No. 15-1539

In the Supreme Court of the United States

BRIAN P. KALEY, 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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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner's acquittal on one count of money laundering conspiracy did not preclude his retrial on hung counts of interstate transportation of stolen property and conspiracy to transport stolen property interstate under the issue-preclusion component of the Double Jeopardy Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is not published in the Federal Reporter but is reprinted in 643 Fed. Appx. 930. A prior opinion of this Court is reported at 134 S. Ct. 1090. Prior opinions of the court of appeals are reported at 677 F.3d 1316 and 579 F.3d 1246.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2016. A petition for rehearing was denied on April 21, 2016 (Pet. App. 8-9). The petition for a writ of certiorari was filed on June 23, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a ten-day jury trial in the United States District Court for the Southern District of Florida,

petitioner was acquitted of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h), and obstruction of justice, in violation of 18 U.S.C. 1512(b)(3). See Pet. App. 2. The jury failed to reach a verdict on one count of conspiracy to transport stolen goods in interstate commerce, in violation of 18 U.S.C. 371, and five counts of transportation of stolen goods in interstate commerce, in violation of 18 U.S.C. 2314 (2006). See *ibid.* Petitioner subsequently moved to dismiss the six counts on which the jury had hung based on the Double Jeopardy Clause of the Fifth Amendment. *Ibid.* He argued that the jury's acquittal on the money laundering conspiracy count necessarily decided an element of the remaining counts in his favor. *Id.* at 2-3. The district court denied the motion to dismiss, and the court of appeals affirmed. *Id.* at 1-7.

1. From 1989 to 2005, petitioner's spouse and co-defendant, Kerri Kaley, was employed by Ethicon Endosurgery, Inc. (Ethicon), a subsidiary of Johnson & Johnson. Indictment 2. She initially worked as a sales representative engaged in the promotion and marketing of Ethicon's products to medical facilities in the New York area, and she was eventually promoted to supervise sales representatives as a Division Manager. *Ibid.* During that time, petitioner was the founder and sole shareholder of BKB Construction Corporation (BKB) and Window Pro, Inc. (Window Pro), each of which listed his home address as its principal place of business. *Ibid.*; see Gov't C.A. Br. 7.

2. a. In April 2007, a federal grand jury in the Southern District of Florida returned a superseding indictment charging petitioner and Kerri Kaley with a multi-million dollar scheme to steal prescription medical devices and resell them on the black market.

Gov't C.A. Br. 1, 6-7. The indictment alleged that petitioner and Kerri Kaley obtained valuable medical devices from Johnson & Johnson sales representatives, who stole them from the shelves of local hospitals. *Id.* at 7. Petitioner and Kerri Kaley stored the devices at their home, packed them, and shipped them to a co-conspirator in Florida in return for payment that typically took the form of checks payable to BKB and Window Pro. *Ibid.* Petitioner and Kerri Kaley then paid the sales representatives who had unlawfully procured the devices using funds from the BKB and Window Pro accounts. *Ibid.*

The indictment charged petitioner and Kerri Kaley with one count of conspiracy to transport stolen prescription medical devices in interstate commerce, in violation of 18 U.S.C. 371; five counts of transportation of stolen goods in interstate commerce, in violation of 18 U.S.C. 2314 (2006); one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and (h); and one count of obstructing justice, in violation of 18 U.S.C. 1512(b)(3).[1]

b. In November 2014, petitioner's and Kerri Kaley's trial began. Gov't C.A. Br. 4. As relevant here, petitioner defended against the money laundering con-

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[1] The indictment also notified petitioner and Kerri Kaley of the government's intent, in the event of conviction, to seek criminal forfeiture of property constituting proceeds of or involved in the charged offenses. Indictment 10. To secure any future forfeiture judgment, the government obtained an order restraining petitioner's and Kerri Kaley's assets pursuant to 21 U.S.C. 853(e). See *Kaley* v. *United States,* 134 S. Ct. 1090, 1095-1096 (2014). Petitioner and Kerri Kaley challenged that pre-trial restraint, and this Court ultimately held that they were not entitled to contest the grand jury's determination of probable cause to believe they committed the crimes at a hearing on the asset freeze. *Id.* at 1096.

spiracy charge by contending that he did not know the devices were stolen and that the funds were not meant to be concealed. See Pet. App. 4-6; see also Gov't C.A. Br. 9-35 (providing summary of evidence at trial concerning the elements of concealment and knowledge).

