ORAL ARGUMENT NOT YET SCHEDULED

No. 11-3113

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES E. COUGHLIN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF APPELLANT

Laura G. Ferguson
Counsel of Record
Timothy P. O'Toole
NACDL Amicus Committee
MILLER & CHEVALIER CHARTERED
655 Fifteenth Street, NW
Suite 900
Washington, D.C. 20005
(202) 626-5800

Counsel for National Association of Criminal Defense Lawyers

December 14, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellant:

Amicus Curiae:

National Association of Criminal Defense Lawyers
1660 L Street, N.W.
12th Floor
Washington, DC 20036

Counsel for *Amicus Curiae*:

Laura G. Ferguson
Timothy P. O'Toole
Miller & Chevalier Chartered
655 15th Street, N.W.
Suite 900
Washington, DC 20005

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for the National Association of Criminal Defense Lawyers ("NACDL") states that NACDL is a non-partisan professional bar association that seeks to advance the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL is a non-profit corporation, NACDL has no parent corporations, and no publicly held company has a 10% or greater ownership interest in the NACDL.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

*Authorities upon which we chiefly rely are marked with an asterisk.

Interest of the Amicus Curiae

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 40,000 affiliate members from all 50 states.[1] Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. NACDL routinely files amicus curiae briefs in the Supreme Court and in other courts throughout the country.

---

[1] Pursuant to Federal Rule of Appellate Procedure ("Rule") 29(a) and Circuit Rule 29(b), the undersigned represents that all parties have consented to the filing of this amicus brief. Pursuant to Rule 29(c)(5), the undersigned certifies that no party's counsel authored the brief in whole or in part; that no party or counsel for a party contributed money that was intended to fund preparation or submission of this brief; and that no person other than the amicus curiae, its members, and its counsel, contributed money that was intended to fund preparation or submission of this brief.

Relevant Procedural Background

The procedural history of this case is set forth in Appellant's brief. Aspects of the procedural history important to arguments of amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") are highlighted below.

A. The First Trial: The Jury Returns a Mixed Verdict, Creating the Double Jeopardy Issue.

On September 11, 2001, Charles Coughlin was an officer in the U.S. Navy working at the Pentagon when a hijacked plane struck the building seventy-five feet from where he was working. *See United States v. Coughlin*, 610 F.3d 89, 93 (D.C. Cir. 2010) ("*Coughlin I*"). In 2004, Coughlin filed a claim with the September 11th Victim's Compensation Fund ("VCF") for injuries he suffered in the attack and its aftermath. The VCF ultimately awarded him $331,034 – $180,000 of which was for non-economic injury and the remaining $151,034 of which was for economic damages. *Id.* at 94.

In 2008, a federal grand jury indicted Coughlin of engaging in a scheme to defraud the VCF and obtain money from the Fund by means of false and fraudulent representations. *Id.* The indictment contained five counts of mail fraud in violation of 18 U.S.C. § 1341, one for each letter that Coughlin sent or caused to be sent to the VCF in support of his claim. In addition, the indictment included two non-mail fraud counts – Count 6, which charged Coughlin with making a false and fraudulent claim in violation of 18 U.S.C. § 287, and Count 7, which charged

him with theft of public money in violation of 18 U.S.C. § 641. *Id.* at 94-95. At his first trial, the jury acquitted Coughlin of three of the five mail fraud counts but hung on two of the mail fraud counts as well as the false claim and theft counts. *Id.* at 95.

B. The Court of Appeals' Decision: The Court Allows Retrial of Two Counts Based on a Sharp Line Between the January-April 2004 Physical Injury Claims and the May-June 2004 Economic Loss Claims.

In *Coughlin I*, this Court addressed whether the issue preclusion component of the Double Jeopardy Clause barred the Government from retrying Coughlin on any of the hung counts. The Court grounded its analysis in *Yeager v. United States*, 557 U.S. 110 (2009). *See Coughlin I*, 610 F.3d at 96. In *Yeager*, the Court reaffirmed its earlier holding in *Ashe v. Swenson*, 397 U.S. 436 (1970), that "the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." 557 U.S. at 119. If a "rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," then the issue was not "necessarily decided." *Id.* at 119-20 (quoting *Ashe*, 397 U.S. at 444).

