

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL NELSON CURRIER,)
)
) Petitioner,)
)
) v.) No. 16-1348
)
) VIRGINIA,)
)
) Respondent.)
)

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 16-1348, Currier versus Virginia.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

There's no dispute that if Virginia, like Nevada, required severance under the circumstances here, issue preclusion would be available with respect to the second trial. That much is dictated by Turner versus Arkansas.

JUSTICE SOTOMAYOR: Doesn't it --

MR. FISHER: So the only --

JUSTICE SOTOMAYOR: Doesn't -- I'm sorry. Why do you say that? Meaning, what Nevada says is no severance, if both parties consent. So why isn't that exactly like Nevada? If you hadn't consented, severance would have been required, correct?

MR. FISHER: So my understanding of

1 Nevada law, and just I'm --

2 JUSTICE SOTOMAYOR: Yeah --

3 MR. FISHER: -- without getting into
4 the weeds of exactly what any particular other
5 state law than Virginia requires, but all I'm
6 saying is state law required severance under
7 the circumstances here without --

8 JUSTICE SOTOMAYOR: Well, it requires
9 --

10 MR. FISHER: -- respect to what the
11 parties --

12 JUSTICE SOTOMAYOR: -- severance
13 unless both parties agree.

14 MR. FISHER: That's what Virginia law
15 says, Your Honor.

16 JUSTICE SOTOMAYOR: Right.

17 MR. FISHER: Right. So I'm
18 distinguishing Virginia law from a state like
19 Nevada or a state like Arkansas in Turner that
20 just simply demands severance, and it's not up
21 to the parties.

22 JUSTICE SOTOMAYOR: I don't know why
23 that's not the same.

24 MR. FISHER: Oh, I think --

25 JUSTICE SOTOMAYOR: Meaning it --

1 MR. FISHER: We think it is the same,
2 Your Honor. So what I'm trying to say is, is
3 that in a state that demands severance, all
4 agree, even my opponents agree, that issue
5 preclusion would be available.

6 JUSTICE SOTOMAYOR: That's Turner.

7 MR. FISHER: That's Turner.

8 JUSTICE SOTOMAYOR: All right.

9 MR. FISHER: Our case --

10 JUSTICE SOTOMAYOR: So Turner says
11 that. Why is this any different? This says --

12 MR. FISHER: I don't think it is.

13 JUSTICE SOTOMAYOR: Okay.

14 MR. FISHER: I don't think it is. And
15 so the only question in this case, though, is
16 whether the fact that Virginia law, as you say,
17 Justice Sotomayor, allows both parties to agree
18 to have a joint trial instead of the default of
19 severance, whether that makes a difference.

20 JUSTICE ALITO: Well, what to
21 default --

22 MR. FISHER: And we think --

23 JUSTICE ALITO: To sort of bracket
24 this problem, what about a jurisdiction like
25 the U.S. courts, where severance is not

1 required, where there's -- says nothing about
2 severance?

3 MR. FISHER: I think there's some
4 variance, Your Honor, across the federal
5 courts, but to take your question of one
6 like --

7 JUSTICE ALITO: All right. Well, take
8 the -- take the -- the model of the
9 jurisdiction that says nothing about severance
10 of -- of -- of this claim -- of charges like
11 these.

12 MR. FISHER: Well, we think the answer
13 there would be the same as well, but I would
14 concede it would be a slightly harder case.
15 But the point -- and there are two distinct
16 reasons why consenting to severance in this
17 situation or even, Justice Alito, in the
18 hypothetical you describe should not waive the
19 right to issue preclusion.

20 First, the issue preclusion is a
21 distinct right from the right against multiple
22 trials. And simply consenting to separate
23 trials is not inconsistent with later invoking
24 issue preclusion.

25 JUSTICE GINSBURG: Mr. Fisher --

1 MR. FISHER: And the second --

2 JUSTICE GINSBURG: -- is that -- is
3 that distinction, that it's not like claim
4 preclusion, more academic than real? That is,
5 in this case, suppose you're right and there
6 can be no retrial of the breaking and entering
7 or of the theft.

8 What's left? What would a prosecutor
9 -- could a prosecutor realistically put on any
10 case for the felon-in-possession charge?

11 MR. FISHER: Well, I think, Justice
12 Ginsburg, it might be a challenge in this case,
13 but it is certainly not theoretical in every
14 case and not even necessarily in this case,
15 depending on how the state would set out to
16 prove the gun charges in the second trial.

17 And I think this is brought out most
18 clearly in the Wittig opinion that Judge
19 Gorsuch -- then Judge Gorsuch wrote for the
20 Tenth Circuit, and that opinion makes it very
21 clear that what issue preclusion provides is
22 the right, as -- as the court put it there, to
23 be tried in a particular way. And so, in some
24 circumstances, like the Ashe case itself, that
25 is functionally going to bar the second trial.

1 But, in other cases, like the Wittig
2 case, there will be the opportunity for the
3 government to go forward in the second trial.
4 And that alone defeats the other side's waiver
5 argument because inconsistency is required for
6 a waiver by conduct, and that's the holding of
7 Jeffers and all of the other double jeopardy
8 cases they cite.

9 JUSTICE ALITO: But there is no issue
10 preclusion clause in the Constitution. There's
11 the -- the double jeopardy provision of the
12 Fifth Amendment, which says that no "person
13 shall be subject for the same offense to be
14 twice put in jeopardy of life or limb."

15 So isn't Ashe -- doesn't Ashe simply
16 provide one definition of the same offense?

17 MR. FISHER: Yes, that's what the
18 Court said in Yeager. And I think, to -- to
19 bring that out a little more fully, what Judge
20 Friendly said in the Kramer opinion, and which
21 we think is correct, is when somebody is tried
22 for technically a second crime, but one which
23 depends upon proving allegations the first jury
24 necessarily rejected because it arose from the
25 same transaction and the jury decided those

1 issue -- issues against the prosecution, then
2 you are functionally being tried for the same
3 offense.

4 JUSTICE ALITO: Yeah, but in Jeffers,
5 the Court held that when the second trial
6 involves the same offense under the Blockburger
7 test and the defendant consents, the second
8 trial can go forward. So why should it not
9 follow that when the defendant consents, if, in
10 fact, that is done, and the second trial
11 involves the same offense under Ashe, this rule
12 should be the same?

13 MR. FISHER: Well, for two reasons,
14 Justice Alito. The first is, is because, at
15 that level of generality, I see your point, but
16 if you look at the specific right involved in
17 Jeffers, the defendant requested two trials and
18 then tried to stop the second trial. So that
19 is fundamentally taking inconsistent positions.

20 Here, Mr. Currier simply consented to
21 separate trials. He didn't object to the
22 second trial as such. He just said you cannot
23 try me in the second case by reproving -- by
24 trying to prove allegations that were rejected
25 in the first trial.

1 JUSTICE ALITO: But wouldn't it be odd
2 to say that the defendant in Jeffers has a
3 lesser double jeopardy right when what he is
4 asserting is consistent with what the Double
5 Jeopardy Clause was originally understood to
6 mean, whereas, in a situation like this, what
7 the defendant is asserting is something that
8 was developed by our cases in the modern era
9 but was not what the Double Jeopardy Clause was
10 originally intended to mean.

11 So, when the defendant is asserting
12 the core double jeopardy right and says, I want
13 a second trial, there can be a second trial,
14 but when the defendant is asserting this new
15 elaboration of the right, there can't be a
16 second trial. Isn't that rather odd?

17 MR. FISHER: We don't think so, and
18 let me leave aside for the moment the question
19 whether Ashe is true to the original
20 understanding and just distinguish Jeffers in
21 this way: Which is Ashe deals with the
22 inviolacy of acquittals, and that, Justice
23 Alito, is the molten core of the -- of the
24 Double Jeopardy Clause, the right not to be
25 tried again for something of which you've been

1 acquitted.

2 And so what the Court said in Ashe and
3 what Judge Friendly said in Kramer before it
4 was the core of the Double Jeopardy Clause does
5 indeed preclude retrials following acquittals,
6 and to have that guarantee, that historical
7 guarantee, have meaning in modern times, it
8 needs to apply under the circumstances here.

9 JUSTICE KAGAN: Mr. Fisher --

10 CHIEF JUSTICE ROBERTS: Well, what --
11 go ahead.

12 JUSTICE KAGAN: First, you had a
13 second point you wanted to make, and then I
14 have a question.

15 MR. FISHER: Thank you.

16 JUSTICE KAGAN: But I just wanted to
17 hear your second point.

18 MR. FISHER: Thank you. I'll get it
19 on the table. The second -- and this is the
20 second point to Justice Alito as well, which is
21 the competing interests involved in a case like
22 this, as compared to Jeffers, are dramatically
23 different.

