United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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No. 21-60124

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GREGORY ALVIN AUZENNE,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 2:19-cr-53-1

Before BARKSDALE, ENGELHARDT, and OLDHAM, *Circuit Judges*.

ANDREW S. OLDHAM, *Circuit Judge*:

A jury acquitted Gregory Alvin Auzenne on seven counts. It hung on the eighth. Auzenne says the Double Jeopardy Clause bars the Government from retrying him on that eighth count. The district court said no. We agree and affirm.

I.

A.

Drug compounding is a way to "prepare medications that are not commercially available, such as medication for a patient who is allergic to an ingredient in a mass-produced product." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 360–61 (2002). When insurers began covering prescriptions for compounded drugs, they had to develop a systematic reimbursement formula. Many insurers decided to reimburse on a per-ingredient basis. This often resulted in reimbursements far exceeding the actual cost of ingredients.

Some pharmacies saw this as an opportunity to commit fraud. Between 2012 and 2014, for example, insurers noted a dramatic spike in reimbursement claims for compounded medications from certain pharmacies in Mississippi. Discrepancies of this nature eventually prompted an FBI investigation.

Auzenne was a pain-management doctor at Rush Hospital in Meridian, Mississippi. He worked in the hospital's Pain Treatment Center. Allegedly, Auzenne reached an agreement with pharmacist Marco Moran. The basic idea—again, allegedly—was as follows. First, Moran created a boilerplate prescription pad, designed to facilitate Auzenne in prescribing unnecessary medications. Second, Auzenne signed an incomplete form—often before even seeing the patient in question. Third, Auzenne's employee, Tiffany Clark, would step in. She'd make copies of the signed form, fill in certain patient information, and fax the form to Moran. Fourth, Moran would complete the form, selecting the compounding medication(s) the patient would receive, and send the prescription to specific pharmacies (which were themselves complicit in the scheme) for fulfillment. Two of those pharmacies were "Custom Care Pharmacy" and "RX Remedies." Fifth and finally,

Moran would cash out by (fraudulently) completing an insurance reimbursement claim. All told, the alleged scheme involved about 200 fraudulent prescriptions and hundreds of thousands of dollars.

The alleged scheme's *sine qua non*—sending compounded drugs to people who didn't order or need them—led to its downfall. In 2014, a patient of the Pain Treatment Center received a compounded cream in the mail. This was a surprise: Nobody had prescribed the cream. When the patient got a call from the Center asking for her insurance information, she grew suspicious and complained to Rush Hospital administrators. After receiving another complaint about unsolicited medical cream, Rush Hospital began investigating Auzenne.

Also in 2014, Blue Cross & Blue Shield of Mississippi ("BCBS") noticed a spike in reimbursement claims from Custom Care Pharmacy for compounded medicines. So BCBS audited Custom Care.

In the fall of 2014 and pursuant to its audit, BCBS sent Auzenne two separate letters. Each letter included a detailed list of prescriptions that Auzenne had supposedly written. And they each asked Auzenne to indicate whether he had really written each prescription. At BCBS's request, Auzenne executed one affidavit for each letter. The affidavits acknowledged that he had written most, but not all, of the listed prescriptions.

Auzenne testified in his own defense at trial. He told the jury that he had discovered Clark's faxing of prescription forms to Moran. He testified that he considered this "completely inappropriate" and "unacceptable." He also testified that he eventually became so suspicious of Moran's "evasive" and "sloppy" behavior that he quit doing any business with him. And Auzenne testified about a meeting he had with Rush Hospital administrators. Specifically, when the administrators confronted Auzenne with the

suspicious volume of compounded-medication scripts coming from RX Remedies, Auzenne "stated he was aware of the issues and that he had been in contact himself with" that pharmacy. Notably, each of these instances occurred *before* Auzenne executed the above-described affidavits.

B.

The Government indicted Moran in 2018. Moran pleaded guilty and agreed to testify against both Auzenne and Clark. In 2019, the Government brought an eight-count indictment against Auzenne and a five-count indictment against Clark. The two cases went to trial together, and much of our above factual summary is based on witness testimony from that trial.

Count 1 charged conspiracy to commit wire fraud and healthcare fraud in violation of 18 U.S.C. § 1349. Counts 2–4 charged wire fraud in violation of 18 U.S.C. §§ 1343 and 2. Count 5 charged conspiracy to violate the Anti-Kickback Statute (42 U.S.C. § 1320a-7b(b)(1)(A)–(B)) in violation of 18 U.S.C. § 371. Count 6 charged Auzenne with substantively violating the Anti-Kickback Statute. Count 7 charged conspiracy to distribute and dispense Tramadol, a Schedule IV controlled substance, in violation of 21 U.S.C. § 846.