The indictment alleged a scheme that lasted from December 2003 to June 2004, and the mailings at issue in the mail fraud counts covered the January 22, 2004 through April 30, 2004 period. *Coughlin I*, 610 F.3d at 93-94. Applying *Yeager*, the *Coughlin I* Court concluded that, in acquitting Coughlin of three of the

five mail fraud counts, "the jury necessarily decided that Coughlin lacked fraudulent intent during the entire period encompassed by the charged mailings – including those mailings cited in the hung counts." *Id.* at 100. The Court then held that, because fraudulent intent is an essential element of the hung mail fraud counts, the Double Jeopardy Clause precluded their retrial. *Id.*

The Court then considered whether the jury's decision that Coughlin lacked fraudulent intent during the period covered by the mailings (January 22-April 30, 2004) precluded the Government from relitigating the false claims and theft counts. In concluding that the Double Jeopardy Clause did not bar retrial on the non-mail fraud counts, the Court drew a sharp distinction between the allegations and evidence associated with the mail fraud counts and the allegations and evidence associated with the false claims and theft counts. According to the Court, a rational jury could have differentiated between the mail fraud scheme and the non-mail fraud counts because the Government had both "theory [and] evidence" to "support the conclusion that something new arose" after Coughlin submitted the last, April 30, 2004 letter to the VCF. *Id.* at 102.

The line between April 30 and May 1 figured prominently in the Court's analysis. On April 14, the VCF had sent Coughlin a letter informing him that he was eligible for a "presumed" award of $60,000 for non-economic loss, with no award for economic loss. *Id.* at 93. Coughlin's April 30 letter to the VCF, the

subject of one of the acquitted mail fraud counts, sought an appeal hearing. At the May 13, 2004 appeal hearing, Coughlin submitted nine new exhibits related to his economic loss claim, including a letter documenting time missed from work to attend medical appointments, carbon copies of checks reflecting payments for household services he could no longer afford, and a six-page schedule calculating his past and future economic claims. *See id.* at 94, 103.

Under the Government's theory, adopted by the Court, "[i]n finding that Coughlin lacked fraudulent intent during [the January through April 2004] period, the jury could have determined that he had been physically injured in the attack on the Pentagon and that, through April, he was only seeking compensation for such physical injuries in good faith." *Id.* at 102. The Government further argued – and this Court agreed – that evidence presented at the first trial provided the jury with a basis for "concluding that, by the time of the May 13 hearing, Coughlin was seeking additional compensation – specifically, for *economic* injury – to which he knew he was not entitled." *Id.* (emphasis in original).

The *Coughlin I* court then detailed the evidence presented at the first trial that would have permitted a rational jury to convict Coughlin on the post-April 30, 2004 false claims and theft counts while acquitting him of the earlier mail fraud counts. This evidence included evidence of the following : (1) Coughlin had overstated his yearly salary when presenting claims regarding his lost income; (2)

many of Coughlin's injury-related absences from work either never happened or were of shorter duration than he claimed; (3) financial information submitted by Coughlin on the cost of future replacement services did not match up with his bank records; and (4) more than a third of the carbon copies of checks Coughlin submitted did not match the checks that actually passed through his bank account. *Id.* at 103.

Another important aspect of *Coughlin I* was the Court's holding that the doctrine of fatal variance did not prevent the Government from retrying Coughlin on a narrower scheme than that charged by the Grand Jury in the indictment. The indictment alleged Coughlin's participation in a single fraudulent scheme that lasted from December 2003 through June 2004. But – in acquitting Coughlin of three of the mail fraud counts – the jury necessarily rejected this allegation. *See id.* at 100. The Court nonetheless held that the jury's rejection of the "broader" (December 2003 through June 2004) scheme did not preclude it from finding that Coughlin participated in a "narrower" (May-June 2004) scheme and the Government could therefore retry Coughlin based on its narrower scheme theory. *Id.* at 104.

The Court expressly rejected Coughlin's argument that retrying him on a scheme substantially different in scope from that charged in the indictment violated the Grand Jury Clause of the Fifth Amendment. *See id.* at 104. Allowing the

Government to retry Coughlin on the narrower scheme would not constitute a fatal variance, the Court reasoned, because the narrower scheme was included within the broader scheme charged in the indictment. *See id.* at 105-06. Critical to the issues before the Court in this appeal, *Coughlin I* emphasized that the indictment alleged a scheme in many parts and that, "in alleging those parts, it dr[e]w the same kind of line that we drew here: the line between Coughlin's claims for physical injures on the one hand and for economic injuries on the other." *Id.* at 106. The Court noted that, "not only did the indictment distinguish physical from economic injury, it did so temporally – it did not specify *any* misrepresentations relating to economic injury as having been made before May 13." *Id.* (emphasis in original). When focusing on the text of the false claim and theft counts, the Court emphasized that "the line between physical and economic injury stands out in high relief." *Id.*