24 And if I could give one more sentence
25 on that, the reason why is because here we're

1 dealing with an acquittal as opposed to a
2 conviction or simply a mistrial. And on the
3 other hand, because we're dealing with an
4 acquittal and because we're just imposing issue
5 preclusion, the prosecution has a full and fair
6 opportunity to prove all of its charges. And
7 so that's what's being taken away from the
8 prosecution in cases like Jeffers and why the
9 Court says it's not fair.

10 But here, the prosecution by
11 definition has an opportunity to prove all of
12 its allegations in the second trial -- is
13 precluded only to the extent that the
14 prosecution would try to retread that ground.

15 JUSTICE KAGAN: Here -- here's my
16 question: Suppose that in this case the court
17 had made very clear to your client the
18 consequences of agreeing to sever. In other
19 words, suppose that there had been some kind of
20 colloquy and the court had said: You know, if
21 you agree to this, one of the things you're
22 agreeing to is that there would -- you won't be
23 able to get issue preclusive effect. Would
24 that be perfectly fine?

25 MR. FISHER: Well, first of all,

1 Justice Kagan, it would not be okay under
2 Virginia law. But setting that part aside, I
3 think that would be a very different question
4 for two reasons.

5 One is you'd have express waiver in
6 that hypothetical if Mr. Currier agreed to that
7 procedure, and here, I think all agree this is
8 a waiver by conduct case.

9 JUSTICE KENNEDY: Do all parties --

10 MR. FISHER: So what you would --

11 JUSTICE KENNEDY: Please, continue.

12 MR. FISHER: So what you would have
13 there is an unconstitutional conditions
14 question. And I think the Court -- those are
15 very hard questions and depend very much on the
16 facts of this case.

17 JUSTICE KAGAN: I mean, I guess the --
18 the reason I ask this is because it seems to me
19 that maybe the problem in this case has to do
20 with the fact that people just don't know what
21 the background rule is, and that we could
22 establish a background rule almost whichever
23 way we establish the background rule and people
24 would then be aware of the consequences going
25 forward when they agree to sever.

1 MR. FISHER: Well, as I said, if you
2 establish the background rule in our favor, I
3 think everything is fine. If you were to
4 establish the background rule the other way or
5 if a state were --

6 (Laughter.)

7 MR. FISHER: -- if a state were to,
8 you'd have an unconstitutional conditions
9 question there.

10 JUSTICE KENNEDY: Is it clear that
11 under Virginia law there could not be a joint
12 trial?

13 MR. FISHER: There could be a joint
14 trial, Justice Kennedy, both --

15 JUSTICE KENNEDY: Is it -- is it clear
16 that severance had to be -- had to be ordered?

17 MR. FISHER: So the Hackney case,
18 which is cited in the briefs, lays out Virginia
19 law, and what it says is the trial court must
20 sever unless both parties agree to joinder.

21 And here, both parties consented to
22 the default severance procedure. That's at JA
23 47 and 48.

24 JUSTICE SOTOMAYOR: Mr. Fisher, the
25 government --

1 JUSTICE KENNEDY: But -- but isn't --
2 isn't -- doesn't that really set up a waiver?
3 Isn't that something like a waiver if he
4 doesn't agree?

5 MR. FISHER: Well, we don't think --
6 we don't think simply agreeing to what the
7 state wants to have in the first place, both as
8 a matter of state law and the prosecutor in
9 this case, should saddle the defendant with
10 waiver by conduct.

11 But if you think -- if you're still
12 not persuaded by that, I would give you the two
13 other reasons I gave Justice Alito, which is to
14 say waiver by conduct can be established only
15 by inconsistency of positions. And there's no
16 inconsistency in Mr. Currier's positions.

17 And the -- the equities or the
18 competing interests are completely different
19 than all the double jeopardy cases in which
20 they find waiver.

21 It's important to recognize, Justice
22 Kennedy, all the other side's cases that deal
23 with waiver or waiver by conduct or whatever
24 the Court calls it in those cases, all deal
25 with the right to multiple trials. They all

1 deal with people who were convicted or there
2 was a mistrial.

3 They don't have a single case, and the
4 Court has never held, that the right to the
5 preclusive effect of an acquittal in any form,
6 whether it's claim preclusion or issue
7 preclusion, can be waived. And so --

8 JUSTICE KENNEDY: Are there any cases
9 where there are bifurcated trials, in other
10 words, the jury -- it's the same jury, but they
11 try the breaking and entering first and the
12 felon-in-possession second, and, if so, would
13 issue preclusion apply there as well?

14 MR. FISHER: So there are no cases
15 from this Court dealing with bifurcation. The
16 Indiana amicus brief describes the fact that
17 some states actually handle this situation by
18 bifurcation. And we think the outcome there
19 and the rules there would be the same as in
20 severance because --

21 JUSTICE SOTOMAYOR: Mr. Fisher, what
22 would happen in those bifurcated trials where
23 -- it happens routinely in the Second Circuit:
24 Same jury, you try the breaking and entering
25 first or the robbery first, and then you try

1 the felon-in-possession.

2 Would double jeopardy bar the trial of
3 the gun once there's been a conviction on the
4 first charge, on the robbery or the breaking
5 and entering?

6 MR. FISHER: Not if there's a
7 conviction, Your Honor, but if there's an
8 acquittal.

9 JUSTICE SOTOMAYOR: Under Jeffers.

10 MR. FISHER: Under Jeffers.

11 JUSTICE SOTOMAYOR: But what you're
12 saying is if there's not, if there's an
13 acquittal, that issue preclusion would bar the
14 second trial?

15 MR. FISHER: That's right. And I
16 think maybe it's --

17 JUSTICE SOTOMAYOR: That's Turner?

18 MR. FISHER: That's Turner. It's also
19 Yeager. I think it's important for the Court
20 to understand how close this case is to Yeager.
21 And --

22 JUSTICE SOTOMAYOR: By the way, it was
23 the government who went to the defendant and
24 said consent to or agree to the severed trials?

25 MR. FISHER: So my understanding is,

1 is that during pre-trial proceedings, the
2 government -- or, I'm sorry, the state, the
3 Commonwealth --

4 JUSTICE SOTOMAYOR: Yes.

5 MR. FISHER: -- reached out to the
6 defense and said: It looks like we have to
7 sever in this case, do you agree? The defense
8 said yes. And so that's reflected, as I said,
9 at pages 47 and 48 of the Joint Appendix.

10 JUSTICE SOTOMAYOR: And just so we
11 state the default rule clearly, to have a -- to
12 have a joint trial, both parties have to agree;
13 otherwise, law mandates severance?

14 MR. FISHER: Correct. And that's
15 clearly in Hackney.

16 CHIEF JUSTICE ROBERTS: I thought --

17 MR. FISHER: But if I could return
18 to --

19 CHIEF JUSTICE ROBERTS: I thought that
20 under Powell, if you're -- you're convicted on
21 a count that is inconsistent with counts on
22 which you've been acquitted, that that's --
23 that's still a conviction?

24 MR. FISHER: That is, Your Honor. I'm
25 glad you asked about Powell, because it brings

1 me back to Yeager. And so let me distinguish
2 the two cases.

3 What Powell says is that if a jury
4 simultaneously convicts and acquits on -- on
5 counts that are in an inconsistent manner, we
6 accept that verdict in all of its form, as you
7 know. And the reason why is because the
8 acquittal cannot be taken to establish any
9 facts against the prosecution.

10 But what Yeager holds is that even in
11 a circumstance where the prosecution brings --

12 CHIEF JUSTICE ROBERTS: Just to --
13 just to pause, why is that?

14 MR. FISHER: Because it's out of
15 respect for the jury, Your Honor. That's the
16 thread that runs through these cases.

17 In -- in Powell, the Court said the
18 jury might have been exercising mercy, as is
19 its right, and so we're not going to upset the
20 acquittal any more than we're going to upset
21 the conviction in the other direction.

22 CHIEF JUSTICE ROBERTS: So we have
23 respect for the same jury but not for two
24 different ones --

25 MR. FISHER: Well --

1 CHIEF JUSTICE ROBERTS: -- in the same
2 -- in the same -- under the same indictment?

3 MR. FISHER: No, but we -- no -- it
4 brings me right back to Yeager. So we haven't
5 had the second jury at the time issue
6 preclusion is invoked. And so remember what
7 happened in Yeager. The prosecution brought
8 all of its charges at once. The jury came back
9 with acquittals on some counts and hung on the
10 other counts. So the -- so the government
11 tried to prosecute everything at once, was
12 unable to get a verdict out of the jury on some
13 counts.

14 What the Court said there is that when
15 we can look at an acquittal alone, without a
16 conviction, and say that acquittal establishes
17 certain facts against the prosecution, issue
18 preclusion applies.

19 JUSTICE KENNEDY: Suppose you --

20 MR. FISHER: And so really --

21 JUSTICE KENNEDY: Suppose you prevail
22 in this case. Would a state then say, okay,
23 what we'll do is we'll just try both -- both of
24 them together, and the jury will hear all the
25 evidence about the felony.