The indictment's eighth count was based on Auzenne's responses to the BCBS affidavits. It alleged that those responses amounted to "[f]alse statements relating to health care matters" in violation of 18 U.S.C. §§ 1035 and 2. Count 8 listed three alternative ways in which Auzenne might have committed that violation:

> Auzenne executed an affidavit under oath in response to an audit conducted by BCBS attesting that he authorized prescriptions for compounded medications for BCBS members that omitted how: (a) Auzenne had pre-signed blank prescriptions; (b) at Auzenne's direction, Clark had filled in

> patient and insurance information and faxed these fraudulent prescriptions to Moran; and (c) Moran had completed the fraudulent prescriptions deciding which compounded medications the BCBS members would receive, in violation of Title 18, United States Code, Sections 1035 and 2.

The jury acquitted Auzenne on Counts 1–7, but it hung on Count 8. (It acquitted Clark on all counts.) Auzenne moved to dismiss Count 8 on double-jeopardy grounds. When the district court denied that motion, Auzenne appealed to this court. Auzenne moved the district court for a stay pending appeal, and the court granted that motion.

II.

Because Auzenne argues that the Fifth Amendment's Double Jeopardy Clause requires the dismissal of Count 8 in its entirety, the collateral order doctrine gives us jurisdiction over this appeal. *See Abney v. United States*, 431 U.S. 651, 658–62 (1977); *see also United States v. Lee*, 622 F.2d 787, 791 (5th Cir. 1980) (our court has collateral-order-doctrine jurisdiction to consider only whether Double Jeopardy bars a whole count). Our review is *de novo*. *See, e.g.*, *United States v. Brown*, 571 F.3d 492, 497 (5th Cir. 2009).

We begin by (A) explaining the relevant rules of law. Then (B) we explain the narrow scope of our inquiry and hold the Double Jeopardy Clause does not bar retrial. We end by (C) addressing two additional arguments—one from Auzenne and one from the dissent.

A.

The Double Jeopardy Clause provides: "No person shall . . . be subject for the same offence to be twice put in jeopardy . . . ." U.S. CONST. amend. V, cl. 2. In *Ashe v. Swenson*, 397 U.S. 436 (1970), the Supreme Court "identified a collateral estoppel ingredient in [the Double Jeopardy] Clause."

Langley v. Prince, 926 F.3d 145, 155 (5th Cir. 2019) (en banc) (quotation omitted). The *Ashe* Court held that, "when an issue of ultimate fact has once been determined by a valid and final judgment," the Clause forbids the prosecution from relitigating that issue "in any future lawsuit." 397 U.S. at 443–46.

According to our precedent, "collateral estoppel may affect successive criminal prosecutions in one of two ways." *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997). First, collateral estoppel might "completely bar a subsequent prosecution." *Ibid.* That's the case "if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution." *Ibid.*; *see also Bolden v. Warden, W. Tenn. High Sec. Facility*, 194 F.3d 579, 584 (5th Cir. 1999) (asking first which facts the jury necessarily decided and second, whether those facts were essential elements of the crime charged in the second prosecution). The theory appears to be that, if the Government can't possibly prove its case without violating *Ashe*, there's no point in letting retrial go forward at all.

But even in cases where "the subsequent prosecution may proceed," collateral estoppel still prohibits "the introduction or argumentation of facts necessarily decided in the prior proceeding." *Brackett*, 113 F.3d at 1398; *accord United States v. Sarabia*, 661 F.3d 225, 229 (5th Cir. 2011) (similar). The theory appears to be that, even when a retrial may proceed, the Government doesn't get to relitigate factual issues the first jury already decided.

The rub in both circumstances is that it's often difficult or impossible to determine which facts the jury "necessarily decided."

B.

Now consider the scope of our inquiry. Auzenne moved the district court to dismiss Count 8 in its entirety—before retrial even got underway. The district court denied that motion. Auzenne now appeals that judgment. And the only relief he seeks in this court is a remand "with instructions to dismiss with prejudice the remaining charge against" him. To answer the question presented, therefore, we need only decide whether the *Ashe* rule "completely bars" the Government from retrying Auzenne on Count 8. *Brackett*, 113 F.3d at 1399.

That means Auzenne must show that the jury necessarily found some fact—and this fact must be an essential element of a retrial on Count 8. *See ibid.*; *Sarabia*, 661 F.3d at 229–30 (defendant bears the burden of showing the jury necessarily found a given fact). Auzenne argues the jury's acquittal on Counts 1–7 necessarily entails a finding that he was not involved in the scheme. And he argues that his involvement in the scheme is an "essential element[] of the" Count 8 offense. *See Bolden*, 194 F.3d at 584. So *Ashe* must bar retrial.