At the close of the government's case-in-chief, petitioner moved for a judgment of acquittal on all counts based on insufficient evidence. See D. Ct. Doc. 360 (Nov. 6, 2014). With respect to the interstate transportation of stolen property counts, petitioner contended, among other things, that the government had presented insufficient evidence that he "knew any of the goods were stolen." *Id.* at 9. Petitioner reiterated that argument with respect to the money laundering conspiracy count, *id.* at 11, and further contended that the government had failed to introduce sufficient evidence of concealment because "[a]ll the transactions were open, transparent and documented in detail." *Id.* at 10. The district court denied the motion for a judgment of acquittal. See 11/6/14 Tr. 139, 143.

At the conclusion of the trial, the jury acquitted petitioner of conspiracy to commit money laundering and obstruction of justice. Pet. App. 2. The jury was unable to reach a verdict on the counts charging petitioner with conspiracy to transport stolen goods in interstate commerce and transportation of stolen goods in interstate commerce. *Ibid.*[2]

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[2] The jury convicted Kerri Kaley of obstruction of justice, but could not reach a verdict on the remaining charges against her. See Gov't C.A. Br. 4. In September 2016, she was retried and convicted on all remaining counts. See D. Ct. Doc. 589 (Sept. 8, 2016), appeal pending (11th Cir. filed Dec. 6, 2016). Another defendant who was charged with the same offenses but was not involved in the pre-trial asset forfeiture litigation went to trial in November

3. Following the jury's verdict, petitioner moved for a judgment of acquittal on the counts on which the jury had hung based on insufficient evidence. D. Ct. Doc. 387 (Nov. 25, 2014). The district court denied the motion, concluding that "the evidence presented at trial relating to the subject counts was sufficient for a jury to reasonably find * * * [petitioner] guilty beyond a reasonable doubt." D. Ct. Doc. 402, at 1 (Dec. 8, 2014).

Petitioner subsequently moved to dismiss the counts on which the jury had hung, asserting that a retrial would violate his double jeopardy rights. Pet. App. 2. Petitioner contended that his acquittal on the money laundering conspiracy count necessarily rested on the jury's determination that he did not know the prescription medical devices were stolen. *Id.* at 3. Because the government would be required to prove petitioner's knowledge that the devices were stolen to obtain convictions for conspiracy to transport stolen goods in interstate commerce and transportation of stolen goods in interstate commerce, petitioner contended that the issue-preclusion component of the Double Jeopardy Clause barred a retrial. *Ibid.*

The government opposed petitioner's motion, arguing that the jury's acquittal on the money laundering conspiracy count could have been based on other elements and did not necessarily rest on a finding that petitioner did not know the devices were stolen. See D. Ct. Doc. 472, at 2-11 (Apr. 15, 2015). The government observed, for example, that the jury could have determined that petitioner "was not a knowing partner in any plot or plan to conceal * * * when the

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2007 and was acquitted. See *Kaley*, 134 S. Ct. at 1095 n.5; see also Gov't C.A. Br. 3 n.3.

funds were routed through his company accounts by his spouse." *Id.* at 7; see 6/3/15 Tr. 85 (government counsel emphasizing at motion hearing that the jury could "very plausibly" have acquitted petitioner on the money laundering conspiracy charge by finding that "there was no concealment" of the transactions).