1 Don't -- do you -- are you happy with
2 what you wish for here?

3 MR. FISHER: Justice Kennedy, that's
4 not been the experience in states that have our
5 rule. So, as we lay out in -- at our -- at a
6 footnote in our reply brief, Florida and Iowa
7 are two states that have had our rule for
8 decades, and there have been no change in the
9 way severance has --

10 JUSTICE BREYER: Why? Why? That's --
11 I mean, that's the part -- the point that was a
12 very practical point.

13 When I'm a judge on the First Circuit,
14 I would say in multiple party, multiple, you
15 know, gang cases and so forth, one of the most
16 common things was a defendant would appeal,
17 either saying it should have been a sever, he
18 should have been severed if he wasn't, or he
19 shouldn't have been if he was, and so forth.
20 Very, very common.

21 And so what was worrying me is that
22 the prosecution, if we -- if we adopt something
23 like you say, and the defendant comes in and
24 says, I want to be severed here at least as to
25 some of the counts, the prosecutor thinks, if I

1 agree to that, I don't know what's going to
2 happen.

3 You know, we'll get some kind of a
4 verdict in this first case. And all I know in
5 the second case is that his lawyer is going to
6 argue that there are various aspects of it that
7 are inconsistent with going ahead with this and
8 we're not going to be ahead with it. At worst,
9 there will be some appeals. It's going to be a
10 nightmare. And the best thing for me to do is
11 just say no.

12 And -- and that is exactly what is
13 worrying me. And -- and you have an
14 alternative. You can say treat the severance
15 as if it were a single trial and just, as you
16 say, he waived the double jeopardy matter when
17 he appeals, so you could say he waived it when
18 he asked for the second trial, you know, when
19 he asked for the separate trial.

20 I have a problem with theirs too, so
21 I'm not just saying that -- that this is the
22 problem I had with yours. So you say, well, it
23 hasn't worked out that way in Florida. Hmm.

24 MR. FISHER: Well, as -- as I say, to
25 the extent we have empirical evidence, it -- it

1 -- it supports my position. Let me give you --

2 JUSTICE BREYER: Why wouldn't it work
3 out that way?

4 MR. FISHER: Let me tell you two
5 reasons --

6 JUSTICE BREYER: Yeah.

7 MR. FISHER: -- Justice Breyer. So
8 the first is remember why severance is -- is --
9 is the default rule here in the first place.
10 It's because of the confounding influence that
11 prior convictions have on a jury's ability to
12 reach accurate verdicts. And prosecutors, just
13 like defense lawyers, have a very strong
14 interest in accurate verdicts out of criminal
15 trials.

16 And, secondly, even from a research
17 management standpoint, which sounds to me more
18 like what you're thinking about here, the
19 prosecution may well agree to severance for a
20 couple of reasons.

21 One is because, if -- if the
22 prosecution gets a conviction, the prosecution
23 can choose to try its stronger claim first. If
24 the prosecution gets a conviction, the
25 prosecution can do just what the state

1 suggested it was going to do here, which is
2 just drop the second charge because it's a --

3 JUSTICE BREYER: But there will be
4 reasons --

5 MR. FISHER: -- less important crime.

6 JUSTICE BREYER: What I'm worried
7 about --

8 MR. FISHER: And it would run
9 concurrent.

10 JUSTICE BREYER: I'm worried about
11 other -- that there are other situations. And
12 the most common claim was I should have been
13 severed and I wasn't, or vice versa, they never
14 win. I mean, the claim hardly ever wins.

15 It's really left to the trial judge.
16 And so I -- I -- I recall that.

17 MR. FISHER: Well, we don't have a
18 problem leaving severance decisions to trial
19 judges according to the various rules across
20 the country. All we're saying is if a
21 defendant --

22 JUSTICE BREYER: Yeah, I'm not -- that
23 isn't -- I'm just so worried about this
24 prosecutor who now is going to take the
25 government's position against and throw, in a

1 very big trial with 19 defendants, some guy who
2 happened to be on the corner, you know, and the
3 jury isn't going to distinguish among them, and
4 you see where I'm going.

5 MR. FISHER: Remember, though, Justice
6 Breyer, I don't think prosecutors are going to
7 necessarily act that way because they have an
8 interest in justice just like the defense does.

9 And, secondly, think -- if they play
10 it out in their minds, if they get a conviction
11 in the first case, they're very likely to just
12 drop the second case or, if the second case is
13 also important, the defense at that point --

14 JUSTICE BREYER: I see, I see.

15 MR. FISHER: -- is likely to plead
16 because he's already been to trial on roughly
17 the same facts.

18 JUSTICE SOTOMAYOR: Mr. Fisher, don't
19 we have a case that says this issue preclusion
20 is only between the same parties?

21 MR. FISHER: Yes, you do, Justice
22 Sotomayor, so I --

23 JUSTICE SOTOMAYOR: And we have a case
24 that says, if another defendant gets an
25 acquittal, that doesn't help you?

1 MR. FISHER: That's Standefer. That's
2 right. And so, Justice Breyer, I think, is --
3 to the extent you're asking about other
4 defendants, that's a separate problem, but I
5 think you're also asking about same defendants.
6 And let me just continue to play that out for
7 you.

8 So the -- even when the conviction
9 happens, it's going to be very unlikely that --
10 that there's going to be a drain on resources
11 or any problem. Remember, an acquittal in the
12 first case is going to be very, very rare, as
13 they are in criminal cases.

14 JUSTICE ALITO: But do you think the
15 result --

16 MR. FISHER: When an acquittal happens
17 --

18 JUSTICE ALITO: I'm sorry. Finish
19 your sentence.

20 MR. FISHER: Oh, I'll just finish my
21 sentence. When an acquittal happens, the
22 prosecution then may well drop the second
23 charges. But if the prosecution pushes ahead,
24 that's exactly what the Double Jeopardy Clause
25 is concerned with.

1 JUSTICE ALITO: Is -- is there
2 anything to indicate that the result would be
3 different -- would have been different in
4 Jeffers if the first trial had been an
5 acquittal?

6 MR. FISHER: Well, the justice who
7 wrote Jeffers, Justice Blackmun, signed on to
8 Green as --

9 JUSTICE ALITO: Yeah. He said --

10 MR. FISHER: -- later on, saying yes,
11 it would have been different.

12 JUSTICE ALITO: He said it later.

13 MR. FISHER: Yeah.

14 JUSTICE ALITO: But the Double
15 Jeopardy Clause doesn't draw a distinction
16 between convictions and -- and acquittals, does
17 it?

18 MR. FISHER: Well, in case after
19 case -- I think Scott is the best example I
20 could give you, where Chief Justice Rehnquist
21 went on at great length about how there's a
22 special place for acquittals under the Double
23 Jeopardy Clause and special rules apply to
24 acquittals.

25 Just -- just take, for example, an

1 appeal for -- appeal for sufficiency of the
2 evidence. If an appellate court finds that
3 there's insufficient evidence and therefore the
4 defendant should have been acquitted, he cannot
5 be retried. On the other hand, if the
6 appellate court finds that simply there was
7 some other error in the case, he can be
8 retried.

9 So the Double Jeopardy Clause does
10 already distinguish in multiple ways between
11 acquittals and convictions.

12 CHIEF JUSTICE ROBERTS: Well, but not
13 entirely. The -- the distinction doesn't hold
14 up in Bravo-Fernandez.

15 MR. FISHER: Well, Bravo-Fernandez, as
16 I said, is a case like Powell. And so let me
17 be clear what I mean when --

18 CHIEF JUSTICE ROBERTS: Yeah, I think
19 so.

20 MR. FISHER: -- when I say acquittal.
21 What I mean by an acquittal is not simply the
22 piece of paper of an acquittal but an acquittal
23 that we can say establishes an issue of
24 ultimate fact against the prosecution.

25 And so, when we have an acquittal like

1 that, which is what we had in Yeager and which
2 was distinguished from the situation in Powell
3 and later distinguished from Bravo-Fernandez,
4 then that acquittal has issue-preclusive
5 effect. And the Court has never held to the
6 contrary on those facts and that are clearly
7 our facts here, and it's clearly Turner as
8 well.

9 A case where the prosecution is forced
10 to wait for its second case, to be -- for the
11 second counts to be tried, but as soon as the
12 jury comes back with an acquittal, the Double
13 Jeopardy Clause and, indeed, the Constitution
14 in general vests that acquittal with special
15 inviolacy. And this goes all the way back to
16 Justice Story's Commentaries, where he said
17 that -- that acquittals have to be -- that the
18 purity and dignity of acquittals needs to be
19 respected, and that is a core purpose of the
20 Double Jeopardy Clause.

21 JUSTICE KENNEDY: Suppose --

22 JUSTICE GINSBURG: Here -- here, we're
23 not --

24 JUSTICE KENNEDY: I'm still interested
25 in what happens if you prevail. Why wouldn't

1 the prosecution have the option then to try the
2 felon-in-possession charge first?