Auzenne's argument fails because, even on the assumption that the jury necessarily found he didn't participate in the scheme, his participation isn't an essential element of the Count 8 offense. *See ibid.* Count 8 charges a violation of 18 U.S.C. § 1035, along with a tag-along charge for aiding-and-abetting liability under 18 U.S.C. § 2. In relevant part, § 1035 imposes a penalty on:

> (a) Whoever, in any matter involving a health care benefit program, knowingly and willfully—
>
> > (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; or

> (2) makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

18 U.S.C. § 1035.

Auzenne could have violated that statute without himself participating in the scheme. Count 8 lists three theories, (a), (b), and (c), by which the Government might prove a § 1035 violation. Theory (c) is especially relevant here because it alleges that Auzenne knowingly omitted Moran's fraudulent activities from his BCBS affidavits. In statutory terms, theory (c) says Auzenne "knowingly and willfully . . . concealed or cover[ed] up . . . [the] material fact" that Moran had been committing insurance fraud by omitting that fact from his affidavit. Under theory (c), the Government need not prove that Auzenne participated in the scheme; it need only prove that Auzenne knew about and failed to disclose *Moran's* participation in it. It follows the Government could prove, on retrial, that Auzenne is guilty on Count 8—even if he didn't participate in the scheme. The fact that Auzenne's own testimony suggests he knew about Moran's fraud is mere icing on the constitutional cake.

C.

Auzenne's principal counterargument is that the Government cannot retry him on Count 8 without broadening the indictment. "[A]fter an indictment has been returned, its charges may not be broadened through amendment except by the grand jury itself." *United States v. Hoover*, 467 F.3d 496, 500 (5th Cir. 2006) (quotation omitted). Auzenne parses the indictment's text and argues that a retrial on theory (c) would impermissibly broaden the charge. He also raises the closely related question whether retrial

would amount to a variance of the indictment. *See United States v. Girod*, 646 F.3d 304, 316 (5th Cir. 2011).

But Auzenne moved to dismiss on double-jeopardy grounds, not on the grounds of constructive amendment or variance. He did not raise those issues in his motion to dismiss, so the district court had no chance to pass on them.

Not only were those issues not before the district court, but it would be difficult or impossible for us to decide them before a retrial. The constructive-amendment inquiry turns on whether "the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged." *United States v. Doucet*, 994 F.2d 169, 172 (5th Cir. 1993). And our court determines whether a variance occurred "by comparing the evidence presented at trial with the language of the indictment." *Girod*, 646 F.3d at 316. We are poorly situated to do either inquiry by way of prognostication. If the Government runs afoul of the constructive-amendment or variance doctrines on retrial, Auzenne can take it up with the district court in the first instance on the basis of actual facts and not hypothetical ones. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

Our esteemed colleague raises a different point in dissent. He agrees with us that the Government can retry Auzenne on theory (c)—but he urges us to go further and hold that it cannot retry him on theories (a) or (b). With greatest respect, we have no jurisdiction to do that. According to precedent from our court and every court of appeals in the Nation to consider the question, we have no power to say anything about theories (a) or (b).

The collateral order doctrine gives us limited jurisdiction over this case. Under that doctrine, the question whether *Ashe* entirely bars a retrial

on a whole count is immediately appealable. *See Abney*, 431 U.S. at 659; *Lee*, 622 F.2d at 791. But the question whether *Ashe* bars the introduction of any given argument or piece of evidence is not. Thus, in *Lee*, we held that "a question of the admissibility of evidence arising from the application of collateral estoppel is not an appealable order." *Lee*, 622 F.2d at 791; *see also United States v. Mock*, 604 F.2d 336, 339 (5th Cir. 1979) (holding the same and explaining, "[w]here the application of collateral estoppel determines the manner in which the trial will proceed, its reach and run should be charted with the aid of a complete record"). And we would create a circuit split by departing from our precedents on this point. *United States v. Wright*, 776 F.3d 134, 141 (3d Cir. 2015) ("[S]even of our sister courts of appeals have found that the touchstone for interlocutory jurisdiction is a collateral-estoppel claim that, if successful, would require dismissal of, at a minimum, an entire count. . . . None of our sister circuits or the federal district courts appear to have taken a contrary view.").

