No. 16-1348

IN THE

Supreme Court of the United States

MICHAEL N. CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari
to the Supreme Court of Virginia

BRIEF FOR PETITIONER

J. Addison Barnhardt
GRISHAM & BARNHARDT, PLLC
414 E. Market Street, Suite D
Charlottesville, VA 22903

Jeffrey L. Fisher
Counsel of Record
David T. Goldberg
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

QUESTION PRESENTED

Whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the Double Jeopardy Clause to the issue-preclusive effect of an acquittal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

BRIEF FOR PETITIONER

Petitioner Michael N. Currier respectfully requests that this Court reverse the judgment of the Virginia Supreme Court.

OPINIONS BELOW

The order of the Virginia Supreme Court (Pet. App. 1a) is published at 798 S.E.2d 164. The opinion of the Virginia Court of Appeals (Pet. App. 2a) is published at 779 S.E.2d 834. The relevant orders of the trial court (J.A. 50-51, 100-01) are unpublished.

JURISDICTION

The Virginia Supreme Court entered its judgment on December 8, 2016. Pet. App. 1a. Petitioner filed a timely petition for a writ of certiorari on May 8, 2017, which this Court granted on October 16, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ."

STATEMENT OF THE CASE

1. In March 2012, a large safe containing approximately $71,000 in cash and twenty firearms was stolen from the home of Paul Garrison II in Albemarle County, Virginia. A few days later, police recovered the safe from a nearby river. It had been forcibly opened. All twenty firearms remained in the safe, but most of the cash was gone.

A neighbor reported that she had seen a pickup truck leaving the Garrison residence around the time of the theft. The police linked that truck to Garrison's nephew, Bradley Wood. Executing a warrant to search Wood's truck, the police found metal shavings and insulating material in the truck's bed. These items appeared to match materials collected from the floor of the Garrison residence, near where the safe had been. The police also collected a cigarette butt from the bed of the truck.

The Commonwealth of Virginia charged Wood with the theft. After initially denying his involvement, he pleaded guilty. Hoping for a more lenient sentence, Wood began cooperating with the police and at first implicated his cousin as an accomplice. *See* Va. Ct. of Appeals Jt. App. ("VA Jt. App.") 188, 228-29. The detective, however, believed that Wood was lying and declined to pursue charges against the cousin. *See id.* 189-90. Wood then claimed instead that petitioner had participated in the theft. The two men had met in prison and had sold firewood together after their release. J.A. 77, 83-84.

2. The Commonwealth indicted petitioner on three charges: (i) breaking and entering, (ii) grand larceny, and (iii) possessing a firearm after having been convicted of a felony. Pet. App. 4a. The firearm

charge was based on the theory that he briefly "handle[d]" the guns inside the safe and "la[id] them down on the bed" of the truck so that the cash could be removed. J.A. 94.

In Virginia, as elsewhere, "evidence that a defendant has committed crimes other than the offense for which he is being tried is highly prejudicial" and generally "inadmissible." *Hackney v. Commonwealth*, 504 S.E.2d 385, 388 (Va. Ct. App. 1998) (en banc). Therefore, "unless the Commonwealth and defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction." *Id.* at 389.

That rule applied here. *See* Pet. App. 9a. The felon-in-possession charge required the Commonwealth to introduce evidence regarding petitioner's criminal history, which included convictions for breaking and entering and grand larceny, VA Jt. App. 509, 513. Yet mentioning petitioner's prior convictions while trying him for the break-in and theft at the Garrison residence would have invited the jury to impermissibly infer guilt based on his past conduct. The Commonwealth, therefore, "was not even in a position where [it] could consider trying these charges simultaneously." J.A. 51 (trial court decision).

Recognizing that "it would be 'reversible error' to try the felon in possession of a firearm charge together with the other charges," the Commonwealth requested severance. J.A. 47; *see also id.* 48. Petitioner agreed, Pet. App. 9a, and the trial court severed the felon-in-possession charge from the other two charges, J.A. 47.

3. The Commonwealth elected to try petitioner first for breaking and entering and grand larceny. It offered two primary strands of evidence. First, Wood testified that petitioner broke into the Garrison residence and stole the safe with him. J.A. 23. Second, the neighbor testified that she saw petitioner riding as a passenger in the pickup truck as it was leaving the Garrison residence. VA Jt. App. 206. The Commonwealth also attempted to introduce evidence that the cigarette butt recovered from the bed of the pickup truck carried petitioner's DNA. But the court excluded this evidence because the prosecution violated Virginia law by failing to disclose it at least twenty-one days before trial. Letter Order at 2, Sept. 12, 2013; *see also* Va. Code § 19.2.270.5.

