 (citations omitted). This Court reaffirmed in *Cunningham* v. *California*, 549 U.S. 270 (2007), that "there was no disagreement among the Justices" that judicial fact-finding under the Sentencing Guidelines "would not implicate the Sixth Amendment" if the Guidelines were advisory. *Id.* at 285. And, in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), the Court again confirmed that its "Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Id.* at 2465-2466; see *id.* at 2467 (noting *Booker*'s recognition that fact-finding by federal judges in application of the Guidelines would not implicate the constitutional issues confronted in that case if the Guidelines were not "binding") (quoting *Booker*, 543 U.S. at 233).

In discussing the type of information that the sentencing court could consider under an advisory Guidelines regime, *Booker* made no distinction between acquitted conduct and other relevant conduct. See, *e.g.*, 543 U.S. at 252 (emphasizing the need to consider all relevant conduct to achieve "the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways"). To the contrary, after emphasizing the judge's "broad discre-

tion in imposing a sentence within a statutory range," *id.* at 233, *Booker* cited *Watts* for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found *unproved* (beyond a reasonable doubt)," *id.* at 251. As the Court recognized in *Watts*, 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 the one of which the defendant was convicted." 519 U.S. at 155 (quoting *Witte* v. *United States*, 515 U.S. 389, 401 (1995)). The rationale of *Watts*—that an acquittal establishes only that certain facts were not proved beyond a reasonable doubt, while facts may be considered at sentencing without satisfying that standard of proof—remains fully valid after *Booker*.

Consistent with those principles, the district court was allowed to find, in calculating petitioner's offense level under Guidelines § 2S1.1(b)(2)(L) (1998), that the value of the laundered funds exceeded $35 million. PSR para. 182. The district court was also allowed to consider, in applying the factors in 18 U.S.C. 3553(a), petitioner's long history of involvement in drug trafficking and his role in bribing jurors in No. 91-6060. 11/29/06 Tr. 60 (finding bribery of jury was "the most egregious evidence of obstruction of justice" in court's experience); *id.* at 61 (noting petitioner's drug-trafficking history "goes back to the '70s").[12]

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[12] Petitioner lumps together the "unproven facts" in his challenge to his sentence. See Pet. 31 n.13. As discussed above, however, the only "unproven fact[]" relied upon by the district court in the calculation of the Guidelines range was the valuation of the laundered funds. The dis-

Petitioner's alternate contention (Pet. 34) that his sentence violates the remedial portion of *Booker* that requires a sentence to be "reasonable" under the standard set forth in 18 U.S.C. 3553(a) is likewise without merit. Contrary to petitioner's contention (Pet. 34) that Congress's use of the word "offense" at various points in Section 3553(a) restricts the district court's consideration to "the offense *of conviction*," the Court's remedial opinion in *Booker* makes clear that sentencing courts may continue, consistent with prior practice, to look to a defendant's "real conduct" when imposing sentence. 543 U.S. at 223 (discussing 18 U.S.C. 3661, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" of a defendant that a sentencing court "may receive and consider for the purpose of imposing an appropriate sentence").

b. Further review of petitioner's acquitted conduct claim would be particularly unwarranted because, as petitioner acknowledges (Pet. 31-32), there is no conflict among the courts of appeals on this issue.[13] Since *Booker*, every court of appeals with criminal jurisdiction has held that a district court may consider acquitted conduct at sentencing.[14] This Court recently denied a

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trict court considered the other two "unproven facts" only as reasons not to vary below the Guidelines range of life imprisonment.

[13] Petitioner's reliance (Pet. 26-30) on various district court decisions and separate concurring and dissenting opinions in the courts of appeals does not warrant further review.

[14] See *United States* v. *White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc); *United States* v. *Jimenez*, 513 F.3d 62, 88 (3d Cir.), cert. denied, 128 S. Ct. 2460 (2008); *United States* v. *Ashworth*, 247 Fed. Appx. 409,

petition for a writ of certiorari raising that issue, see *Toepfer* v. *United States*, 129 S. Ct. 1000 (2009) (No. 08-469), just as it has repeatedly denied other similar petitions for writs of certiorari,[15] including those denied after the Court's decisions in *Rita*, *supra*, and *Gall* v. *United States*, 128 S. Ct. 586 (2007).[16] The Court has likewise denied numerous petitions for writs of certiorari that raised claims similar to petitioner's alternate claim (see Pet. 33-34) that his Sixth Amendment rights were violated because his sentence would be unreasonable

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409-411 (4th Cir. 2007), cert. denied, 128 S. Ct. 1738 (2008); *United States* v. *Hurn*, 496 F.3d 784, 788 (7th Cir. 2007), cert. denied, 128 S. Ct. 1737 (2008); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 128 S. Ct. 1736 (2008); *United States* v. *Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States* v. *Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006), cert. denied, 127 S. Ct. 1502 (2007); *United States* v. *Dorcely*, 454 F.3d 366, 371 (D.C. Cir.), cert. denied, 127 S. Ct. 691 (2006); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).

[15] See, *e.g.*, *Edwards* v. *United States*, 127 S. Ct. 1815 (2007) (No. 06-8430); *Dorcely* v. *United States*, 127 S. Ct. 691 (2006) (No. 06-547); *Armstrong* v. *United States*, 549 U.S. 819 (2006) (No. 05-1548); *Lynch* v. *United States*, 549 U.S. 836 (2006) (No. 05-10945).

[16] See, *e.g.*, *Morris* v. *United States*, 128 S. Ct. 2502 (2008) (No. 07-1094); *Douglas* v. *United States*, 128 S. Ct. 1875 (2008) (No. 07-8765); *Hurn* v. *United States*, 128 S. Ct. 1737 (2008) (No. 07-605); *Mercado* v. *United States*, 128 S. Ct. 1736 (2008) (No. 07-5810); *Smith* v. *United States*, 128 S. Ct. 1737 (2008) (No. 07-7432); *Wemmering* v. *United States*, 128 S. Ct. 1737 (2008) (No. 07-7739); *Ashworth* v. *United States*, 128 S. Ct. 1738 (2008) (No. 07-8076); *Freeman* v. *United States*, 128 S. Ct. 1750 (2008) (No. 07-9368).

absent the district court's reliance on the acquitted, unproven and uncharged conduct.[17] There is no reason for a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[17] See, *e.g.*, *Marlowe* v. *United States*, 129 S. Ct. 450 (2008) (No. 07-1390); *Bradford* v. *United States*, 128 S. Ct. 1446 (2008) (No. 07-7829); *Alexander* v. *United States*, 128 S. Ct. 1218 (2008) (No. 07-6606).

In addition, petitioner did not raise an "as-applied" Sixth Amendment claim until his reply brief in the court of appeals in his current appeal. See 06-16473 Pet. C.A. Br. 47-58; 06-16473 Pet. C.A. Rep. Br. 23-24. The Eleventh Circuit has a well-settled rule that a defendant may not raise an issue for the first time in a reply brief, see, *e.g.*, *United States* v. *Britt*, 437 F.3d 1103, 1104 (2006), and, consistent with that practice, the court of appeals did not address petitioner's as-applied Sixth Amendment claim. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon 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).