Here, Auzenne argued *only* that the collateral-estoppel ingredient of the Double Jeopardy Clause imposes a total bar to retrial on Count 8. That's the argument the district court considered and rejected, and that's the only argument we have jurisdiction to consider now. Auzenne did not ask the district court to exclude a particular argument or piece of evidence. And even if he did, and even if the district court refused to limit the Government's arguments or evidence, we could not review that decision in this posture. So we can't say anything about theories (a) and (b)—no matter how earnestly the parties or our most-learned colleague ask us to. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) ("Every federal appellate court has a

special obligation to satisfy itself . . . of its own jurisdiction . . . even though the parties are prepared to concede it." (quotation omitted)).[*]

AFFIRMED.

[*] We also note that the Government was under no obligation to file a speaking indictment. The Government chose to list theories (a), (b), and (c) in Count 8. But the Government could have simply alleged a violation of 18 U.S.C. §§ 1035 and 2 without listing the theories. In the latter case, our panel unanimously agrees that the Double Jeopardy Clause would not "completely bar a subsequent prosecution [because] [n]one of the facts necessarily determined in the former trial is an essential element of" the offense charged in Count 8. *See Brackett*, 113 F.3d at 1398. So we'd simply send the case back for that retrial without speculating about what the Government might or might not do or say. Then on retrial, Auzenne could argue (albeit without the benefit of immediate appealability) that *Ashe* bars the Government from introducing evidence or arguments that the first jury necessarily rejected. We struggle to see why the Government's choice to file a speaking indictment should change things one bit.

RHESA HAWKINS BARKSDALE, *Circuit Judge*, dissenting in part:

At issue is whether, having been tried on eight counts and acquitted on the first seven (charged participation in fraudulent health-care scheme), double jeopardy bars Dr. Auzenne's being tried again on count 8 (knowingly and willfully executing materially misleading statement in connection with benefits, items, or services involving a health-care violation of 18 U.S.C. §§ 1035 and 2). Because his acquittal on counts 1–7 does not preclude a rational jury's finding he knowingly filed a false affidavit regarding one of the three types of charged conduct in count 8 (part (c)), double jeopardy does not bar retrial for part (c) of that count. The jury, however, necessarily found Dr. Auzenne was not a participant in the scheme, barring retrial on parts (a) and (b) of count 8 (*as the Government concedes if he was not a participant*). Moreover, retrial only on part (c) does not implicate our jurisdiction over this appeal. Therefore, although I join the majority in holding double jeopardy does not bar retrial of part (c), I respectfully dissent from my esteemed colleagues' holding we lack jurisdiction to bar retrial of parts (a) and (b).

I.

A double-jeopardy analysis is obviously fact and trial-procedure intensive. Accordingly, some of the following facts are repetitious to that of the majority opinion, but they are necessary to demonstrate why parts (a) and (b) of count 8 cannot be retried. In other words, all of the following facts are necessary for the required analysis, as discussed *infra*, in deciding what a rational jury would have found.

Dr. Auzenne was indicted on eight counts in September 2019 as part of a fraud investigation involving several Mississippi-based compound pharmacies. Drug compounding is "used to prepare medications that are not commercially available, such as medication for a patient who is allergic to an

ingredient in a mass-produced product". *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 360–61 (2002).

Dr. Auzenne, among others, testified at his two-week jury trial in November 2020. Tiffany Clark, his assistant, was a co-defendant in that trial. (As discussed *infra*, she did not testify.) The following is based primarily on trial testimony.

When government and private healthcare benefit programs (insurers) began covering compound medications, they had to develop a system for a reimbursement formula. Many began reimbursing these medications on a per-ingredient basis. This formula often resulted in prices exceeding the ingredients' actual cost, offering a large potential profit for pharmacies. Pharmacies (and others involved) began manipulating the system. For example, insurers noted a dramatic spike in reimbursement claims from the same pharmacies in Mississippi for compounded medications. This prompted an investigation by the FBI in 2015.

This case involves an alleged conspiracy between, *inter alia*: Dr. Auzenne, a pain-management doctor at Rush Hospital, in Meridian, Mississippi; Clark, his assistant; and Marco Moran, a pharmacist. In the fall of 2013, Dr. Auzenne and Moran agreed to partner in a compound pharmacy (who initiated the relationship is disputed). Dr. Auzenne invested $40,000 in Custom Care Pharmacy, Moran's new venture, in exchange for 20 percent ownership in the pharmacy.

Moran created a compound-medication prescription pad that included spaces for a patient's name, date of birth, and insurance information, and three sections denoting categories of compound medication: topical pain creams, specialty creams, and metabolic supplement capsules. Moran, who pleaded guilty, testified as a Government

witness at the trial of Dr. Auzenne and Clark that the formulas were based more on "profitability", than "medical efficacy".