In sum, the premise of the Court's ruling that the Double Jeopardy and Grand Jury Clauses of the Fifth Amendment permitted the Government to retry Coughlin on the false claims and theft count related to claims for economic injury arising after April 30, 2004, was that a sharp line could be drawn between the broader scheme theory presented at trial and rejected by the jury and the alternate narrower scheme May-June 2004 economic injury scheme as to which a rational jury could have reached a different conclusion. Any blurring of that line would

have undermined the very basis for the Court's issue preclusion ruling. It was the post-April 30, 2004 evidence related to the economic loss claims submitted by the Government that enabled the Court to conclude that the jury had not necessarily rejected the Government's theory that, after April 30, 2004, Coughlin "developed an intention to fraudulently overstate his losses." *See id.* at 108 (citing Government's evidence). Absent the ability to isolate the allegations and evidence regarding the May-June 2004 economic loss claims, the findings that necessarily flowed from the jury's rejection of the broader scheme theory would have precluded Coughlin's retrial on the hung false claim and theft counts.

C. The Retrial Following Remand: The Government Unduly Focuses on the Pre-May 2004 Physical Injury Evidence Related to the Precluded Broader Scheme Theory.

On remand, the indictment was dramatically redacted to limit the allegations and counts to the narrower scheme outlined by the Court of Appeals. *Compare* App. 40-49 (original, pre-*Coughlin I* indictment) *with* App. 167-69 (redacted, post-*Coughlin I* indictment). The District Court's evidentiary rulings, however, failed to observe the careful delineation drawn in *Coughlin I* between precluded and non-precluded issues.

As set forth in the Opening Brief for Appellant ("Br."), much of the evidence introduced at trial related to the allegations regarding Coughlin's physical injury claims – the very allegations that were stricken from the indictment because

they were associated with the broader scheme the Government was precluded from retrying. *See* Br. at 18-27.

For example, Coughlin had not claimed any economic loss for diminished athletic activities. App. 425-30. His request for compensation for diminished athletic activities was entirely related to his pre-May 2004 non-economic injury claim. Nonetheless, the Government repeatedly introduced evidence in an effort to establish that Coughlin had not suffered any diminishment in his athletic activities as a result of 9/11, including expert testimony of an orthopedic surgeon specializing in sports medicine (*id*. at 976-77), testimony of two additional witnesses regarding the physical demands of lacrosse, and Coughlin's participation after 9/11 (*id.* at 1476-1566, 1568-1633), and photographs of Coughlin playing lacrosse (*see id.* at 175). The Government began with the issue in its opening (*id.* at 477, 450) and returned to it in closing, displaying a picture of Coughlin running the New York City Marathon with a word balloon of "I no longer run marathons" from his January 2004 letter to the VCF (*id.* at 461-62, 1990-91), the letter that formed the basis for one of precluded mail fraud counts.

The District Court rejected Coughlin's argument that the admissibility of the medical and athletic activities evidence should be governed by Federal Rule of Evidence 404(b). Instead, the District Court treated the evidence as "intrinsic to the charged crimes, rendering Rule 404(b) inapplicable." App. 201. *See also id.* at

202 ("this evidence is inextricably intertwined with the very acts that the defendant committed when he engaged in the behavior that constituted the charged crime"). By subjecting the evidence closely tied to the acquitted and precluded counts stricken from the indictment as nonetheless intrinsic, the District Court allowed the Government to bypass Rule 404(b)'s notice requirement and deprived Coughlin of the defendant's entitlement under Rule 404(b) to a jury instruction that the evidence could be used only for particular purposes.

The District Court also rejected Coughlin's argument that the Government placed a prejudicially disproportionate focus on the medical and athletic activities evidence at trial. According to the District Court: "once this Court properly found the evidence relevant under rule 401 and admissible under Rule 403, it was the government's decision how to structure the case that it presented at trial." *Id.* at 200. As a result of the District Court's rulings, nothing prevented the Government from subjecting Coughlin to a trial that, at least from an evidentiary standpoint, mirrored the first trial.