The district court denied petitioner's motion to dismiss, rejecting petitioner's double jeopardy claim. 6/3/15 Tr. 86. The court concluded that it could not "determine with any precision the basis for the jury's verdict as to" the money laundering conspiracy charge. *Ibid.* "[A]bsent the ability to make that determination," the court could not "find that there was a common element [of] fact in [the hung counts] that had to have necessarily been decided" by the acquittal. *Ibid.* The court therefore held that issue preclusion did not apply. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-7. The court rejected petitioner's argument that the jury had necessarily decided that he did not know that the prescription medical devices were stolen when it acquitted him of money laundering conspiracy because that acquittal could have rested "on a number of [other] grounds." *Id.* at 5. As the court observed, "the parties hotly contested the scienter element of the money laundering charge requiring that [petitioner] knowingly concealed the proceeds of the unlawful device sales." *Ibid.* "If the jury decided that the funds were not meant to be concealed," the court reasoned, "it would have to acquit [petitioner] without needing to make any finding regarding knowledge of the stolen nature of the devices." *Ibid.* The court highlighted evidence that "indicated that [petitioner and Kerri Kaley] made no attempt to conceal the flow of pro-

ceeds," including that "the Florida reseller who purchased the devices from the Kaleys provided them invoices bearing Kerri's name with each payment; the Kaleys spoke with their accountant about the fact that the only funds going into their 'construction' businesses were from the sale of medical devices; the Kaleys used their home address for their construction businesses and named themselves as officers of those businesses; and the Kaleys paid the sale representatives involved and some personal bills by check from the funds of those businesses." *Id.* at 5-6.

The court of appeals rejected petitioner's argument that the jury necessarily decided that petitioner lacked knowledge of the stolen nature of the devices based on his allegation that the evidence on that element was constitutionally insufficient. Pet. App. 6 n.1. The court observed that the jury would have to acquit if it found any one element insufficient, and it was unable to determine "on which element the jury rested." *Id.* at 7 n.1. Because "the jury could have decided the money laundering charge on facts that do not implicate any overlapping elements of the transportation of stolen goods charges," the court concluded that petitioner could not carry his burden to show that issue preclusion barred a retrial on the hung counts. *Id.* at 6.[3]

ARGUMENT

Petitioner renews his claim (Pet. 16-25) that his acquittal of money laundering conspiracy precludes re-

[3] Following the court of appeals' decision, the district court granted petitioner's motion to stay his retrial pending this Court's disposition of his petition for a writ of certiorari. 07-cr-80021 Docket entry No. 553 (July 28, 2016).

trial on the hung counts of interstate transportation of stolen property and conspiracy to transport stolen property interstate under the issue-preclusion component of the Double Jeopardy Clause. Petitioner further asserts (Pet. 26-36) that the lower courts are divided on what burden of proof governs the preclusion inquiry. Those claims lack merit. The court of appeals correctly concluded that petitioner had failed to carry his burden of showing that the jury's acquittal necessarily decided an element in his favor that overlaps with the hung counts, and no conflict exists on the question presented. Petitioner's factbound arguments do not warrant this Court's interlocutory review.

1. Petitioner is incorrect to contend (Pet. 4) that issue-preclusion principles bar his retrial on the counts on which the jury hung at his first trial.

a. In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court held that the Double Jeopardy Clause "embodie[s]" the doctrine of issue preclusion, which bars a prosecution that would require the relitigation of ultimate factual issues that were resolved against the government in an earlier prosecution. *Id.* at 445. A jury's acquittal of a defendant on one charge precludes the government from proceeding against him on a second charge, however, only if the jury necessarily found a fact in the defendant's favor that is an essential element of the second charge. See *id.* at 443-445. To determine what a jury has necessarily decided, "courts should 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant

seeks to foreclose from consideration.'" *Yeager* v. *United States*, 557 U.S. 110, 119 (2009) (quoting *Ashe*, 397 U.S. at 444).

To establish that the issue-preclusion component of the Double Jeopardy Clause applies, this Court has "made clear that '[t]he burden is on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided' by a prior jury's verdict of acquittal." *Bravo-Fernandez* v. *United States*, 137 S. Ct. 352, 359 (2016) (brackets in original) (quoting *Schiro* v. *Farley*, 510 U.S. 222, 233 (1994)); see *Schiro*, 510 U.S. at 232, 236 (rejecting defendant's reliance on issue preclusion because he had "not met his burden of establishing the factual predicate for the application of the doctrine" by showing that the issue of intent to kill "was actually and necessarily decided in [his] favor"). If multiple "possible explanations for the jury's acquittal verdict at [the] first trial" exist, a defendant cannot satisfy that burden because he cannot show that any particular issue "was determined in [his] favor." *Dowling* v. *United States*, 493 U.S. 342, 352 (1990); see *Schiro*, 510 U.S. at 233 (observing that the existence of multiple possible bases for the jury's verdict prevents a defendant from being able to establish that issue preclusion applies); cf. *Bravo-Fernandez*, 137 S. Ct. at 366 (observing that issue preclusion cannot apply when the jury's verdict "shroud[s] in mystery what the jury necessarily decided").