As noted, the alleged scheme included one of Dr. Auzenne's assistants, Clark. She was indicted with Dr. Auzenne on the first five of the eight counts against him; as noted, was tried with him; and was acquitted on all five counts. As also noted, and unlike Dr. Auzenne, she did not testify.

Clark filled in the patient's name, date of birth, and his or her insurance information in the above-described compound-medication-prescription form. She then faxed the forms to Moran, who would select one prescription from each section, as well as the number of refills.

The factual issue for how the forms were signed is both critical and disputed. The Government provided evidence that Dr. Auzenne pre-signed the bottom of a blank prescription form at Moran's request, and Clark photocopied the signed prescription form to use. On the other hand, Dr. Auzenne testified he never signed a blank prescription form and either Moran forged his signature or Clark lifted his signature from another document and inserted it in the form.

To keep up with the large number of prescriptions that were written by Moran and needed to be filled, Moran partnered with Tommy Spell, of RX Remedies, and Wade Walters, of Medworx, according to testimony by Spell, Walters, and Moran. Both Spell and Walters pleaded guilty to conspiracy to commit health-care fraud. Walters also pleaded guilty to money laundering. As noted, both testified at the trial of Dr. Auzenne and Clark.

From January to December 2014, approximately 200 fraudulent prescriptions were filled, or refilled, as a result of the scheme. In May 2014, Dr. Auzenne and Rush Hospital began receiving patient complaints about medications they were receiving but not expecting. This triggered an

investigation by the hospital administrators and compliance officers. As Dr. Auzenne and Cathy Robinson, vice-president and chief compliance officer for Rush Health Systems at the time, testified, Dr. Auzenne assured administrators that he was aware of the problem and that his office staff had spoken with someone at RX Remedies (the pharmacy in question) and his patients. Dr. Auzenne testified: it was around this time he discovered Clark was faxing prescription forms with patients' information to Moran; and he became suspicious of Moran and confronted him. Dr. Auzenne testified that he believed Moran "was being evasive and sloppy" and having issues getting his new venture started; so he (Dr. Auzenne), decided to extricate himself from Custom Care Pharmacy.

In May 2014, Moran returned to Dr. Auzenne his $40,000 investment and separately paid him $127,000. The check for $127,000 was written to Pharmacon Solutions, Dr. Auzenne's holding company, established when he and Moran went into business together, and the check's memo line noted the check was for "consulting services". The basis for Moran's $127,000 payment to Dr. Auzenne is disputed. Dr. Auzenne testified that the payment was for the consulting work he did for Moran regarding compound prescriptions. But, Moran testified the payment was "to incentivize Dr. Auzenne to write additional prescriptions".

In the fall of 2014, Blue Cross & Blue Shield of Mississippi (BCBS) conducted an audit in response to a "spike" in compound-medication-reimbursement claims. On 15 October and 24 November 2014, respectively, BCBS sent Dr. Auzenne two separate letters requesting that he verify his authorization of specific prescriptions (all were obtained from Moran as part of BCBS' audit of Custom Care Pharmacy). Each letter contained an attached list of prescriptions from Dr. Auzenne, including: member name and identification number; prescriber; pharmacy; prescription date; total

price; and a column for Dr. Auzenne to indicate whether he authorized the prescription by circling "yes" or "no".

For the first list, Dr. Auzenne executed an affidavit acknowledging he had written all of the prescriptions in question; and for the second list, he acknowledged by affidavit that he had written some, but not all, of the prescriptions. At trial, however, Dr. Auzenne testified: he misunderstood BCBS' request; and his understanding was that he was only supposed "to identify the patients that were ours".

BCBS' representative testified at trial that Dr. Auzenne did not: disclose that his signatures on the prescriptions were forged; reveal pre-signed prescription forms were being used; mention the $127,000 payment he received from Moran; reveal his meeting with Rush Hospital's compliance officers regarding patient complaints; or disclose that Moran, a non-physician, was prescribing medications. The BCBS representative further testified: Had BCBS known these facts, it would never have paid any claims associated with these prescriptions.

As noted in part, following the Government's investigation, Moran: pleaded "guilty to conspiracy to commit health care fraud"; named Dr. Auzenne as a participant in the scheme; and testified at his and Clark's trial.