The Court's holding in *Coughlin I* that the Government was not precluded from retrying the false claims and theft counts rested on the proposition that the allegations and evidence related to those counts were entirely independent of the January-April 2004 physical injury, non-economic loss claim integral to the acquitted counts. *See* 610 F.3d at 102-03, 106. It was only the Government's

"narrower" scheme theory – the theory that, after April 30, 2004, Coughlin developed an intent to make false claims for economic loss – that survived the preclusive effect of the earlier acquittals. Despite this Court's holding, the Government proceeded to try the case – with the District Court's approval – much the same as if it were retrying its broader scheme theory and relitigating the question whether Coughlin fraudulently made claims for physical injuries.

Argument

I. Contrary to the District Court's Interpretation, *Dowling* Does Not Establish a Blanket Rule That the Issue Preclusion Component of the Double Jeopardy Clause Never Operates to Exclude Evidence.

A. The Double Jeopardy Clause Protects Criminal Defendants from Relitigating Ultimate Issues of Fact Necessarily Decided by a Previous Verdict of Acquittal.

The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life and limb." U.S. Const., amend. V. The Supreme Court's Double Jeopardy jurisprudence has eschewed a crabbed interpretation of the brief text of the Clause and instead has looked to its common-law ancestry to inform questions of its protective scope. *Yeager v. United States*, 557 US. 110, 117 (2009) (citing examples where the Court has extended the Double Jeopardy protection beyond the plain text of the Clause to honor the "*spirit* of the instrument") (emphasis in original). Thus, though the text speaks of protecting a defendant from retrial for

the "same offence," in *Ashe v. Swenson*, 397 U.S. 436 (1970), the Supreme Court recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel, or "issue preclusion."

Under the doctrine of issue preclusion, a familiar subject in civil litigation, "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. When applying the doctrine to criminal prosecutions, the Court in *Ashe v. Swenson* cautioned that it should not be applied "with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Id.* at 444. Accordingly, "[w]here a previous judgment of acquittal was based upon a general verdict, as is usually the case," the court must "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." *Id.*

Ashe arose out of an incident in which a group of masked men robbed six men playing poker in the basement of a home. The State unsuccessfully prosecuted Ashe for robbing one of the men. Six weeks later, Ashe was brought to trial again, this time for robbing a different participant in the poker game. *Id.* at 439. In the second trial, the witnesses were largely the same as in the first, though

this time their testimony was substantially stronger on the question of Ashe's identity. *Id.* at 439-40. The jury convicted, and Ashe appealed. The Supreme Court held that Ashe's acquittal in the first trial foreclosed the second trial because the acquittal verdict could only have meant that the jury was unable to conclude beyond a reasonable doubt that the defendant was one of the robbers. *Id.* at 445. With the jury having necessarily determined by its verdict in the first trial that Ashe was not one of the robbers, the State could not constitutionally hale him before a new jury to litigate that issue again. *Id.* at 446.

In *Yeager v. United States*, 557 U.S. 110 (2009), the Supreme Court addressed the scope of Double Jeopardy issue preclusion in the scenario presented here – where a jury has acquitted on some counts but hung on others. In that case, at the first trial, the jury acquitted Yeager (a former Enron executive) of the indictment's fraud counts but hung on the insider trading counts. The Government then retried Yeager on a new indictment, which charged him with some of the previous insider trading counts. *Id.* at 114-15. Yeager argued that, with its acquittal on the fraud counts, the jury had necessarily determined that he did not possess material non-public information about the Enron project and its value to Enron, elements essential to the Government's prosecution for insider trading. The Court of Appeals held that issue preclusion did not bar the second trial, reasoning that, where a jury acquits on some counts and is hung as to other counts sharing the

same essential elements, it is impossible to know what the jury reasonably decided in acquitting. *See id.* at 115-16.

The Supreme Court reversed, holding that, when a case involves acquittal on some counts and a mistrial on others, "*Ashe* is nevertheless controlling." *Id.* at 120. The apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not diminish the preclusive force of the acquittals. *Id.* at 112. In determining what the jury necessarily decided in the first trial, hung counts are to be treated as nonevents. *Id.* at 120. As the Court explained, "a jury speaks only through its verdict," so "its failure to reach a verdict cannot – by negative implication – yield a piece of information that helps put together the trial puzzle." *Id.* at 121. "A mistried count is therefore nothing like the other forms of record material that *Ashe* suggested should be part of the preclusion inquiry." *Id.*

The Court then reaffirmed the principle, first announced in *Ashe v. Swenson*, that issue preclusion is firmly rooted in the Constitutional protection from double jeopardy. Even if a jury's verdict is "based upon an egregiously erroneous foundation, its finality is unassailable." *Id.* at 122-23 (internal citation and quotation omitted). Applying the doctrine of issue preclusion to Yeager's prosecution, the Court then held that, if his possession of insider information was a critical issue of ultimate fact in the acquitted counts, Yeager was protected from

prosecution for any other charge for which his possession of insider information is an essential element. *Id.* at 123.