3 MR. FISHER: Sure. We don't have a --
4 the prosecution is the -- is -- is the
5 plaintiff. And so the prosecution presumably
6 can choose which case it wants to try first.

7 All we're saying, Justice Kennedy --

8 JUSTICE KENNEDY: Would you do that in
9 a bifurcated trial?

10 MR. FISHER: Pardon me?

11 JUSTICE KENNEDY: Would you do that in
12 a bifurcated trial anywhere?

13 MR. FISHER: Well, I think you might
14 have a challenge -- if your bifurcation dealt
15 with the same jury --

16 JUSTICE KENNEDY: Yes.

17 MR. FISHER: -- once you got the --
18 once you got the prior conviction out in front
19 of the jury, I think then you might have a --
20 you might have a problem under state law in --
21 in dealing with the prior convictions. But in
22 general, Justice Kennedy, remember, this
23 question's going to come up in scenarios that
24 don't deal with prior convictions.

25 And this brings me back to Justice

1 Alito's question, I think. You know, the other
2 side's position here is not just that in a case
3 like this issue preclusion wouldn't be
4 available; the other side's position, I think,
5 leads inevitably to the conclusion that if
6 there were a greater and lesser offense and the
7 first trial was for the lesser offense and the
8 defendant was acquitted, that in this situation
9 the defendant would not even be able to invoke
10 the right to issue preclusion.

11 And that I think is a highly unjust
12 result. And so the prosecution --

13 JUSTICE GINSBURG: Mr. Fisher, the
14 issue preclusion was taken over into the
15 criminal context in Ashe, but it originated in
16 civil cases.

17 Is there any difference between issue
18 preclusion as it would apply in a civil case
19 and in a criminal case?

20 MR. FISHER: Well, not for purposes of
21 this case, Justice Ginsburg. As -- as -- as
22 the Court wrote in Bravo-Fernandez, you have to
23 be careful in criminal cases when you decide
24 what issues of ultimate fact the first jury
25 decided because of the nature of general

1 verdicts in criminal cases.

2 But, as to the scope of issue
3 preclusion once you establish what issues of
4 ultimate fact were decided against the
5 prosecution in the first case, it's exactly the
6 same rule that carries over to --

7 JUSTICE GORSUCH: Mr. Fisher, are we
8 confident that civil issue preclusion would
9 apply in circumstances like these, where a
10 party consents to a bifurcated trial, or might
11 it be more law of the case where it's more
12 equitable?

13 I know you cite an old Tenth Circuit
14 case suggesting issue preclusion might apply
15 here, but it's -- it's a malleable doctrine
16 even in the civil context. And when a party
17 consents to two trials, it may or may not
18 apply. And law of the case, if it's the same
19 jury and bifurcated, it -- it very well might
20 not.

21 So what do we do about that?

22 MR. FISHER: So let me say two things,
23 Justice Gorsuch. First, we looked as hard as
24 we could and were only able to scrape out a few
25 cases. The other side --

1 JUSTICE GORSUCH: An unpublished New
2 York district court opinion.

3 MR. FISHER: We cited what we found.

4 JUSTICE GORSUCH: Yeah.

5 MR. FISHER: The other side I don't
6 think disputes -- you can ask them, but I
7 didn't take them to dispute our -- our
8 representation based on civil law, the civil
9 side of things.

10 And also I'd point you to Judge
11 Friendly's opinion in Kramer, where, on page
12 917, he surveys older cases from this Court
13 that are civil, and those cases, the Keokuk
14 case is one.

15 JUSTICE GORSUCH: But you'd agree in
16 civil cases -- or maybe you wouldn't, tell me
17 if I'm wrong -- that in civil cases it's not a
18 foregone conclusion that issue preclusion would
19 apply in these circumstances. It might be law
20 of the case, and it might be subject to some
21 consideration about the defendant's consent? I
22 mean --

23 MR. FISHER: Well, we --

24 JUSTICE GORSUCH: -- you'd agree that
25 your research did not prove that this would be

1 obviously precluded even in a -- in a civil
2 matter?

3 MR. FISHER: Well -- well, I'll just
4 say our research uncovered limited authority to
5 that effect. So there's not a --

6 JUSTICE GORSUCH: Fair --

7 MR. FISHER: -- absolute answer.

8 JUSTICE GORSUCH: Fair enough. Yeah.

9 MR. FISHER: But we think it should
10 apply for all the same reasons we'd be saying
11 here. But the -- I would just add to that,
12 though, if there's any doubt that the reason
13 for applying issue preclusion is enhanced in
14 the criminal context when you have the special
15 nature of an acquittal --

16 JUSTICE GORSUCH: Well, what do we do
17 about --

18 MR. FISHER: -- and that's --

19 JUSTICE GORSUCH: What do we do about
20 the fact that claim preclusion in the criminal
21 context isn't as robust, in the criminal
22 context, under Blockburger as it would be in
23 the civil context? We use a transaction test
24 in the civil context and an elements test in
25 the criminal context. We shouldn't be

1 concerned that it's anomalous that it would be
2 creating a -- an issue preclusion doctrine that
3 may be more robust than in the civil context
4 here, even though in claim preclusion it's less
5 robust?

6 MR. FISHER: Well, I think, Justice
7 Gorsuch, it's perhaps helpful to separate --
8 separate out the substantive boundaries of the
9 doctrine, whether it be claim preclusion and
10 issue preclusion, from the -- from the question
11 whether they can be waived.

12 And so we leave the substantive
13 boundaries of issue preclusion and, obviously,
14 claim preclusion where we found them. But as
15 to waiver, we don't think it's anomalous to say
16 that an acquittal -- the preclusive effect of
17 an acquittal is harder to waive than the right
18 to claim preclusion for the competing interests
19 I've mentioned and because of the lack of
20 inconsistency.

21 If I could reserve my time.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. McGuire.

25

1 ORAL ARGUMENT OF MATTHEW R. MCGUIRE
2 ON BEHALF OF THE RESPONDENT

3 MR. MCGUIRE: Mr. Chief Justice, and
4 may it please the Court:

5 The difficult question presented in
6 this case can be answered by applying the logic
7 of three principles this Court has already
8 embraced.

9 First, when a defendant agrees to have
10 multiple trials, he gives up his right to argue
11 that the later trial is barred based on double
12 jeopardy.

13 JUSTICE SOTOMAYOR: How can you call
14 this an agreement? State law says you're
15 entitled to severance unless both of you
16 consent to joinder.

17 So, under state law, they have an
18 absolute right to severance. So they're
19 agreeing to what the law gives them?

20 MR. MCGUIRE: I have three responses,
21 Justice Sotomayor. The first is that the
22 question presented to the Court in this case
23 doesn't take account of Virginia's specific
24 law. It's just whether -- when a defendant
25 consents to have sequential trials.

1 JUSTICE SOTOMAYOR: Well, that begs --
2 that begs the question.

3 MR. MCGUIRE: But if the Court does go
4 beyond sort of the question presented and look
5 at Virginia law here, the facts in this case,
6 and you can see this in the November 20, 2013,
7 brief in support of the motion in limine, and
8 the record here isn't fulsome on the point, but
9 this is from the defendant himself. The way
10 this case actually ends up being severed is the
11 defendant in court with a different
12 Commonwealth's attorney represents the case
13 needs to be severed. So, in some sense,
14 there's a motion.

15 JUSTICE SOTOMAYOR: It needs to be
16 severed under state law.

17 MR. MCGUIRE: Well, he could have
18 agreed to go forward to the judge on a trial --

19 JUSTICE SOTOMAYOR: Now that's the
20 question. Can you agree to give something up
21 because you're going to be damaged if you
22 don't? If you -- I mean, why are you
23 conditioning a defendant's right to separate
24 trials on him giving up the prejudice argument
25 of a joint trial?

1 MR. McGUIRE: Well, Justice Sotomayor,
2 it --

3 JUSTICE SOTOMAYOR: He's entitled to a
4 separate trial. Why does he need to give it
5 up?

6 MR. McGUIRE: Well, so what Virginia
7 has done is confer an extra benefit on criminal
8 defendants in cases like this where they can
9 have the choice --

10 JUSTICE SOTOMAYOR: It's not a --

11 MR. McGUIRE: -- of having severance.

12 JUSTICE SOTOMAYOR: It's not a
13 benefit; it's a right.

14 MR. McGUIRE: Well, it -- it comes
15 from -- it's an interpretation of a state
16 judicial rule of procedure by the court of
17 appeals. The Virginia Supreme Court has never
18 said that this is actually what is required as
19 a matter of Virginia law. So, in a sense, it's
20 unsettled, but it's a extra benefit.

21 JUSTICE SOTOMAYOR: So there's no
22 right to an appeal, but we have said -- no
23 constitutional right to an appeal, you're
24 entitled to it statutorily, but we've said it's
25 unfair, a Hobbesian choice, to force a

1 defendant to give up his right to appeal to
2 retain his double jeopardy rights.