In Dr. Auzenne's eight counts, count 1 charged conspiracy to commit wire fraud and healthcare fraud in violation of 18 U.S.C. § 1349; counts 2–4, wire fraud in violation of 18 U.S.C. §§ 1343 and 2; count 5, conspiracy to violate the Anti-Kickback Statute (AKS) (42 U.S.C. § 1320a-7b(b)(1)(A)–(B)), in violation of 18 U.S.C. § 371; count 6, soliciting and receiving remuneration in exchange for providing signed prescriptions for compounded medications paid for in whole or in part by a federal health-care benefit program, in violation of the AKS and 18 U.S.C. § 2; count 7,

conspiracy to distribute and dispense Tramadol, a Schedule IV controlled substance, in violation of 21 U.S.C. § 846; and count 8, knowingly and willfully executing a materially misleading statement, in violation of 18 U.S.C. §§ 1035 and 2.

During the trial, in addition to the testimony of Moran, Spell, and Walters, the Government presented evidence from, *inter alia*: former patients who received medications that they were not expecting; an expert witness in the fields of pain management, pharmacology, and compounded medications; Rush Hospital employees; law-enforcement officers who investigated the scheme; and the BCBS employee who conducted Dr. Auzenne's audit.

In addition to his own testimony, Dr. Auzenne presented evidence from, *inter alia*: two of his nurses; the chief technology officer of a company that builds software solutions for the healthcare industry, who testified Dr. Auzenne's signature could have been taken from a document he had signed and then placed on the prescription form; a handwriting expert; an expert witness in the fields of pain management, pharmacology, and compounded medications; the manager of a billing company; and a BCBS member who, despite not being a patient of Dr. Auzenne's, received medication supposedly prescribed by him.

As noted, throughout the two-week trial, the parties offered conflicting testimony including, *inter alia*: whether Dr. Auzenne's signatures on the prescriptions were originals or forged; whether the $127,000 he received was for consulting fees or kickbacks for his part in the alleged scheme; and whether he instructed Clark to provide patient information to Moran.

Dr. Auzenne was acquitted on counts 1–7 (participation in fraudulent health-care scheme), but the jury could not reach a verdict on count 8 (materially misleading statement). The district court discharged the jury without objection and entered a "no verdict" notation on the docket for count 8. Dr. Auzenne filed a motion to dismiss that count, claiming retrial on it is barred by double jeopardy.

The district court denied the motion, noting Dr. Auzenne had "not demonstrated that the jury's general verdicts on Counts 1–7 necessarily constitute a finding that he did not participate in the alleged scheme to defraud". In the alternative, the court ruled: "even if the jury necessarily found that [Dr. Auzenne] did not knowingly and willfully participate in the alleged scheme to defraud a health care benefit program, it could still find him guilty on Count 8 based on the alleged cover-up". Retrial on count 8 was set for July 2021, but was stayed, pending this appeal.

II.

The denial of a motion to dismiss on double-jeopardy grounds is an appealable order. *See Abney v. United States*, 431 U.S. 651, 659 (1977). Regarding Dr. Auzenne's appeal from the denial of his motion to dismiss count 8, the court, in granting his motion to stay his retrial pending appeal, ruled he presented the requisite nonfrivolous claim of double jeopardy. *See United States v. Dunbar*, 611 F.2d 985, 988 (5th Cir. 1980) (en banc) (explaining "in any denial of a double jeopardy motion, [the district court] should make written findings determining whether the motion is frivolous or nonfrivolous" and, if the latter, "the trial cannot proceed until a determination is made of the merits of an appeal").

At issue is whether, having been acquitted on counts 1–7, double jeopardy bars Dr. Auzenne's being tried again on count 8, which provides:

> Auzenne executed an affidavit under oath in response to an audit conducted by BCBS attesting that he authorized prescriptions for compounded medications for BCBS members that omitted how: (a) Auzenne had pre-signed blank prescriptions; (b) at Auzenne's direction, Clark had filled in patient and insurance information and faxed these fraudulent prescriptions to Moran; and (c) Moran had completed the fraudulent prescriptions deciding which compounded medications the BCBS members would receive, in violation of Title 18, United States Code Sections 1035 and 2.

"Whether a prosecution violates the Double Jeopardy Clause or [,subsumed in that clause,] is precluded by collateral estoppel are issues of law", reviewed *de novo*. *United States v. Brown*, 571 F.3d 492, 497 (5th Cir. 2009). As noted, collateral estoppel is embodied in the Fifth Amendment's guarantee against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). "[W]hen 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. To determine whether a second trial is barred, our court engages in a two-step analysis.

First, we must "determine which facts were 'necessarily decided' in the first trial". *United States v. Sarabia*, 661 F.3d 225, 229 (5th Cir. 2011) (quoting *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997)). Second, if a fact has been necessarily decided, we consider whether that fact is an essential element of the offense in the second trial. *Bolden v. Warden, W. Tenn. High Sec. Facility*, 194 F.3d 579, 584 (5th Cir. 1999).