B. The Supreme Court's Cases on the Evidentiary Component of Double Jeopardy Issue Preclusion Do Not Authorize the Unrestricted Use of Acquitted Conduct Evidence Where the Defendant Is Retried on the Same Indictment.

Here, the District Court held that Coughlin's motion in limine to exclude the acquitted conduct evidence "simply can't be squared with *Dowling*." App. 136 (citing *Dowling v. United States*, 493 U.S. 342 (1990)). The District Court's ruling erroneously extended *Dowling* to allow retrial on the same indictment of hung counts using evidence related to acquitted and precluded counts struck from the indictment. As a result, Coughlin was subjected to a second trial that required him to relitigate an ultimate fact necessarily decided in the first trial – whether he lied to the VCF in seeking compensation for physical injury.

Dowling involved a very different scenario than that presented here. Dowling was tried and acquitted of charges under Virgin Islands law of burglary, attempted robbery, assault, and weapons offenses in connection with a break-in at the home of Vena Henry. Dowling was then later tried for federal crimes of bank robbery and armed robbery, as well as various crimes under Virgin Islands law, in connection with a bank robbery that occurred in the same town two weeks before the break-in at Henry's residence. *Dowling*, 493 U.S. at 344-45. During the bank robbery trial, Henry identified Dowling as one of the men who had broken into her

home and testified that he was accompanied by another man, who the Government alleged was the getaway driver for the bank robbery. Henry also testified that Dowling had a small handgun and ski mask, which was also true of the bank robber. The Government sought to admit the testimony under Federal Rule of Evidence 404(b), which provides that evidence of other crimes, wrongs, or acts may be admissible against a defendant for purposes other than character evidence. The District Court instructed the jury that Dowling had been acquitted of robbing Henry, and emphasized the limited purpose for which Henry's testimony was being offered. *Id.* at 345-46.

In deciding that Henry's testimony was admissible, the Supreme Court emphasized that Dowling conceded that the prior acquittal for the Henry break-in did not determine an ultimate issue in the bank robbery case. *Id.* at 348. The Court "decline[d] to extend *Ashe v. Swenson* and the collateral-estoppel component of the Double Jeopardy Clause to exclude ***in all circumstances*** . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence ***simply because*** it relates to alleged criminal conduct for which a defendant has been acquitted." *Id.* (emphasis added).

The Court's analysis turned on the lower standard of proof governing admissibility as compared to the beyond reasonable doubt standard of proof for criminal convictions. Under Rule 404(b) similar act evidence is relevant if the jury

can "reasonably conclude" that the act occurred and that the defendant was the actor. *See id.* at 348. The Court found that a jury could reasonably conclude Dowling was the masked man who entered Henry's home, even if it did not find beyond a reasonable doubt that he committed the crimes charged at the first trial. *Id.* at 348-49; *see also id.* at 351 (Dowling had not disputed his presence in the home at the first trial).

A few years after *Dowling*, the Court returned to the question of whether a "mere overlap in proof between two prosecutions" establishes a Double Jeopardy violation in *United States v. Felix*, 503 U.S. 378, 386 (1992). As with *Dowling*, the District Court here erroneously treated *Felix* as controlling.

In *Felix*, the defendant was first tried and convicted in federal court in Missouri for attempting to manufacture methamphetamine between August 26 and August 31, 1987, based on the delivery of precursor chemicals and equipment to him in Missouri. At a second trial in the federal court in Oklahoma, Felix was tried and convicted of conspiracy and substantive counts in connection with the operation of a meth facility in Oklahoma. *See id.* at 380-81. At the first trial, the Government presented evidence of the Oklahoma meth operation to demonstrate criminal intent with respect to the Missouri transaction. *Id.* at 384-85.

The Supreme Court held that Double Jeopardy issue preclusion did not prevent the Government from trying the substantive counts in Oklahoma. After

noting that the Double Jeopardy Clause bars duplicative prosecution of the defendant for the "same offence," the Court concluded that "none of the offenses for which Felix was prosecuted in the Oklahoma indictment is in any sense the 'same offence' as the offence for which he was prosecuted in Missouri." *Id.* at 385. As the Court explained: "The actual crimes charged in each case were different in both time and place; there was absolutely no common conduct linking the alleged offenses." *Id.* Given the lack of common conduct linking the two offenses, the mere overlap of proof between the two prosecutions did not implicate Felix's Constitutional rights. *Id.* at 386. Thus, the admission of evidence regarding the Oklahoma meth operation at the first Missouri trial under Rule 404(b) did not constitute prosecution for that crime for purposes of the Double Jeopardy Clause. *Id.* at 387.