As Members of this Court have recognized, a defendant's burden to show that a jury's acquittal necessarily resolved facts in his favor "is a demanding standard." *Yeager*, 557 U.S. at 133 (Alito, J., dissenting on other grounds). "The second trial is not precluded simply because it is unlikely—or even very

unlikely—that the original jury acquitted without finding the fact in question"; instead, "[o]nly if it would have been *irrational* for the jury to acquit without finding that fact is the subsequent trial barred." *Id.* at 133-134; see *id.* at 127 (Kennedy, J., concurring in part and concurring in the judgment) (observing that a "judgment[] of acquittal preclude[s] the Government from retrying [the defendant] * * * if, and only if, it would have been *irrational* for the jury to acquit without finding that fact") (citation and internal quotation marks omitted).

Under a straightforward application of this Court's decisions, petitioner cannot satisfy his burden of establishing that the jury at his first trial necessarily decided that he did not know that the prescription medical devices were stolen when it acquitted him of money laundering conspiracy. To obtain a conviction on that charge, the government was required to prove, *inter alia*, that petitioner "conspired to conduct 'a financial transaction which in fact involves the proceeds of specified unlawful activity,' 'knowing that the transaction [wa]s designed in whole or in part[] to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.'" Pet. App. 5 (quoting 18 U.S.C. 1956(a)) (second set of brackets in original). Because petitioner "hotly contested" multiple elements of that offense, the court of appeals correctly found that the jury "could have acquitted [him] of the money laundering count on a number of grounds that would not require a determination of whether [he] knew the devices were stolen." *Ibid.*

For example, the court of appeals cited evidence from which the jury could have concluded that peti-

tioner did not know that the proceeds from sale of the devices were meant to be concealed. See Pet. App. 5-6 (summarizing evidence on that issue). If the jury credited that evidence, it could have "acquit[ted] [petitioner] without needing to make any finding regarding [his] knowledge of the stolen nature of the devices." *Id.* at 5. Observing that "it is far from clear what facts the jury decided when it acquitted" petitioner, the court declined to "engage in guesswork to determine on which grounds the jury ultimately decided the issues in [petitioner's] trial." *Id.* at 6-7 (citation omitted). "Because [petitioner] [wa]s unable to carry his burden of showing that the jury necessarily concluded he did not know the devices were stolen," the court correctly held that the issue-preclusion component of the Double Jeopardy Clause does not bar his retrial on the hung counts. *Id.* at 7.

b. Petitioner's argument to the contrary lacks merit. Petitioner asserts (Pet. 4) that the government failed to introduce sufficient evidence of his knowledge that the prescription medical devices were stolen at his first trial. Based on that factual contention, he contends (Pet. 21-25) that the jury should be deemed to have decided the knowledge issue in his favor for purposes of applying issue preclusion. Petitioner acknowledges (Pet. 23) that "[i]t may well be * * * that the jury made a finding of fact in [his] favor on another element of the offense," which alone would suffice to require the jury to acquit, but he asserts that "if the evidence of the essential element that the defendant seeks to foreclose was insufficient as a matter of due process, a reviewing court must still conclude that the jury 'necessarily decided' that element in the acquitted defendant's favor."