Both sides agreed that the sole issue for the jury to decide was whether petitioner was involved in stealing the safe. In his closing remarks to the jury, the prosecutor asked: "What is in dispute? Really only *one issue and one issue alone*. Was the defendant, Michael Currier, one of those people that was involved in the offense?" J.A. 35 (emphasis added). The defense maintained that petitioner "did not participate at all" in the crimes. Trial Tr. 89 (defense's opening statement). It attacked the weaknesses in the Commonwealth's evidence and warned the jury that "[u]nreliable testimony is how innocent people go to jail." J.A. 44.

The jury acquitted petitioner of both charges concerning the theft of the safe. Pet. App. 4a.

4. Following this acquittal, the Commonwealth insisted on pressing ahead with the felon-in-possession prosecution.

In response, petitioner invoked the issue preclusion component of the Double Jeopardy Clause, which "precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009) (citing *Ashe v. Swenson*, 397 U.S. 436 (1970)). Specifically, petitioner contended that the first jury in its acquittal had necessarily determined that he was not involved in the break-in and theft. VA Jt. App. 9. Accordingly, he moved to preclude the prosecution from introducing at the second trial any evidence of his alleged involvement in the break-in and theft at the Garrisons' home. VA Jt. App. 11; *see also* Pet. App. 5a.

In a second motion, petitioner argued that if the Double Jeopardy Clause precluded the prosecution from alleging that he stole the firearms, the trial court should dismiss the felon-in-possession charge outright. Petitioner contended that without any evidence that he helped to steal the safe containing the guns from the Garrisons' home, the prosecution lacked sufficient evidence to support its claim that he had possessed any firearms at all. VA Jt. App. 11; *see also* Pet. App. 5a.

The trial court denied the first motion—and therefore necessarily the second as well. Pet. App. 5a. The court described the issue preclusion doctrine as "designed to prevent the Commonwealth from subjecting the accused to the hazards of vexatious multiple prosecutions." J.A. 51. It observed that the Commonwealth had not sought separate trials for the purpose of harassing petitioner; to the contrary, "[i]t would have been prejudicial to the defense" to have tried the charges together. *Id.* Consequently, the

court held that that the acquittal at petitioner's first trial should not be given issue-preclusive effect. *Id.*

The case then proceeded to the second trial, on the felon-in-possession charge. The Commonwealth again sought to prove that petitioner broke into the Garrisons' home and helped steal the safe containing the firearms. *See, e.g.*, J.A. 64-68, 76-80 (Bradley Wood's testimony); *id.* 64-68 (neighbor's testimony); *id.* 88-91 (prosecution's closing statement). As the prosecutor explained to the trial judge, it would have been "impossible for the jury to understand how we get a safe in the river without the—and how we connect Mr. Currier to the safe in the river without that prior, that prior involvement there in the house." *Id.* 57.

At the same time, the Commonwealth modified its presentation at the second trial in two ways. First, the Commonwealth's key witnesses refined their testimony and redelivered it with greater poise. For example, the Garrisons' neighbor had testified at the first trial that she "didn't suspect anything" when she saw the pickup truck leaving the house. J.A. 16. At the second trial, however, she testified that she had seen the safe in the back of the truck as it left the house, and even specified that she "could see the knob" on the safe. *Id.* 72-73. And at the second trial, Wood anticipated and preemptively denied the defense's suggestion that he had accused petitioner of participating in the theft because they had had a falling out. *Compare id.* 31-32, *with id.* 83-84. Having already undergone cross-examination once, Wood told petitioner's attorney: "I know where this story is going . . . . [I]t's the same story you used last time." *Id.* 83-84. Second, the Commonwealth corrected its procedural error from the first trial by successfully

introducing into evidence the cigarette butt found in the back of the pickup truck—thereby confirming that petitioner had at some point been in Wood's truck (though not necessarily on the day of the theft). *See* VA Jt. App. 480-81.

Finally, to prove the "felon" element of the felon-in-possession charge, the Commonwealth told the second jury—unlike the first—about petitioner's prior convictions. *See* J.A. 89; VA Jt. App. 509, 513.