3 MR. McGUIRE: Well, that's --

4 JUSTICE SOTOMAYOR: So why is it not a
5 Hobson's choice to be forced to give up the
6 prejudice of a joint trial in order to retain
7 the double jeopardy rights?

8 MR. McGUIRE: Well, I think Your Honor
9 is talking about Green, the case there.

10 JUSTICE SOTOMAYOR: Uh-huh.

11 MR. McGUIRE: And so, if we look at
12 Green, what the court there said was you do, in
13 fact, give up your double jeopardy right with
14 respect to the conviction that you appealed.

15 Green just said you don't give up your
16 double jeopardy right with respect to the
17 acquittal that was implicit in that case.

18 JUSTICE SOTOMAYOR: Well, you've
19 already been -- you've already been tried.

20 MR. McGUIRE: Right. So, you -- in
21 that case, there was no act that you -- that we
22 would say constitutes waiver before the appeal.
23 The appeal doesn't waive the acquittal that
24 predates the appeal. But the appeal waives the
25 conviction piece of that case.

1 Here, we don't think there is a
2 Hobson's choice at all because the Court has
3 always looked at the prejudice associated with
4 prior felony status as a matter of evidentiary
5 rule.

6 And so there's not a constitutional
7 due process argument on the other side.

8 JUSTICE SOTOMAYOR: The state -- the
9 state has made a different determination. The
10 state has said that presumptively these charges
11 are prejudicial if they're tried together, and
12 presumptively we won't permit it.

13 MR. MCGUIRE: Well, what Hackney says
14 ultimately is that the -- the -- Virginia wants
15 to give extra protections to criminal
16 defendants in this context, to allow them to
17 have control over the proceedings, which is
18 what this Court has, generally speaking, looked
19 to.

20 JUSTICE SOTOMAYOR: No, but that's not
21 true, because it gives not just the defendant
22 but the state the right. The defendant can't
23 do it by himself or herself. The state has to
24 agree to it as well.

25 MR. MCGUIRE: Well, there's no

1 suggestion in this case that the state would
2 not have wanted a joint trial. The presumption
3 in Virginia --

4 JUSTICE SOTOMAYOR: Well, it went --
5 it didn't ask for one. What it said to the
6 defendant was: We have to sever. Do you
7 agree? And the defendant said: Yeah, we have
8 to.

9 MR. MCGUIRE: That's the
10 representation based on Hackney from the
11 Commonwealth's attorney. If the defendant, for
12 example, was going to testify at the trial, and
13 he knew that his prior status was coming in
14 anyway, he may very well prefer to have a
15 single trial, and he could have brought that
16 forward to the Commonwealth attorney's
17 attention, and there's no sign that they would
18 have said no to that procedure.

19 And so what we think under Hackney is
20 you look at what the defendant himself did.
21 Here, the defendant consented. In the case
22 where the defendant wants to have a joint trial
23 but the Commonwealth forces severed trials, we
24 wouldn't argue waiver by conduct in that case.

25 JUSTICE BREYER: Can I --

1 JUSTICE KAGAN: Well, Mr. -- I'm
2 sorry.

3 JUSTICE BREYER: I -- I -- look, it's
4 complicated. And I keep trying to simplify it.
5 And -- and tell me what's wrong with this
6 simplification.

7 All right. Let's take two examples,
8 or three. Example 1, all right, the defendant
9 is accused of two crimes, A and B. He is tried
10 first on A and acquitted. Then a few months
11 later the prosecution decides B.

12 Now nobody objects, do they, two
13 totally separate trials, no nothing, that this
14 issue preclusion thing applies in B, however it
15 applies. I mean, however it applies, it
16 applies in B. Is that right?

17 MR. MCGUIRE: That's right, Justice
18 Breyer.

19 JUSTICE BREYER: Okay. Now let's take
20 Example 2. Example 2 is they decide to try
21 both A and B in the same trial.

22 Now here, if he's found guilty of one,
23 even if it's totally inconsistent, the verdict
24 stands, right?

25 MR. MCGUIRE: That's right.

1 JUSTICE BREYER: And the reason it's
2 right is because this is in a sense allowing a
3 little bit of jury nullification in. We think:
4 Well, the jury thinks that's the fair thing to
5 do. Okay?

6 Now, if those are the two examples, we
7 have here Example 3. It is a different jury,
8 but it once was not. So, since it is a
9 different jury, our reason for allowing the
10 inconsistent verdicts in my example no longer
11 exists.

12 This was not a jury that saw the whole
13 thing. It was a jury that only saw this case.
14 And, therefore, let him assert the double
15 jeopardy, whatever it is, because our reason
16 for not doing it isn't there.

17 Now, of course, we'd have to have a
18 corollary, unfortunately, for -- what did you
19 call it, the -- the bifurcated jury, because
20 there it is the same jury. I don't know what
21 to do about that one.

22 But -- but the -- the -- in -- in
23 these three, see, my three examples, I just say
24 is the reason for Example 1 there in our case,
25 answer no, so treat it like two separate

1 trials.

2 And, by the way, if the prosecutor has
3 a problem, he can always insist on a written
4 waiver if the defendant really wants the
5 separate trial. All right.

6 So what's wrong with my examples?

7 MR. MCGUIRE: So, Justice Breyer, I
8 think your -- the way you approached the
9 hypothetical is to bracket this case with the
10 issue preclusion cases, Powell, Bravo-Fernandez
11 and Yeager.

12 What we think the right set of cases
13 for the Court to look at in deciding the issue
14 here are the multiple trial right cases where
15 the -- what you -- you don't necessarily look
16 at the acquittal that came up in the middle of
17 the trial.

18 What you ask -- or in the split
19 proceedings here. What you ask is, did the
20 defendant take an act before the acquittal
21 arose that presupposed he would have two
22 trials?

23 And so here, under and consistent with
24 all the precedent on mistrials or motions to
25 dismiss, you have a case where the defendant

1 agreed to have the prosecute -- agreed to have
2 two trials ever -- before he was acquitted, and
3 he necessarily undertook the risk --

4 JUSTICE KAGAN: Well --

5 MR. MCGUIRE: -- of inconsistent
6 verdicts.

7 JUSTICE KAGAN: -- Mr. McGuire, I
8 mean, it's one thing to say, as we've said many
9 times, that when you say I want two trials,
10 that what you've given up is the right to
11 object about two trials. Right? That really
12 is inconsistent. If you're insisting on
13 multiple trials, or preferring multiple trials,
14 then you can't assert your right against
15 multiple trials.

16 But that's not this case. Somebody
17 can say I want two trials and still have it in
18 his view that, in that second trial, normal
19 issue preclusion principles will apply. So
20 sometimes that will prevent the second trial,
21 but sometimes it won't prevent the second trial
22 because the government can prove its case
23 another way.

24 And so there's no inconsistency of the
25 kind that exists in claim preclusion in this

1 kind of case, is there?

2 MR. MCGUIRE: Well, there is, Justice
3 Kagan, because issue preclusion has to be
4 understood as part of the three core
5 protections under the Double Jeopardy Clause.
6 And so the hypothetical that you spun out there
7 suggests that issue preclusion does serve to
8 bar only evidence in some cases and not
9 necessarily preclude a trial.

10 It's important to note that in none of
11 this Court's cases addressing issue preclusion
12 has that ever been the result.

13 JUSTICE KAGAN: Well, I don't -- I
14 don't understand what that means. The -- the
15 Solicitor General says that as well in its
16 brief, and I didn't understand that either,
17 because surely the government doesn't mean that
18 if the government couldn't prove their case
19 another way, the government could try to do so.
20 Right?

21 I mean, if the government could prove
22 their case another way, then the trial isn't
23 barred. Right? The trial goes forward with
24 the government proving its case another way.

25 MR. MCGUIRE: Well, what we would say,

1 Justice Kagan, is that just means issue
2 preclusion doesn't apply at all in that case
3 because, when issue preclusion applies in the
4 criminal context, it serves only to bar the
5 trial.

6 And Dowling really is a good example
7 of this dealing with 404(b) identification
8 evidence. In that case, the defendant had been
9 acquitted there.

10 JUSTICE KAGAN: Well, whatever you
11 call it, the point still stands that the
12 defendant is in a position where it's perfectly
13 consistent to say two things: Yes, I would
14 like two trials, and in that second trial, I
15 expect that issue preclusion principles will
16 apply.

17 That's very different from the kind of
18 inconsistency that we've pointed out in the
19 past, where the government can't -- the person
20 can't say on the one hand I want two trials and
21 say on the other hand I don't want two trials.

22 MR. MCGUIRE: Well, Justice Kagan, I
23 think we're maybe speaking past each other just
24 a little bit.

25 Let me try again to be a little bit

1 clearer, which is our position is that once the
2 defendant says in the second trial I want to
3 argue issue preclusion, issue preclusion
4 principles would apply to limit the
5 government's theories, that issue preclusion
6 doesn't do that, and that this Court has never
7 held that to be the case.