This case provides no opportunity to consider petitioner's legal argument because he is wrong to assert that the evidence of his knowledge that the devices were stolen was constitutionally insufficient. Petitioner fails to acknowledge that the district court twice denied his motion for a judgment of acquittal based on insufficient evidence. See 11/6/14 Tr. 139, 143 (denying motion at the close of the government's case); see also D. Ct. Doc. 402, at 1 (denying post-trial motion). At trial, "[m]ultiple witnesses testified explicitly that the devices were stolen, that neither the sales representatives nor the Kaleys were authorized to take these items for resale, and that the quantity of devices possessed and shipped by the Kaleys was consistent only with an organized theft scheme." Gov't C.A. Br. 51 (citing trial transcripts). "Witnesses also testified that [petitioner] helped pack the boxes of devices for shipment to Florida, knew about the storage of large quantities of devices in the family garage, received checks, and spoke with Kerri and other conspirators about the scheme." *Id.* at 51-52. The district court accordingly correctly concluded that "the evidence presented at trial * * * was sufficient for a jury to reasonably find * * * [petitioner] guilty beyond a reasonable doubt." D. Ct. Doc. 402, at 1. Petitioner provides no basis to disturb that ruling, and his factbound challenge to it does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (observing that this Court does "not grant * * * certiorari to review evidence and discuss specific facts").

In any event, petitioner's argument cannot be squared with the issue-preclusion inquiry this Court adopted in *Ashe*—which perhaps explains why peti-

tioner cites no decision from any court adopting his proposed rule. In determining whether a jury's acquittal necessarily decided an issue in the defendant's favor, this Court does not consider whether it would have been irrational for the jury to decide that issue *against* the defendant; instead a court must examine "whether a rational jury could have grounded its verdict upon an issue *other than* that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444 (citation omitted; emphasis added). Petitioner does not challenge the court of appeals' conclusion that it would have been rational for the jury at his first trial to acquit him of money laundering conspiracy based on a finding that the government failed to prove the element of concealment. Pet. App. 5-6. Because a rational jury could have acquitted on that basis, with no need to further consider whether petitioner knew the devices were stolen, see *id.* at 6 n.1, the court correctly concluded that petitioner could not meet his burden of establishing that issue preclusion applies.

Contrary to petitioner's suggestion (Pet. 23-24), the court of appeals' decision does not conflict with *Griffin* v. *United States*, 502 U.S. 46 (1991). *Griffin* held that a general verdict that may rest on one of two bases need not "be set aside if the evidence is inadequate to support conviction as to one of the" two grounds. *Id.* at 47. In reaching that conclusion, the Court observed that jurors are unlikely to "convict[] on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient." *Id.* at 59-60 (citation omitted). In *Griffin*, it would have been irrational for the jury to convict on the ground that was not

supported by sufficient evidence. In this case, in contrast, the jury could have rationally acquitted petitioner of money laundering conspiracy based on a finding of no concealment. That "possible explanation[] for the jury's acquittal verdict" prevents petitioner from carrying his burden to show that the jury instead necessarily decided the knowledge issue in his favor. *Dowling*, 493 U.S. at 352.

2. Petitioner contends (Pet. 26-36) that lower courts disagree on what standard a defendant must satisfy to establish that a jury necessarily decided an issue in his favor for purposes of invoking issue preclusion. But the circuit split he alleges is illusory. Petitioner identifies no court that would find a retrial precluded on the facts of his case. And, in any event, petitioner conceded below that issue preclusion does not apply where, as here, a defendant contests multiple factual issues at trial and the government presents constitutionally sufficient evidence on each of those elements.

a. Petitioner observes (Pet. 27) that the court of appeals found that he "did not meet his burden of showing by convincing and competent evidence that the jury necessarily determined that [he] did not know the devices were stolen." Pet. App. 4. He contends (Pet. 27-36) that lower courts have articulated varying standards for determining whether a defendant has shown that a jury necessarily decided an issue in his favor. Although petitioner characterizes "the positions taken by many of the circuits" as "murky," he recognizes that most courts to have considered the issue have interpreted *Ashe* to impose a stringent burden on a defendant that is difficult to satisfy if the defendant contested multiple elements at trial. Pet. 36; see Pet. 29-32. Petitioner contends (Pet. 32) that those

decisions "stand[] in sharp contrast" to the First Circuit's decision in *Hoult* v. *Hoult*, 157 F.3d 29, 32 (1998), cert. denied, 527 U.S. 1022 (1999), which he interprets as imposing a less demanding standard on defendants seeking to invoke issue preclusion.