The second jury found petitioner guilty and sentenced him to five years in prison. Pet. App. 5a.

Petitioner moved to set aside the verdict on double jeopardy grounds, renewing his issue preclusion argument. Pet. App. 5a. The trial court acknowledged that the jury in the first trial had necessarily rejected the theory the Commonwealth renewed in the second trial: "If they didn't find him guilty of the safe, they didn't find him guilty of the guns." J.A. 101. The court, however, denied petitioner's motion. It reasoned—as it had in its pretrial order—that issue preclusion was unavailable because the second trial had not been "an attempt by the government to infringe upon [petitioner's] Fifth Amendment protection against double jeopardy, but rather to protect" petitioner from undue prejudice. *Id.*

5. The Virginia Court of Appeals affirmed. Pet. App. 2a. It noted that courts have split over whether a defendant may invoke issue preclusion "when [he] has obtained severance of the charges against him and the first trial results in an acquittal." *Id.* 10a n.2 (citing several decisions on each side of the conflict). The court of appeals sided with those courts that have held that defendants may not, under these circumstances, invoke issue preclusion.

The court of appeals offered two reasons for this holding. First, it quoted *Ohio v. Johnson*, 467 U.S. 493 (1984), for the proposition that the Double Jeopardy Clause is not violated unless "'prosecutorial overreaching' is present." Pet. App. 8a-9a (quoting *Johnson*, 467 U.S. at 501). Although *Johnson* concerned only the right against multiple trials, the court of appeals assumed that the limitation it deduced from that case also applies to the distinct double jeopardy right to the issue-preclusive effect of an acquittal. *See id.* 9a-10a. And the court of appeals saw no prosecutorial overreaching in this case because "[t]he point of separate trials here was to *benefit* the defendant by avoiding the undue prejudice that would occur upon the mention of the defendant's felonious past to the jury." *Id.* 9a.

As a secondary rationale, the court of appeals suggested that petitioner waived his right to issue preclusion because the severance here occurred "with [his] consent." Pet. App 10a; *see also id.* at 11a n.2 (phrasing question presented in terms of whether defendants in this position "waive [their] right to assert" the right to issue preclusion). Applying issue preclusion under these circumstances, the court of appeals suggested, would have unfairly deprived the Commonwealth of a full opportunity to prove all of its allegations. Pet. App. 9a.

6. The Virginia Supreme Court granted discretionary review and affirmed. Pet. App. 1a. In lieu of writing an opinion, the court issued a published order adopting as its own "the reasons stated in the opinion of the Court of Appeals." *Id.*

SUMMARY OF ARGUMENT

Petitioner did not lose his double jeopardy right to the issue-preclusive effect of an acquittal by consenting to severance of the charges against him.

I. The Virginia Court of Appeals concentrated its analysis on a case involving the double jeopardy right against multiple trials, *Ohio v. Johnson*, 467 U.S. 493 (1984). But this case involves a different right: the right to issue preclusion. Whereas the right against multiple trials guards against the mere fact of a successive trial (regardless of the outcome of the first trial), the right to issue preclusion protects the integrity of a prior acquittal. And as its very name suggests, the doctrine of issue preclusion does not necessarily bar a successive trial. The doctrine simply precludes "relitigating any *issue* that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009) (emphasis added).

II. In light of issue preclusion's distinct foundation and consequences, this Court has thrice held that a defendant may invoke that right "irrespective of the good faith of the State in bringing successive prosecutions." *Harris v. Washington*, 404 U.S. 55, 56-57 (1971) (per curiam); *accord Yeager*, 557 U.S. at 118, 122-23; *Turner v. Arkansas*, 407 U.S. 366, 367, 370 (1972) (per curiam). This is because an acquittal is inviolate—regardless of whether there is any prosecutorial overreaching.

Issue preclusion is also available regardless of whether a defendant consents to having separate trials. The Commonwealth asserts that *Jeffers v. United States*, 432 U.S. 137 (1977), dictates a finding of waiver under these circumstances. But *Jeffers*—

like *Johnson*—involved only the right to multiple trials. Specifically, it held that a defendant who requests separate trials necessarily waives the protection against multiple trials because the former and the latter are mutually exclusive. That reasoning does not apply to this case. There is no inconsistency between preferring separate *trials* and later seeking to prevent the government from relitigating an *issue* resolved against it at the first trial.