Defendant "bears the burden of demonstrating that the issue he seeks to foreclose was necessarily decided". *Sarabia*, 661 F.3d at 229–30 (citations omitted). In determining what the jury has "necessarily decided", we are to "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.* at 230 (quoting *Yeager v. United States*, 557 U.S. 110, 120 (2009)). But, analysis of a hung count, as in this instance, is not relevant to that inquiry because it is impossible to know what a hung count represents. *Id.* (citing *Yeager*, 557 U.S. at 120).

This review "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings". *Id.* (quoting *Ashe*, 397 U.S. at 444). The elements required of each count must also be considered when analyzing what the jury necessarily decided. *Id.* at 231. The mere possibility a fact *may* have been determined is not enough to bar a second trial. *Id.* at 232 (explaining the court's "inquiry does not focus on what the jury *may* have decided, but rather on what it *must* have decided" (emphasis in original)).

If, as discussed *infra*, the court determines an essential fact has not been "necessarily decided", the inquiry ends, and collateral estoppel does not apply. *See, e.g.*, *id.*; *United States v. El-Mezain*, 664 F.3d 467, 554–57 (5th Cir. 2011). Essential facts "constitute essential elements of the offense in the second trial". *Bolden*, 194 F.3d at 584. But, this requires more than a difference in statutory elements. *El-Mezain*, 664 F.3d at 556 n.40 (explaining "if that were the test, the court would never reach the question whether there was a factual identity"). "[C]ollateral estoppel analysis focuses on whether a fact, rather than a legal element, was shared by the offenses in successive prosecutions". *Id.* If the decided fact is "essential", a second trial is barred. *See United States v. Solis*, 299 F.3d 420, 434–35 (5th Cir. 2002). Again, if it is not essential, a second trial is not precluded. *See id.*

A.

In maintaining double jeopardy bars the Government from retrying him on count 8, Dr. Auzenne contends: because the jury acquitted him on counts 1–7, it "necessarily decided" he did not knowingly participate in the fraudulent scheme; for count 8, the Government is required to prove he knowingly "omitted" his participation in the fraudulent scheme from an affidavit; and, by retrying him on count 8, the Government would be required to prove an "issue of ultimate fact" the jury has already found the Government failed to prove beyond a reasonable doubt.

The record reflects the district court erred in concluding the jury's acquittal on counts 1–7 does not "necessarily constitute a finding that [Dr. Auzenne] did not *participate* in the alleged scheme to defraud". (Emphasis added.) As discussed below, this non-participation conclusion is based on examining the record in the requisite "non-technical, commonsense approach" to determine which issues of ultimate fact were actually in dispute at trial. *See United States v. Leach*, 632 F.2d 1337, 1339 (5th Cir. 1980).

Although, as previously noted, the parties dispute essential facts, the jury acquitted Dr. Auzenne on counts 1–7 (and Clark on all of the counts against her: counts 1–5 of those also against Dr. Auzenne). Based on my reviewing the record and considering the jury's acquittal on counts 1–7, the jury must have necessarily decided that Dr. Auzenne was not a participant in the alleged scheme. For example, for the jury to acquit Dr. Auzenne on those counts, it must have necessarily decided: for counts 1–5, he did not pre-sign prescription forms and instruct Clark to fax them to Moran for them to be completed; for count 6, the $127,000 was for consulting fees and not a kickback; and for count 7, Dr. Auzenne had no part in the charged conspiracy to write the prescription for Tramadol.

And, *as the Government concedes for this appeal*, Dr. Auzenne's being a participant in the alleged scheme is a necessary element to the below, again-quoted parts (a) and (b) of count 8. On the other hand, the Government is not estopped from trying him again on part (c) of count 8, because his being a participant is not an essential element for that part of the count. As quoted *supra*, count 8 provides:

> Auzenne executed an affidavit under oath in response to an audit conducted by BCBS attesting that he authorized prescriptions for compounded medications for BCBS members that omitted how: (a) Auzenne had pre-signed blank prescriptions; (b) at Auzenne's direction, Clark had filled in patient and insurance information and faxed these fraudulent prescriptions to Moran; and (c) Moran had completed the fraudulent prescriptions deciding which compounded medications the BCBS members would receive, in violation of Title 18, United States Code Sections 1035 and 2.