The Court then considered whether the Government could prosecute Felix for conspiracy where two of the nine overt acts charged in the second prosecution were based on conduct for which Felix previously had been prosecuted and convicted in Missouri. *See id.* at 388. Here, the Court relied on its longstanding rule that a substantive crime and a conspiracy to commit that crime are not the "same offence" for double jeopardy purposes. *Id.* at 389. The Court acknowledged its double jeopardy jurisprudence precluding a subsequent prosecution if one of the two offenses is a lesser-included offense of the other. *Id.*

at 388-90. In determining that a similar rule should not apply in the conspiracy/overt act setting, the Court reasoned that the "lesser included offense analysis," while useful in context of a prosecutions related to a "single course of conduct," was less useful in conspiracy prosecutions, which typically involve "allegations of multilayered conduct, [both] as to time and place." *Felix*, 503 U.S. at 390.

In admitting the acquitted conduct evidence in this case, the District Court cited two post-*Dowling* cases from this Circuit, as representing a "clear rejection" of a pre-*Dowling* line of authority applying issue preclusion to acquitted conduct evidence. *See* App. 140.[2] The two post-*Dowling* cases cited by the District Court are *United States v. Davis*, 235 F. App'x 747, 749 (D.C. Cir. 2007) (per curiam), and *United States v. Lukens*, 114 F.3d 1220, 1221 (D.C. Cir. 1997). But both cases merely followed the Supreme Court's holding in *Felix* that ***conspiracy prosecutions*** could include evidence of acquitted conduct. Thus, *Davis* is a brief *per curiam* opinion in which the Court held that the District Court did not abuse its

[2] One of the pre-*Dowling* cases, *Green v. United States*, 426 F.2d 661, 662 (D.C. Cir. 1970), requiring exclusion of acquitted conduct evidence, has not been overruled and, in fact, has been cited as recently as 2007. *See United States v. Andrews*, 479 F.3d 894, 900 (D.C. Cir. 2007) (Williams, J., concurring). *Green* involved a situation similar to that here, where there was a mixed verdict at the first trial, resulting in both an acquitted count and hung counts, followed by a retrial of the hung counts. The court held that evidence of acquitted conduct could not be introduced at the second trial.

discretion in admitting acquitted conduct evidence under Rule 404(b) in a conspiracy prosecution as intrinsic to the conspiracy charge. 235 F. App'x at 749. And, in *Lukens*, this Circuit held that the defendant's prior acquittal for bribery did not preclude the Government from introducing evidence of the payments that were the subject of the bribery charges as proof of overt acts in furtherance of the charged conspiracy. 114 F.3d at 1222.

Both *Dowling* and *Felix* involved a second prosecution on a separate indictment for entirely separate criminal acts; unlike *Ashe v. Swenson* and the instant case, they did not involve re-prosecution for the "same criminal episode." *See Yeager v. United States*, 557 U.S. 110, 119 (2009) (analyzing *Ashe*). Here, Coughlin was indicted for a single scheme lasting from January 2004 to June 2004 to seek compensation from the Victim Compensation Fund as to which he knew he was not entitled. *See United States v. Coughlin*, 610 F.3d 89, 106 (D.C. Cir. 2010) ("Coughlin is correct that '[t]he one and only Indictment allege[d] one and only one scheme'") (quoting Appellant's Reply Br. 17).

But not only did this case involve re-prosecution on the same indictment, more importantly it involved a remand from this Court's 2010 decision in *Coughlin I* applying the issue preclusion component of the Double Jeopardy Clause to narrow the scope of the second prosecution. Neither the Supreme Court's decisions in *Dowling* and *Felix*, nor this Circuit's decisions in *Davis* and

Lukens, address the situation presented here. The District Court thus erred in treating these cases as controlling.

C. Where the Scope of a Second Prosecution on the Same Indictment Has Been Narrowed by Application of the Doctrine of Issue Preclusion, the Evidence at Trial Should Conform to the Narrowed Scope.