8 In fact, in the briefing in Ashe, the
9 briefs disclaim that they were ever asking the
10 court for a rule on that fashion. So what we
11 would say is that when you raise issue
12 preclusion, when you say I want to raise that
13 to bar the -- to do something related to the
14 Double Jeopardy Clause, the only thing you can
15 be saying is that the second trial cannot go
16 forward at all because the same ultimate fact
17 from the first trial has to be proven in the
18 second one.

19 JUSTICE KAGAN: Well --

20 JUSTICE ALITO: And the Commonwealth
21 could have proved the second offense without
22 making any reference to the breaking and
23 entering of the residence or the theft of the
24 safe. They could have called Wood and they
25 say: Where were you on such and such a date,

1 such and such a time? I was by the river. And
2 what were you doing? I had a safe with guns
3 and money. And was -- were you by yourself?
4 No. Petitioner was with me. And what did he
5 do? He took out the guns and he was possessing
6 the guns. They could have done that.

7 But I bet if they had done -- I don't
8 think Mr. Fisher would say that that would be
9 okay. I think he would say that would still be
10 barred by -- by issue preclusion.

11 And if that is the case and the
12 defense understood at the time when they agreed
13 to the second trial that the prosecution would
14 not be able to prove the second offense in that
15 way, then I don't see why they didn't
16 understand the consequences of agreeing to the
17 second trial with respect to issue preclusion
18 to exactly the same extent as they understood
19 the consequences with respect to a -- a second
20 trial in the Jeffers situation.

21 MR. MCGUIRE: We think that's exactly
22 right, Justice Alito. And it's also important
23 to explain why having an evidentiary rule here
24 would be problematic in a number of ways.

25 For example, here, one piece of

1 evidence that comes up a lot from my friend on
2 the other side is the cigarette butt with the
3 DNA that was found in the car. And they say,
4 well, that didn't get into evidence at the
5 first trial, but it was introduced at the
6 second, so in some sense, it's -- you're seeing
7 the dry run problem.

8 But it's not clear why that evidence
9 wouldn't come in anyway in the second trial.
10 It's not linked necessarily to the burglary.
11 It's just a cigarette butt in the truck.

12 And so it's not clear how this would
13 actually work in practice to a very real
14 degree, but we do think that the Court should
15 just link issue preclusion directly with the
16 multiple trial right. To one of the questions
17 earlier, it has not been understood generally
18 as normal civil issue preclusion in this
19 context.

20 And if you look at the various
21 opinions, including then Judge Gorsuch's
22 opinion in Wittig or Kramer, what you see are
23 really two different strands of issue
24 preclusion analysis that go on in federal
25 courts in particular. One is under the Double

1 Jeopardy Clause where it would serve to bar a
2 second trial, and another is sort of a federal
3 judicial -- federal oversight of the judiciary,
4 as coming under Oppenheimer.

5 JUSTICE GINSBURG: Can we -- can we
6 clear up one thing about this case? The
7 Virginia Court of Appeals, which has written
8 the dispositive opinion, thought that
9 overreaching was an ingredient of issue
10 preclusion in criminal cases.

11 I see nothing in our cases that
12 requires overreaching in order to apply issue
13 preclusion.

14 MR. MCGUIRE: Justice Ginsburg, we
15 agree that the court of appeals looked at
16 prosecutorial overreach as an important
17 component of the Double Jeopardy Clause. We
18 are not suggesting that the defendant needs to
19 prove prosecutorial overreaching in order to
20 assert issue preclusion.

21 But we think the best way to look at
22 the concept in this case generally is the way
23 Johnson framed it, which is that issue
24 preclusion really applies where the state has
25 made an effort to prosecute you seriatim, and

1 so where the defendant has the choice to
2 consent and, in fact, does consent, you don't
3 have that situation. The state isn't the one
4 imposing the second trial on you as much as you
5 have agreed to have that procedure. And --

6 JUSTICE BREYER: It doesn't say the
7 state in the Constitution. It says "shall not
8 be subject to." So -- so, I mean, can we do
9 this, which is a more -- I'm trying to get my
10 hands on this case, which is filled with
11 complexity.

12 Just say: Look -- Justice Gorsuch
13 asked this question, and I'll just do it again
14 -- we're not certain -- we don't have to decide
15 the contours of issue preclusion. Isn't there
16 enough agreement among the lower courts and in
17 this Court that there is something to it in
18 some cases?

19 And then say: Whatever that is --
20 we're leaving it, you know, to the research and
21 so forth, but whatever that is, the question
22 here is whether the doctrine, in some form or
23 other, applies when there is the second trial
24 as a result of the -- the Virginia law or as a
25 result of the waiver or as a result of

1 whatever. Can we just do that?

2 MR. McGUIRE: Well, that's the
3 question the Court granted certiorari on,
4 Justice Breyer.

5 JUSTICE BREYER: Which, the second?

6 MR. McGUIRE: The second one --

7 JUSTICE BREYER: Yeah.

8 MR. McGUIRE: -- about whether or not,
9 when a defendant consents to sequential
10 trials --

11 JUSTICE BREYER: Yes.

12 MR. McGUIRE: -- does that forego
13 their right --

14 JUSTICE BREYER: Yeah. So we just
15 answer that question, period --

16 MR. McGUIRE: I --

17 JUSTICE BREYER: -- in your opinion?

18 MR. McGUIRE: That's the easiest way
19 to resolve this case.

20 JUSTICE BREYER: Yeah.

21 MR. McGUIRE: And we think that the
22 best -- the clearest articulation of the rule
23 that underlies a lot of this Court's double
24 jeopardy precedent is that what the Court wants
25 is for the defendant to have as much control as

1 possible over the way the course of proceedings
2 will play out. And so here Virginia has given
3 him the right to force severance, and Justice
4 Sotomayor is right, there is a particular
5 scenario --

6 JUSTICE SOTOMAYOR: How about if he
7 had stood up and simply said: Do you agree?
8 You say: Judge, that's what the law says.

9 MR. MCGUIRE: Our position, Justice
10 Sotomayor, would be if he doesn't object to it,
11 then that is the same thing. He's gone ahead
12 willingly with the two trials.

13 JUSTICE SOTOMAYOR: All right. So he
14 has -- he has no rights under Virginia law, is
15 what you're saying --

16 MR. MCGUIRE: Well, he has --

17 JUSTICE SOTOMAYOR: -- to maintain his
18 -- he has to go to trial and suffer the
19 prejudice to be able to retain his double
20 jeopardy claims?

21 MR. MCGUIRE: To argue issue
22 preclusion here and to not have this waiver
23 argument, he would have to want to go to a
24 joint trial. And if he wanted to do that, then
25 the Commonwealth -- and the Commonwealth forced

1 him into multiple trials, we would not argue
2 any sort of waiver there.

3 But, as we pointed out on brief, there
4 is good reasons why a defendant might want one
5 trial in a case like this one: If he intends
6 to testify or if he has some awareness that the
7 evidence might come in under Rule 404(b), for
8 example. The jury is going to learn anyway in
9 the context -- context of that first trial that
10 he is a prior felon or has some prior criminal
11 history.

12 And so there, there's no benefit to
13 the defendant of having two trials. So the
14 only reason in a sense it looks unfair in this
15 case is because he's already made some
16 litigation decisions, that he's not going to
17 testify or that he doesn't think the evidence
18 is going to come in that way.

19 And so, once he's made some choices,
20 he's going to either have one trial where he
21 now has allowed this to come in to prove the
22 felon-in-possession charge, or he goes to two
23 trials, in which case our position is he's
24 given up his right to argue that the second
25 trial should be barred.

1 And I want to come back to one thing
2 Justice Breyer and Justice Kennedy raised
3 earlier. There -- this case does present an
4 example of the state doing more than the
5 Constitution requires in some sense. This
6 Court has not said that introducing evidence of
7 prior felony status is a constitutional
8 violation.

9 And where you have the Court of
10 Appeals of Virginia interpreting a state
11 judicial rule to have this severance package,
12 it wouldn't be a stretch to think that if that
13 necessarily takes away the Commonwealth's right
14 to try a defendant for all the charges that
15 they have brought forward, that the state
16 supreme court could revisit that judicial
17 interpretation.

18 Other states may have it as a statute
19 or there may be a binding decision from the
20 state's highest court. But you actually don't
21 have that here. And so, in that case, there is
22 a -- an unfortunate risk that what is a
23 pro-criminal defendant measure may ultimately
24 be retracted if defendants can't be seen as
25 having given up their right to argue that the

1 second trial is barred here.

2 I would also just like to note for the
3 Court that we also briefed the issue of if the
4 Court finds that there was no waiver, the Court
5 could go ahead and address whether the
6 Petitioner carried his burden under Ashe and
7 Yeager of showing that an issue of ultimate
8 fact was necessarily decided in this case.
9 That would have to be proven beyond a
10 reasonable --

11 JUSTICE GINSBURG: But that would --
12 that would be left over for remand. The only
13 question we have is the waiver: Does he --
14 does he waive issue preclusion if he accepts
15 severance?