Count 8 charges Dr. Auzenne knowingly filed a false affidavit. Although the jury must have necessarily found he was not a participant in the scheme, a rational jury could still find he filed a false affidavit regarding part (c) of count 8, which concerns Moran's conduct. Along that line, and as discussed *supra*, Dr. Auzenne testified, *inter alia*, he: discovered Clark was faxing prescription forms with patients' information to Moran; and became suspicious of Moran's conduct, eventually extricating himself from Custom Care Pharmacy. Further, as also discussed *supra*, both Dr. Auzenne and Robinson testified Rush Hospital administrators confronted Dr. Auzenne about the issue and he informed them he was aware of the problem and had confronted RX Remedies about it. And, as also discussed *supra*, these events occurred before he executed the affidavits.

B.

The majority holds *sua sponte* that we do not have jurisdiction to bar the Government's retrying Dr. Auzenne on parts (a) and (b) of count 8. In support, it relies on our court's decisions in *United States v. Lee* and *United States v. Mock*. In *Lee*, defendant, prior to trial, sought to suppress evidence "tending to show the existence of facts necessarily resolved in his favor in the two earlier trials". 622 F.2d 787, 791 (5th Cir. 1980). The district court declined to do so. *Id.* Defendant challenged this ruling on appeal. *Id.* This court declined to consider the suppression-of-evidence issue, citing *United States v. Mock*, 604 F.2d 336 (5th Cir. 1979). In *Mock*, defendant appealed the denial of his motion in limine to exclude evidence from a previous trial. 604 F.2d at 337.

The majority opinion also relies, *inter alia*, on the Third Circuit's decision in *United States v. Wright*, asserting a holding to the contrary would cause a circuit split. In *Wright*, defendants appealed the district court's denial of their motion to "limit the scope of the new trial to prevent relitigation of issues that were necessarily decided in their favor when the jury acquitted them on several counts" and to bar arguments that would constructively amend the indictment. 776 F.3d 134, 139 (3d Cir. 2015) (citation omitted). The Third Circuit held that it lacked jurisdiction, noting that, "the touchstone for interlocutory jurisdiction is a collateral-estoppel claim that, if successful, would require dismissal of, at a minimum, an entire count". *Id.* at 141.

This case is distinguishable from our court's above-discussed, binding precedent, as well as that relied upon by the majority from other circuits. Again, analysis of the procedure followed in district court before the appeal is critical. Dr. Auzenne has not sought in his appeal to suppress any evidence, let alone evidence from his previous trial. He instead seeks dismissal of count

8, claiming the jury necessarily found he was not a participant in the scheme. Consistent with my analysis, *the Government concedes*: if the jury necessarily decided he was not a participant, it is estopped on remand from prosecuting subparts (a) and (b) of count 8, but could do so on part (c).

That concession, however, has no connection to our having jurisdiction over this appeal. As discussed *supra*, we have jurisdiction regarding count 8. As also discussed *supra*, the jury necessarily found Dr. Auzenne was not a participant in the scheme. By holding that the Government is estopped from prosecuting parts (a) and (b) of count 8, and unlike in *Lee* and *Mock*, we would not be ruling on any evidence suppression previously requested in district court. We would simply be holding the Government to its concession and narrowing count 8 to exclude necessarily decided facts. (Whether the Government's concession is enforced on remand, if it seeks to repudiate it, is, of course for the district court to decide.) Again, as noted in the majority opinion and *supra*, Dr. Auzenne has not asked *on appeal* for any evidence to be suppressed.

C.

In sum, Dr. Auzenne's acquittal on counts 1-7 does not preclude a rational jury's finding he knew Moran was involved in the fraud and did not disclose it in his BCBS affidavits, in which, as stated in count 8, Dr. Auzenne "attest[ed] that he authorized prescriptions for compounded medications for BCBS members". The jury did, however, necessarily find that he was not a participant in the scheme, and therefore, parts (a) and (b) cannot be retried. Restated, because his participation in the scheme to defraud is not an essential element for part (c) of count 8, retrial of that count is not barred, except for parts (a) and (b).

As stated in 1980 in *Lee*—the primary authority relied upon by the majority in holding we lack jurisdiction to bar prosecution of parts (a) and (b) of count 8—"[t]he protection of collateral estoppel is an established rule of federal criminal law and extends to prevent redetermination of evidentiary facts as well as ultimate facts". 622 F.2d at 789 (citations omitted). Barring prosecution of parts (a) and (b) of count 8 is a perfect example of providing this venerable protection, not to mention enhancing greatly judicial economy and efficiency. We are as capable as the able district judge of making the call on collateral estoppel *vel non* for those two parts, and our doing so comports with why interlocutory appeals are permitted for such double-jeopardy, collateral-estoppel issues.

III.

For the foregoing reasons, I respectfully dissent in part.