The Supreme Court's cases have recognized that the Double Jeopardy Clause "embodies two vitally important interests." *Yeager*, 557 U.S. 117. As the Court explained in *Yeager*:

> The first is the "deeply ingrained" principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Id. at 117-18 (quoting *Green v United States*, 355 U.S. 184, 187-88 (1957). The second interest is the preservation of the finality of judgments, which animates the issue preclusion component of the Double Jeopardy Clause. *See id.* at 118-19. The first interest, while not precluding the Government from seeking a second trial when the first trial ends in a mistrial, is nonetheless implicated when the Government seeks to re-prosecute. *Id.* at 118.

Here, the operation of the "second interest" (*i.e.*, the aspect of the Double Jeopardy Clause which protects defendants from relitigating ultimate issues of fact decided in the first trial), constrained the scope of the re-prosecution of the mistrial

counts. On retrial in such a circumstance, the Fifth Amendment also operates to serve the first interest in protecting the defendant from being subjected to a trial that mirrors the first trial rather than reflecting the narrowed scope compelled by Double Jeopardy issue preclusion.

The entire premise for the Court's decision in *Coughlin I* that the Government could retry Coughlin for the false claims and theft counts was its conclusion that a jury could reasonably have decided that Coughlin did not make fraudulent claims for physical injuries in January to April 2004, that he in fact was physically injured, but that he decided in May 2004 to make false and fraudulent claims for economic loss. *Coughlin I*, 610 F.3d at 101-04. Further the Court concluded that those economic loss claims were supported by evidence that was entirely independent of the January-April 2004 claims related to physical injury. *Id.* at 103. With the Court having determined the preclusive effect of the prior acquittals, the Double Jeopardy Clause guaranteed that the subsequent trial would protect Coughlin from the embarrassment, expense, and ordeal of relitigating whether he had lied to the Victim Compensation Fund about the extent of his physical injuries. Yet, the Government, unrestrained by the District Court, set about embarrassing Coughlin by repeatedly presenting evidence to the jury in an effort to establish that very fact, such as the photos of him playing lacrosse or running a marathon, and suggesting he had not earned his Purple Heart. And

although the indictment was dramatically pared down on remand from *Coughlin I*, Coughlin was subjected to the ordeal and expense of defending against factual allegations found in the original, unredacted indictment. *See* Opening Brief of Appellant (Statement of Facts) at 18-24.

The District Court's view that the preclusive effect of prior acquittals on hung counts has no evidentiary significance ignores the first "vitally important interest[]" embodied in the Double Jeopardy Clause. *See Yeager*, 557 U.S. at 118. The Government's right to have one complete opportunity to convict on the hung count does not open the door for it to use the second trial as an opportunity to embarrass and burden the defendant with a rehash of evidence of the acquitted counts.

II. At the Very Least, Where Issue Preclusion Serves to Narrow the Indictment on Retrial, Evidence of Acquitted Conduct May Not Be Admitted as "Intrinsic" Evidence, Unregulated by Federal Rule of Evidence 404(b), and Without Engaging in a Careful Balancing Under Rule 403.

Even assuming *arguendo* that the Double Jeopardy Clause does not create an absolute bar to the use of acquitted evidence conduct on retrial on an indictment narrowed by issue preclusion, the admissibility of the evidence should be governed

by Federal Rule of Evidence 404(b), with the associated protections provided by that Rule.[3]

Under Rule 404(b), evidence of a "crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). Such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* 404(b)(2). In a criminal case, on request by the defendant, the prosecutor must "provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial" and "do so before trial – or during trial if the court, for good cause, excuses lack of pretrial notice." *Id.* 404(b)(2)(A), (B). On defendant's request, the trial court also is required to instruct the jury on the limited purposes for which the evidence may be considered. *United States v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000); *see also* Fed. R. Evid. 105 (mandating, upon request, limiting instruction for multi-purpose evidence).

Here, the District Court held that Coughlin was not entitled to the Rule 404(b) protections for the acquitted conduct evidence. The District Court invoked

---

[3] As previously noted in Part I.B., in *Dowling*, the evidence related to the acquittal for the unrelated criminal episode had been admitted under Rule 404(b). *See Dowling v. United States*, 493 U.S. 342, 345-46 (1990).

the principle that only "extrinsic" – not "intrinsic" – evidence is governed by Rule 404(b). *See* App. 201 ("this Court properly treated the medical and athletic activities evidence as intrinsic to the charged crimes, rendering Rule 404(b) inapplicable"). According to the District Court, this evidence was "inextricably intertwined with the very acts that the defendant committed when he engaged in the behavior that constituted the charged crimes." *Id.* at 202.

