



must identify what the jury, at the first trial of this case, necessarily decided as to any particular count on which it acquitted. *United States v. Giarratano*, 622 F.2d 153, 156 (5th Cir. 1980) (the claim of collateral estoppel must be rejected in the absence of “specific evidence” of knowing the basis of a prior acquittal). This showing imposes a great burden on the defense. *United States v. Cala*, 521 F.2d 68, 70 (2d Cir. 1974) (stressing that it is a “rare case where a defendant can sustain his burden of establishing that the prior jury necessarily decided an essential issue in his favor”); *United States v. Gugliaro*, 501 F.2d 68, 70 (2d Cir. 1974) (“it usually cannot be determined with any certainty upon what basis the previous jury reached its general verdict”); *United States v. Mahaffy*, 499 F. Supp. 2d 291, 296 (E.D.N.Y. 2007) (“It is unusual for a defendant to be able to meet this burden.”) (citing *Cala*). Mere speculation regarding the basis of acquittal is insufficient: A defense claim of collateral estoppel necessarily fails where a “rational jury *could have* grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (emphasis added).

Each of the factual propositions embodied by each essential element of a charged offense must be proved in a criminal case. Unlike a jury’s guilty verdict, which establishes that certain factual propositions are true, “[a] not guilty verdict is not fairly to be characterized as a finding that even one [factual] proposition is false, or that its opposite is true.” *United States v. Hogue*, 812 F.2d 1568, 1578 (11th Cir. 1987). In short, an acquittal proves nothing for purposes of issue-preclusion analysis. Because any attempt to identify the basis of the jury’s acquittals amounts to little more than guesswork, Defendant Coker’s Motion to Dismiss must be denied.

Even so, defendant Coker’s Motion to Dismiss unjustifiably relies on *United States v. Coughlin*, 610 F.3d 89 (D.C. Cir. 2010), to bolster the erroneous conclusion that his acquittal on

Count 29, charging him with committing Honest Services Wire Fraud, necessarily forecloses retrying Count 31, which also charged him with committing Honest Services Wire Fraud. But *Coughlin* is inapposite, and its holding is fact-specific.

In pertinent part, *Coughlin* involved a defendant charged with committing five counts of mail fraud in violation of 18 U.S.C. § 1341. At trial, the jury acquitted the defendant on three of the five counts, and hung on the remaining two. *Coughlin*, 610 F.3d at 391. On appeal, the defendant argued that the Double Jeopardy Clause foreclosed retrial of the two remaining counts, and the D.C. Circuit agreed, but only “[b]ased on the record before [it].” *Id.* at 98. In reviewing the trial record, the D.C. Circuit highlighted that the *sole* “defense at trial was that [the defendant] lacked fraudulent intent because he had always acted in good faith.” *Id.* The D.C. Circuit further noted that the jury instructions had made clear that any reasonable doubt as to whether the defendant had acted in good faith must result in acquittal on the mail-fraud counts. *Id.* Based on that records, the D.C. Circuit held that “the jury *necessarily* found that [the defendant] lacked fraudulent intent when he mailed each of the three letters referenced in” the three mail-fraud acquittals. *Id.* (emphasis added).

Here, unlike *Coughlin*, it is impossible to determine precisely why the jury acquitted any of the defendants on some Honest Services Fraud charges, but not others. Defendant Coker’s acquittal as to Count 29 does not, on its own, explain the basis of the jury’s findings. *Hogue*, 812 F.2d at 1578 (“a not guilty verdict is not fairly to be characterized as a finding that even one [factual proposition] is false”). Nor does the trial record provide clarification: The record shows that the defendants raised numerous arguments in opposition to the charges. For example, as the United States pointed out in its Combined Opposition, in only the first 10 of 41 pages of his summation, defendant McGregor alone raised nine different issues as potential bases for acquittal. Gov’t

Combined Opp. at 61 n.14 (citing (Trial Tr. Vol. 36, 186-196, Aug. 3, 2011)). Because nine defendants, including McGregor and Coker, were jointly charged in Counts 29 and 31, the myriad potential bases of acquittal raised by one of them could have influenced verdicts as to any of them. The broad-brush nature of the defense arguments further punctuates the difficulty in identifying the root of the jury's verdicts. In sum, it simply is not possible to determine on which of these diverse grounds the jury acquitted defendant Coker with respect to Count 29.

Moreover, implicit to defendant Coker's Double Jeopardy argument with respect to Counts 29 and 31 is the unwarranted assumption that the two counts are indistinguishable. This ignores, however, key differences in the calls that could have affected how the jury decided elements necessary for a conviction under Honest Services Wire Fraud. As the Court instructed the jury, such a conviction requires proof that a defendant transmitted or cause to be transmitted a wire communication, such as a telephone call, to help carry out, further, or assist a scheme to defraud, Dkt. No. 1640 at 32. Based on these predicates, a rational jury may very well have identified significant differences between the evidence offered to prove Counts 29 and 31, such that jurors unanimously deemed defendant Coker worthy of acquittal as to the former, but not the latter.

As the Court itself aptly recognized during a recent oral argument, "We don't know why the jury decided to do what it did." (Tr. Oral Argument, 83: 14-15, Aug. 25, 2011.) Notably, Counts 29 and 31 were based on separate telephone calls (calls J-136 and J-138, respectively), each of which transmitted a different substantive conversation, of varying length, on a different day. These were wholly separate conversations. Focusing on the differences between the telephone calls, some jurors could have concluded that Count 31, but not Count 29, involved wire transmissions "caused" by defendant Coker "to help carry out the scheme to defraud" in furtherance of the alleged bribery



CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

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