Contrary to petitioner's assertion, no conflict exists among the courts of appeals that would warrant this Court's review. All courts recognize that this Court's decision in *Ashe* requires courts to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444; see, *e.g.*, Pet. App. 4; *United States* v. *Sarabia*, 661 F.3d 225, 229 (5th Cir. 2011); *United States* v. *Coughlin*, 610 F.3d 89, 96 (D.C. Cir. 2010); *United States* v. *Rigas*, 605 F.3d 194, 218 (3d Cir. 2010); *United States* v. *Howe*, 590 F.3d 552, 556 (8th Cir. 2009); *United States* v. *Hall*, 551 F.3d 257, 269 (4th Cir. 2009); *United States* v. *Marino*, 200 F.3d 6, 10 (1st Cir. 1999), cert. denied, 529 U.S. 1137 (2000); *United States* v. *Romeo*, 114 F.3d 141, 143 (9th Cir. 1997); *United States* v. *McGowan*, 58 F.3d 8, 12 (2d Cir. 1995); *United States* v. *Uselton*, 927 F.2d 905, 907 (6th Cir. 1991); *Buck* v. *Maschner*, 878 F.2d 344, 345 (10th Cir. 1989); *United States* v. *Patterson*, 827 F.2d 184, 197 (7th Cir. 1987). Petitioner suggests (Pet. 27-28) that the court of appeals adopted a different standard by stating that petitioner bore the burden to prove "by convincing and competent evidence" that the jury necessarily decided the knowledge issue in his favor. Pet. App. 4 (citation omitted). In context, however, the court's formulation reflects only that petitioner faced a burden that could not be satisfied by showing that "the jury *possibly* found that [he] did not know the de-

vices were stolen." *Id.* at 6 (emphasis added). That is consistent with this Court's precedent that if multiple "possible explanations for the jury's acquittal" exist, a defendant cannot "satisfy his burden" to establish that a jury necessarily decided one particular issue in his favor. *Dowling*, 493 U.S. at 352.

Petitioner is incorrect to contend (Pet. 32-34) that the First Circuit's decision in *Hoult* conflicts with the decisions from other courts of appeals. In *Hoult*, the First Circuit applied *Ashe*'s holding in a civil context to determine whether a verdict in favor of the defendant in a prior civil suit against her father alleging that he had sexually abused and raped her precluded the father's subsequent civil suit against the defendant for defamation based on her allegations of rape. 157 F.3d at 31. *Hoult* reiterated the standard from *Ashe* that a court must "decide 'whether a rational jury could have grounded its verdict upon an issue other than that which the [moving party] seeks to foreclose from consideration.'" *Id.* at 32 (citation omitted; brackets in original). The court concluded that issue preclusion applied because the first suit was "ultimately a credibility contest between the two opposing parties" that had been resolved in the daughter's favor. *Id.* at 33. Petitioner errs (Pet. 32) in asserting that the First Circuit in *Hoult* "applied collateral estoppel even when the verdict may have been based on an issue other than the one the litigant seeks to foreclose." *Hoult* instead concluded that alternative explanations for the first jury's verdict were "wholly unrealistic," such that the "*only* plausible explanation is that the jury accepted [the daughter's] testimony as to the rapes." 157 F.3d at 33 (emphasis added). That stand-

ard aligns with the approach of all other courts of appeals.

b. In any event, this case does not provide an appropriate vehicle to consider petitioner's argument (Pet. 37) that issue preclusion should not be "categorically unavailable to a defendant who contested more than a single element at trial." In the court of appeals, petitioner conceded that issue preclusion does not apply "[w]here there is constitutionally sufficient evidence as to more than one factual issue * * * because the court cannot surmise the basis for a verdict that turns on weighing evidence, making credibility determinations and reaching unanimity on one or more of those issues in play." Pet. C.A. Reply. Br. 9 n.4. Because the district court correctly rejected petitioner's sufficiency-of-the-evidence challenge, see p. 12, *supra*, and because petitioner does not (and cannot) dispute that a rational jury could have acquitted him of money laundering conspiracy based on an element that does not overlap with the counts on which he seeks to avoid retrial, petitioner is not entitled to issue preclusion under the standard he conceded was appropriate below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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