At the very least, equitable considerations dictate that where, as here, defendants consent to severance to avoid undue prejudice, they should not be deemed to relinquish their right to issue preclusion. Evidence of prior convictions is highly prejudicial. Accordingly, defendants facing multiple charges, only one of which permits the prosecution to introduce evidence of their prior convictions, have no real choice but to accept severance. On the other hand, the prosecution is not prejudiced when defendants who have assented to severance retain their right to issue preclusion. Issue preclusion extends only to issues that the prosecution has fully litigated and that were necessarily decided against it. So in a case such as this one, the prosecution is not deprived of a full and fair opportunity to prove all of its allegations.

ARGUMENT

In its resolution of the question presented, the Virginia Court of Appeals treated two strands of double jeopardy law—the right against multiple trials and the right to issue preclusion—as interchangeable. *See* Pet. App. 6a-10a. Those rights, however, are conceptually distinct. And once the distinct purposes and effects of issue preclusion come

into focus, it becomes apparent that a defendant does not lose that right where, as here, charges are severed "with the defendant's consent and for his benefit," *id.* 10a.

I. Issue preclusion and the right against multiple trials are different double jeopardy rights.

1. The Double Jeopardy Clause of the Fifth Amendment (applicable to the states through the Fourteenth Amendment) protects the accused from being "twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V; *see also Benton v. Maryland*, 395 U.S. 784, 796 (1969). By preventing the prosecution from "mak[ing] repeated attempts to convict an individual for an alleged offense," the Clause serves as a bulwark between the individual and "the State with all its resources and power." *Green v. United States*, 355 U.S. 184, 187 (1957). In particular, the double jeopardy guarantee spares the accused from the "embarrassment, expense and ordeal" of "liv[ing] in a continuing state of anxiety and insecurity," as well as from the "enhanc[ed] possibility that even though innocent he may be found guilty." *Id.* at 187-88.

The Clause effectuates its overall guarantee through multiple distinct protections. One such protection is the right against multiple trials for the same offense. *See, e.g.*, *Brown v. Ohio*, 432 U.S. 161, 168-69 (1977). Another is the right to the issue-preclusive effect of an acquittal. *See, e.g.*, *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 (2016); *Ashe v. Swenson*, 397 U.S. 436, 445 (1970).

The right against multiple trials is a form of claim preclusion: it instructs that a "final judgment on the merits foreclos[es] successive litigation of the

very same claim"—or, in the parlance of criminal law, the same charge. *Bravo-Fernandez*, 137 S. Ct. at 357 (alteration in original) (quotation marks and citation omitted). The question whether two charges are considered the same for the purposes of the right against multiple trials depends exclusively on the formal elements of the two charges: if each of the two charges contains an element the other lacks, the prosecution may try a defendant a second time. *See, e.g.*, *Blockburger v. United States*, 284 U.S. 299, 304 (1932). But if one charge is a lesser-included offense of the other, the defendant is entitled to limit the prosecution to a single trial. *See Brown*, 432 U.S. at 166. For example, the right against multiple trials protects a defendant who has been tried and convicted of second-degree murder from subsequently being tried for first-degree murder of the same victim.

While the right against multiple trials provides complete protection when applicable, it applies only in rare circumstances. "[W]ith the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses," prosecutors can "spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. So long as each charge has one element the others lack, the right against multiple trials does not bar a successive prosecution based on the same underlying conduct—even after a defendant has been acquitted.

This is where issue preclusion (sometimes called collateral estoppel) comes into play. *See Bravo-Fernandez*, 137 S. Ct. at 356 & n.1. As Judge Friendly explained, "to permit the Government to force a defendant *who has won an acquittal* to

relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment." *United States v. Kramer*, 289 F.2d 909, 916 (2d Cir. 1961) (emphasis added).

In contrast to the right against multiple trials, which operates with respect to *charges*, the double jeopardy right to issue preclusion prevents the prosecution from rearguing *issues* that a jury has already decided in the defendant's favor at a prior trial. *See Bravo-Fernandez*, 137 S. Ct. at 358. Looking beyond the formal elements of each charge, the rule turns on the contentions the parties advanced, and the evidence they presented, at the first trial. *Ashe*, 397 U.S. at 444. It "precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009) (citing *Ashe*, 397 U.S. 436).