16 MR. MCGUIRE: That's the question the
17 Court granted certiorari on, Justice Ginsburg,
18 but we understood the Court's precedent to mean
19 that we can argue -- argue for an alternative
20 basis for affirmance. And here, from the
21 reasons Justice Alito gave earlier, this case
22 does not present an issue of ultimate fact that
23 even if he could carry his burden and argue
24 issue preclusion under Ashe, that would bar the
25 second trial.

1 Unless there are further questions,
2 we'd ask the Court to affirm.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Ms. Ross.

6 ORAL ARGUMENT OF ERICA L. ROSS
7 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
8 IN SUPPORT OF THE RESPONDENT

9 MS. ROSS: Mr. Chief Justice, and may
10 it please the Court:

11 The Double Jeopardy Clause provides
12 defendants with a right against multiple trials
13 for the same offense, but it does not protect a
14 defendant from the consequences of his
15 voluntary litigation choices.

16 Whereas here, a defendant agrees to
17 multiple trials on different charges in order
18 to obtain a benefit, he cannot thereafter argue
19 that his charges are, in fact, one offense for
20 purposes of the Double Jeopardy Clause.

21 JUSTICE KAGAN: Well, Ms. Ross, why
22 not make sure that it actually is the
23 defendant's choice? I mean, if it were, that
24 would be one thing. So why isn't the best rule
25 a rule that says we're going to insist that

1 some kind of colloquy takes place where the
2 judge says to the defendant, you know, if -- if
3 you want these two trials, here's the result of
4 that; you lose the ability to argue issue
5 preclusion? Why isn't that the best way to
6 think about this kind of problem?

7 MS. ROSS: So I think that's not the
8 best way to think about this kind of problem,
9 Your Honor, because the -- this Court's cases
10 do not generally think about the double
11 jeopardy right in those terms.

12 So, in *Dinitz*, for example, this Court
13 specifically held that a defendant's claim that
14 he did not knowingly and intelligently waive
15 his right to have a double jeopardy claim was
16 not for -- was not the right way to think about
17 that issue because, in fact, the Court sort of
18 presupposes that in these circumstances these
19 are litigation decisions that may be difficult
20 that may be made sort of in --

21 JUSTICE KAGAN: But your argument is
22 all about voluntary choices on the part of the
23 defendant, and you're essentially arguing a
24 kind of waiver by conduct.

25 And what I'm suggesting is if this

1 is -- you know, if this -- if the way to think
2 about this case is what is the defendant giving
3 up when he agrees to a severance, then the
4 obvious answer is: Tell the defendant what the
5 consequences are, and ask him whether he's
6 willing to suffer them.

7 MS. ROSS: Your Honor, that might be
8 one way to deal with the problem. I think, as
9 Justice Kennedy and Justice Breyer were
10 suggesting earlier, if that is the way that is
11 adopted, it is likely that many states would
12 choose not to go through that process because,
13 again, the -- this Court has made very clear
14 that the introduction of evidence of a
15 defendant's prior convictions is not itself a
16 due process violation.

17 So severance is not required as a
18 matter of -- of federal law here. And so I
19 think if states are required to go through a
20 knowing and voluntary waiver process, that then
21 may -- I mean, we think those waivers would be
22 completely enforceable, but I take my friend's
23 argument to be that they might not be, in fact.

24 And so some defendants would, in fact,
25 challenge those waivers, and the state would be

1 opening itself up on the back end to at least
2 litigation and inefficiency that it does not
3 need to open itself up to.

4 I also think that in this case the
5 most logical way to have looked at this
6 agreement ex ante would have been for the
7 defendant to know that he was giving up his
8 right to -- to challenge the fact that these
9 were held in one proceeding.

10 So you can look at this a few
11 different ways. I think one of them is to
12 think that this agreement was made so that the
13 evidence of Petitioner's prior felony
14 convictions would not come in at the first
15 trial, but aside from that, nothing in this
16 agreement was meant to or did, by -- by its
17 terms, say that the other options for potential
18 outcomes that would have been possible in one
19 trial would be off the table.

20 So, as some of the discussion earlier
21 suggested, had this happened in one trial,
22 Petitioner could have been convicted on all
23 offenses, acquitted on all offenses, or some
24 mix thereof, and nothing about saying I want to
25 have two trials so that this other evidence

1 doesn't come in logically suggests that he's
2 retaining the option to keep one of those from
3 happening.

4 JUSTICE KAGAN: Well, but maybe the
5 defendant understands that we in our Double
6 Jeopardy Clause have -- have emphasized pretty
7 strongly the value of acquittals, and that
8 acquittals mean something in our system, and
9 they preclude the government from doing certain
10 things that are inconsistent with those
11 acquittals.

12 So I guess -- I guess I don't -- don't
13 understand why, in the absence of a colloquy,
14 and given the backdrop of double jeopardy law
15 that focuses so much on not doing anything
16 that's inconsistent with acquittals, the
17 defendant would, of course, know that he was
18 giving up his right to issue preclusion?

19 MS. ROSS: Right, Your Honor. And I
20 think that this goes back to some of the
21 discussion that Justice Alito was having
22 earlier, which is to say that the question in
23 this case, I think, is -- is best
24 conceptualized as: What right did defendant
25 agree not to invoke and what is he trying to

1 invoke now?

2 And I think that what this agreement
3 said was that I'm going to have multiple
4 trials. And so what the Double Jeopardy Clause
5 protects is multiple -- against is multiple
6 trials for the same offense.

7 And so, when Petitioner made that
8 agreement, he was essentially saying I'm not
9 going to fight later about this is one --
10 whether this is one offense or --

11 JUSTICE KAGAN: Well, but --

12 MS. ROSS: -- multiple offenses.

13 JUSTICE KAGAN: -- then you're saying,
14 when you say the Double Jeopardy Clause
15 protects multiple trials for the same offense,
16 that's one thing that the Double Jeopardy
17 Clause protects.

18 And another thing that the Double
19 Jeopardy Clause protects -- and this is the
20 difference between the claim preclusion aspect
21 of it and the issue preclusion aspect of it --
22 is the preservation of acquittals.

23 And that's what is involved in this
24 case.

25 MS. ROSS: So, Your Honor, I would

1 just note that the way that the Double Jeopardy
2 Clause protects acquittals is in two specific
3 ways, and we lay this out in our papers.

4 On the one hand, as everyone agrees
5 here, following an acquittal, a defendant
6 cannot be tried again. So he can't -- on that
7 particular claim, he cannot -- the government
8 cannot appeal. There cannot be another trial.
9 Everyone agrees that's being respected here.

10 The second way that this Court's
11 decisions in the Double Jeopardy Clause protect
12 acquittals is by modifying the definition of
13 the same offense for purposes of the multiple
14 trials analysis.

15 So what -- the way that we give
16 finality to an acquittal is by saying that, in
17 fact, that acquitted offense was the same
18 offense as another offense that is technically
19 distinct for charging purposes.

20 And in this case, when --

21 JUSTICE SOTOMAYOR: I'm sorry, what's
22 technically distinct about having committed a
23 robbery against two people? If you rob each
24 person, those are distinct crimes.

25 MS. ROSS: That's correct, Your Honor.

1 JUSTICE SOTOMAYOR: But we don't
2 permit you to try a person for robbing one
3 person and then try the second crime, which is
4 not technically distinct, it's distinct
5 completely, there are different people
6 involved. We don't let you try that second
7 person, that second crime.

8 MS. ROSS: That's correct --

9 JUSTICE SOTOMAYOR: If you've been
10 acquitted.

11 MS. ROSS: That's correct, Justice
12 Sotomayor. And the reason why we don't allow
13 you to try that second acquittal or that second
14 offense is because, for purposes of the Double
15 Jeopardy Clause and for purposes of how we
16 define the same offense, we say that in those
17 circumstances, just as in Blockburger we say
18 that sometimes things that are technically
19 distinct, meaning they're in different code
20 sections, are the same offense because they
21 have overlapping elements.

22 Here, we say that they're the same
23 offense because they have over -- an issue of
24 ultimate fact that the prosecution necessarily
25 must prove in both cases.

1 JUSTICE GINSBURG: But they wouldn't
2 be --

3 JUSTICE BREYER: That's claim
4 preclusion.

5 JUSTICE GINSBURG: They wouldn't be
6 the same offense, the claim preclusion first,
7 in the Ashe case, multiple victims. There's no
8 claim preclusion when there's a second victim
9 because it's a different -- different party.
10 But there certainly is issue preclusion because
11 of what was necessarily determined in the first
12 case.

13 MS. ROSS: That's correct, Justice
14 Ginsburg. And in Ashe, what happens is that
15 the defendant cannot be tried for the second
16 offense.