The premise of the Court's decision in *Coughlin I* was that Coughlin's alleged narrower scheme in May-June 2004 to make false claims for economic loss was divisible from the acts associated with the precluded broader scheme, which included the January-April 2004 physical injury claims. *See* 610 F.3d at 106 (noting that the indictment "drew the same kind of line that we draw here: the line between Coughlin's claims for physical injuries on the one hand and for economic injuries on the other"). The line drawing which made possible the retrial of Coughlin for the May-June 2004 economic injury claim cannot be squared with the District Court's "inextricably intertwined" theory.

This Circuit has criticized the often arbitrary distinction between intrinsic and extrinsic evidence for purposes of Rule 404(b). *See United States v. Alexander,* 331 F.3d 116, 126 n.13 (D.C. Cir. 2003) ("Given the practical and definitional problems that plague the extrinsic-intrinsic distinction, we have called into question the need for such distinction."); *Bowie*, 232 F.3d at 927 ("So far as

we can tell, the only consequences of labeling evidence 'intrinsic' are to relieve the prosecution of Rule 404(b)'s notice requirement and the court of its obligation to give an appropriate limiting instruction upon defense counsel's request."). As the Court of Appeals explained in *Bowie*, "[b]ifurcating the universe into intrinsic and extrinsic evidence has proven difficult in practice," and formulations adopted by the sister circuits are "not particularly helpful." *Id.* at 928. The Seventh Circuit has rejected the inextricable intertwinement doctrine as "overused, vague, and quite unhelpful." *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010).

But even if the intrinsic versus extrinsic evidence distinction remains some vitality in this Circuit, it should not be used to allow the Government to circumvent Rule 404(b)'s safeguards where the Government is retrying the defendant on the same indictment following a partial acquittal. Otherwise, a defendant is whipsawed by conflicting theories. For example, here, the Government avoided the preclusive effect of the prior acquittals by drawing a sharp line between conduct that formed the basis for the mail fraud counts (the January-April 2004 claims for physical injury) and the basis for the theft and false claims counts (the May-June 2004 claims for economic loss). But, on retrial, the Government argued that this conduct was "inextricably intertwined" such that the acquitted conduct evidence could come in without notice to the defendant and without a limiting

instruction to the jury. This fundamentally unfair and prejudicial whipsaw can be avoided if acquitted conduct evidence is admitted only via the filter of Rule 404(b).

The District Court also erred in failing to provide any searching consideration of whether the acquitted conduct evidence should be excluded under Federal Rule of Evidence 403. *See* App. 154-55. Under Rule 403, the court may exclude evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly resenting cumulative evidence." Fed. R. Evid. 403. Where the evidence consists of prior wrongful acts of the defendant in a criminal case, the risk of unfair prejudice looms large.

As one leading commentator explains: "Since the other acts will not appear in the indictment and the defendant cannot elicit the intent to use such proof through discovery, his opportunity to defend himself may be impaired through lack of notice." 22A Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5239 (2012). Where, as here, the evidence relates to acquitted conduct, the admission of the evidence also "undermines the values that support the prohibition on double jeopardy." *Id.*

Conclusion

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

/s/ Laura G. Ferguson
Laura G. Ferguson
Counsel of Record
Timothy P. O'Toole
NACDL Amicus Committee
MILLER & CHEVALIER CHARTERED
655 Fifteenth Street, N.W., Suite 900
Washington, DC 20005
Phone: (202) 626-5567
Facsimile: (202) 626-5801
E-mail: lferguson@milchev.com

Counsel for the National Association of Criminal Defense Lawyers

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   X this brief contains 6,557 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   __ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   X this brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14-point font Times New Roman, *or*

   __ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program]* with [*state number of characters per inch and name of type style]*.

Dated: December 14, 2012

/s/Laura G. Ferguson
Attorney for *Amicus Curiae*,
The National Association of
Criminal Defense Lawyers

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Elizabeth Trosman
Amanda J. Winchester
U.S. Attorney's Office - Appellate Division
555 4th Street, NW, Room 8104
Washington, DC 20530
Email: elizabeth.trosman@usdoj.gov
Email: amanda.winchester@usdoj.gov

Counsel for United States of America

Steven M. Klepper
John A. Bourgeois
Kramon & Graham, PA
One South Street, Suite 2600
Baltimore, MD 21202-3201
Email: sklepper@kg-law.com
Email: jbourgeois@kg-law.com

Counsel for Charles E. Coughlin

/s/ Laura G. Ferguson