2. Like the right against multiple trials, the right to issue preclusion is designed in part to prevent "unfair and abusive reprosecutions." *Ashe*, 397 U.S. at 445 n.10; *see also Ohio v. Johnson*, 467 U.S. 493, 502 (1984). But the issue preclusion doctrine's focus on preserving the integrity of acquittals distinguishes it from the right against multiple trials.

The right against multiple trials can be triggered regardless of "whether in the former trial [the defendant was] acquitted or convicted." *Green*, 355 U.S. at 187 (quotation marks omitted); *see also, e.g.*, *Brown*, 432 U.S. at 168-69. This is because the harm

that right seeks to prevent is the mere fact of having to stand trial a second time. The issue preclusion doctrine, by contrast, can spring only from an acquittal, such as occurred here. The doctrine is designed to prohibit relitigation of prosecutorial allegations that a jury has already rejected.

Protecting the integrity of acquittals is an interest of the highest order. As this Court has noted time and again, "the law attaches particular significance," *United States v. Scott*, 437 U.S. 82, 91 (1978), and "special weight" to acquittals, *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). Once a defendant has been acquitted, the Government cannot appeal. *United States v. Ball*, 163 U.S. 662, 671 (1896). Indeed, the finality of an acquittal is "unassailable," *Yeager*, 557 U.S. at 122-23, and "absolute," *Burks v. United States*, 437 U.S. 1, 16 (1978). Even when an acquittal results from a trial court's mistakenly dismissing charges or granting a midtrial motion, the Double Jeopardy Clause insists that it remain inviolate. *See Evans v. Michigan*, 568 U.S. 313, 324 (2013) (dismissal); *Sanabria v. United States*, 437 U.S. 54, 68-69 (1978) (midtrial motion); *see also Green*, 355 U.S. at 188 ("[I]t is one of the elemental principles of our criminal law" that an acquittal cannot be disturbed, even if it "may appear to be erroneous.").

The Double Jeopardy Clause's special respect for acquittals is rooted in the inherent disparity between the Government, "with all its resources and power," and individual criminal defendants. *Green*, 355 U.S. at 187. If the Government were allowed a second opportunity to litigate issues after an acquittal, it would "gain[] an advantage from what it learn[ed] at the first trial about the strengths of the defense case

and the weaknesses of its own." *DiFrancesco*, 449 U.S. at 128. This would create "an unacceptably high risk" that the prosecution—even if acting in the utmost good faith—"might wear down the defendant so that 'even though innocent he may be found guilty.'" *See Scott*, 437 U.S. at 91 (quoting *Green*, 355 U.S. at 188).

The need to accord special solicitude to acquittals is also tied to the importance of the right to trial by jury. The use of juries in criminal cases embodies "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). Juries "function as circuitbreaker in the State's machinery of justice," ensuring that the criminal justice system is one "of limited state power." *Blakely v. Washington*, 542 U.S. 296, 306, 313 (2004); *see also United States v. Powell*, 469 U.S. 57, 65 (1984). A jury's verdict of acquittal thus "represents the community's collective judgment" that the prosecution has failed to prove its allegations, *Yeager*, 557 U.S. at 122—a judgment that is owed unconditional respect, lest the citizenry lose faith in the fairness of the system.

3. Issue preclusion also produces consequences that are distinct from those that flow from the right against multiple trials. As its very name suggests, issue preclusion—unlike the right against multiple trials—does not necessarily bar a successive prosecution. *See Yeager*, 557 U.S. at 125-26. This basic principle accords with the right's common-law analog, which "do[es] not purport to prohibit litigation of matters that have never been argued or decided." 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4416, at 424 (3d ed. 2016);

see also Restatement (Second) of Judgments § 27, at 256 (1982). If a defendant who has been acquitted "fail[s] to show that the jury necessarily resolved in his favor an issue of ultimate fact that the Government must prove in order to convict him" at a second trial on new charges, the second trial may proceed. *Yeager*, 557 U.S. at 125.