17 Now I take Petitioner to agree that,
18 if that were what he were arguing, he could not
19 go forward with that.

20 JUSTICE BREYER: Okay. So what's the
21 difference? That is -- I -- I misspoke. It's
22 issue preclusion. That's how we prevent the
23 government from prosecuting the second poker
24 player robbery. Okay?

25 MS. ROSS: Yes.

1 JUSTICE BREYER: Defense in the first
2 case was I was in Chicago at the time. The
3 jury accepted it. Okay?

4 Now we're into the second case and he
5 was just as much in Chicago. All right? Now,
6 you're saying he waived that when the only
7 difference is that you separated the trial.
8 That's all. They started trying both together
9 and now it's separate. But it ends up two
10 separate trials.

11 And what I think I'm having trouble
12 grasping is why you should treat that any
13 differently. And now your argument is because
14 he's waived it by conduct.

15 So Justice Kagan says, hey, he's
16 waived it by conduct. Let's just be sure he
17 waived it. Let him waive it expressly, if he
18 wants to waive it, because after all the
19 Constitution says that no person shall be held,
20 you know, for jeopardy twice, or whatever it
21 is.

22 And now we --

23 (Laughter.)

24 JUSTICE BREYER: Okay. You get the
25 point?

1 MS. ROSS: Yes, Justice Breyer, I do.

2 JUSTICE BREYER: You get the point.
3 He's waiving a constitutional right and,
4 therefore, why shouldn't it be express? And
5 that's -- that is where I think I stop because
6 I want to know your answer.

7 MS. ROSS: Certainly, Justice Breyer.
8 So my answer is that the same argument could
9 have been made and I think, in fact, was made
10 in Jeffers, that essentially in Jeffers the
11 defendant said: I want to be tried separately.
12 And then later he said: Well, actually, this
13 is a lesser included offense in a greater
14 offense, and that under this Court's precedent,
15 now means that I was actually charged with one
16 offense. And so I should have had one trial.

17 And this Court said, no, when you made
18 the agreement to have two separate trials, you
19 should have said at that point that these might
20 be the same offense, and, actually, I want to
21 have one trial.

22 The Court said, if there is a right in
23 the background under the Double Jeopardy
24 Clause, it is the defendant's to invoke.

25 And for that reason, I think that the

1 same logic would apply here. If when
2 Petitioner agreed to have two separate trials
3 he actually thought, well, later I would like
4 to be able to bar or limit that second trial
5 because they're, in fact, for the same offense,
6 that's my right to invoke now.

7 JUSTICE SOTOMAYOR: What would have
8 happened here if the defendant got up and said
9 Virginia law requires separate trials. I won't
10 -- I want what the law gives me. I won't waive
11 my double jeopardy rights.

12 What then does the court do and what
13 then does the prosecutor do?

14 MS. ROSS: May I answer, Your Honor?

15 CHIEF JUSTICE ROBERTS: Sure.

16 MS. ROSS: So, if the defendant says I
17 will not waive and I want separate trials, I
18 think then the prosecution and the court would
19 have to decide sort of what -- what happens
20 going forward.

21 And the prosecution in that case would
22 have every reason to oppose severance, as I
23 think -- as I think that states and prosecutors
24 might well do going forward if -- if this case
25 comes out that way. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Four minutes, Mr. Fisher.

4 REBUTTAL ARGUMENT OF JEFFREY L. FISHER
5 ON BEHALF OF THE PETITIONER

6 MR. FISHER: Thank you. I think I
7 heard two separate ways to look at this case,
8 and I want to respond to each of them.

9 So my friend from Virginia, in
10 particular with just -- in a colloquy with
11 Justice Kagan, says the only way issue
12 preclusion works is that you invoke it at the
13 outset of the second trial and, if you cannot
14 bar the second trial at that point, it drops
15 away and the right is gone.

16 And if that is correct, then Judge --
17 then Judge Gorsuch's opinion for the Tenth
18 Circuit in Wittig and all other eight circuits
19 we cite in Footnote 2 of our reply brief across
20 the federal court system that all understand
21 issue preclusion to depend on what happens in
22 the second trial and to only bar a particular
23 way of trying the case.

24 And most importantly, as Judge Gorsuch
25 put it for the Tenth Circuit, to sometimes

1 force courts to wait and see what happens in
2 that trial to see whether issue preclusion is
3 violated, all of that has to be wrong and it
4 would all be upended.

5 JUSTICE ALITO: But could the -- could
6 the Commonwealth have proven the second charge
7 the way that I suggested during the prior
8 argument --

9 MR. FISHER: I think perhaps --

10 JUSTICE ALITO: -- by making no
11 reference to the breaking and entering or the
12 larceny --

13 MR. FISHER: I think perhaps yes,
14 Justice Alito. And so I want to be clear about
15 that. All we're arguing is that they cannot
16 try the second case in a manner that would make
17 Mr. Currier an aider, abettor, or participant
18 in the breaking and entering of which the juror
19 -- the jury convicted him.

20 And so that would be a question of
21 Virginia law whether the stuff down by the
22 river would have satisfied that.

23 JUSTICE ALITO: Well, why would it not
24 --

25 MR. FISHER: But in general --

1 JUSTICE ALITO: -- why would it not?
2 It proves all the elements of the offense.

3 MR. FISHER: Well, the way the jury
4 instructions were laid out in the -- in the --
5 in the case, it said participate in some way in
6 the crimes of breaking and entering and the
7 theft.

8 And so whether handling the guns down
9 by the river later would be participating in
10 some way in that would be an argument the
11 parties could have.

12 But the crucial point, Justice Alito,
13 and my crucial point to the whole Court, is
14 that issue preclusion does not necessarily bar
15 a second trial.

16 And the other side doesn't dispute
17 that the test is inconsistency. And it simply
18 cannot be inconsistent. If the government is
19 right, then Wittig is wrong and all the other
20 cases across the federal courts are wrong.

21 JUSTICE ALITO: I think what you just
22 said, I don't want to belabor the point, but it
23 does seem to me inconsistent with the Second
24 Circuit's opinion in Kramer that you relied on
25 pretty heavily.

1 MR. FISHER: I'll just say not at all.
2 I just would urge the Court to reread that
3 opinion. We're exactly on all fours with that
4 opinion.

5 JUSTICE ALITO: No, I read it.

6 MR. FISHER: They sent it back down --

7 JUSTICE ALITO: But you could have --
8 they could have proven the -- the -- the second
9 offense without making any reference to what
10 had happened in the other -- in the other
11 offense.

12 MR. FISHER: Which is why Judge
13 Friendly does not bar a second trial and sends
14 certain cases back for retrial with the
15 government simply not being able to introduce
16 certain evidence --

17 JUSTICE GORSUCH: Mr. Fisher, what's
18 your second point?

19 MR. FISHER: Thank you. Thank you.

20 (Laughter.)

21 MR. FISHER: My -- my second point is
22 that the other thing that, particularly the
23 Solicitor General, the argument they make, is
24 that the government has a right, so to speak,
25 to try all of its counts at once, just like in

1 Powell.

2 And so my answer to that is that
3 argument simply is exactly the same argument
4 the Court rejected in Yeager. In Yeager, the
5 Court said if the government comes forward and
6 says we want to try all these counts, but then,
7 through no fault of its own, is unable to reach
8 a verdict on particular counts, but a jury
9 comes back and acquits in a manner that we can
10 say resolves certain issues of ultimate fact
11 against the prosecution, the square holding of
12 Yeager, which is -- rejects the exact argument
13 you just heard, is that issue preclusion
14 applies in those circumstances.

15 And there's a good reason why it
16 applies. One way to think about issue
17 preclusion and the Court's whole double
18 jeopardy jurisprudence that we've been talking
19 about today is to let the defendant have a fair
20 trial and not be tried twice for the same
21 thing, but also to allow the prosecution one
22 full and fair opportunity to prove all of its
23 allegations.

24 And so, in all the Jeffers-style
25 cases, that's what the prosecution would be

1 deprived of and why the Court has not allowed
2 the Double Jeopardy Clause to be invoked.

3 In this case, just like in Yeager, the
4 only thing that's being prevented is the
5 prosecution having a second bite at the apple
6 as to particular allegations. It can even --
7 and I'll just return to my colloquy with
8 Justice Alito when I -- to -- to conclude, it
9 can even allow the second trial to go forward,
10 just simply in a manner that doesn't allow the
11 prosecution functionally to try the defendant
12 for the same offense twice.

13 And so, if you believe the postulates
14 that inconsistency is the test and that Wittig
15 and all the other cases we have cited are
16 correct, it leads inequitably to our
17 conclusion. And even if you don't believe that
18 is enough, then the equities in the case and
19 the competing interests and the right to the
20 inviolacy of an acquittal should persuade you
21 to -- to reverse the judgment below.

22 If there's any more questions, I'm
23 happy to answer them.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

1 (Whereupon, at 11:05 a.m., the case in
2 the above-entitled matter was submitted.)
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