To be sure, in some cases the arguments and evidence presented at a first trial are so closely aligned with allegations in a second indictment that, as a practical matter, the issue-preclusive effect of an acquittal at the first trial prohibits a second trial. *Ashe* is an example of this phenomenon. There, a group of men robbed six poker players. 397 U.S. at 437. The State first tried the defendant for robbing one of the players, and he was acquitted. The State then charged the defendant with robbing a second player. *Id.* at 438-40. Scrutinizing the arguments and evidence presented at the first trial, this Court concluded that the jury necessarily decided that Ashe was not "one of the robbers." *Id.* at 445. Consequently, the issue preclusion doctrine barred the State from relitigating that issue at a second trial. And because the State lacked sufficient evidence to support any alternative theory, a second prosecution for the robbery of another poker player was "wholly impermissible." *Id.*

But not every case is like *Ashe.* In many cases, issue preclusion does not bar a second trial at all; the prosecution can press ahead on any theory that the jury in the first trial did not necessarily reject. *See, e.g.*, *Joya v. United States*, 53 A.3d 309, 323 (D.C. 2012); *Jackson v. State*, 183 So. 3d 1211, 1215 (Fla. Dist. Ct. App. 2016). For example, suppose a defendant were charged with assault based on the

theory that he fired a gun at the victim. If he admitted owning and firing the gun and presented only a self-defense theory, an acquittal would bear issue-preclusive effect: the prosecution would be barred from relitigating the issue of whether the defendant was justified in shooting the victim. But the preclusive effect of the acquittal would not bar a second trial for felon-in-possession of a firearm. The prosecution would be free to press forward on the theory that the defendant owned the firearm that he used during the altercation.

II. Defendants do not lose their right to issue preclusion when they consent to severance.

As a general matter, defendants may invoke issue preclusion whenever they have been acquitted and the prosecution seeks to retry them on another charge arising from the same events. But in the opinion that the Virginia Supreme Court adopted here, Pet. App. 1a, the Virginia Court of Appeals held that the right to issue preclusion cannot be invoked where criminal charges are "severed with the defendant's consent and for his benefit." *Id.* 10a.

This holding is incorrect. An acquittal's issue-preclusive effect does not depend on whether severance occurred for the defendant's benefit—or otherwise in the absence of prosecutorial overreaching. And a defendant's consent to severance does not waive his right to rely on the issue-preclusive effect of a prior acquittal. Accordingly, this Court should reverse the judgment of the Virginia Supreme Court and remand for an application of the issue preclusion doctrine to the facts of this case.

A. An acquittal retains its issue-preclusive effect regardless of whether sequential trials result from prosecutorial overreaching.

The Virginia Court of Appeals correctly noted that the right to the issue-preclusive effect of an acquittal, like other double jeopardy rights, is designed in part to "prevent[] prosecutorial abuse and overreaching." Pet. App. 7a. But the court of appeals erred in holding that issue preclusion applies *only* when the prosecution acts in bad faith in seeking a second trial. The Double Jeopardy Clause's insistence upon safeguarding the finality of acquittals requires the availability of issue preclusion, regardless of prosecutorial motives.

1. This Court has squarely and repeatedly held that the issue-preclusive effect of an acquittal does not depend on whether prosecutorial overreaching causes sequential trials. This principle was first established in two cases decided shortly after *Ashe*: *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam), and *Harris v. Washington*, 404 U.S. 55 (1971) (per curiam). And it was recently reinforced in *Yeager v. United States*, 557 U.S. 110 (2009).

In *Turner*, Arkansas prosecutors believed the defendant had murdered and robbed someone. 407 U.S. at 366-67. Yet an Arkansas statute prohibited jointly trying a defendant for murder and any other offense. *Id.* at 367. Like the Virginia rule requiring severance here, this Arkansas statute was designed to benefit the defense—to keep it from suffering

undue prejudice at a single trial on multiple charges.[1] So the State first tried Turner for murder, and a jury acquitted. The State then sought to try him for robbery. Even though state law—*not* an overzealous prosecutor—dictated these sequential trials, this Court held that the case was "squarely controlled by *Ashe*" and that the defendant was entitled to assert issue preclusion. *Id.* at 370.

Harris is in accord. In that case, the Washington Supreme Court held that *Ashe* did not apply because there was "no indication of bad faith of the state in deliberately making a 'trial run' in the first prosecution." *State v. Harris*, 480 P.2d 484, 488 (Wash. 1971). Indeed, "it was to the advantage of the defendant, and not the state, to separate the trials" because certain evidence was inadmissible in the first trial that was admissible in the second. *Id.* But this Court reversed. An acquittal has issue-preclusive effect, the Court explained, "irrespective of the good faith of the State in bringing successive prosecutions." *Harris*, 404 U.S. at 56-57.

---

[1] The anti-joinder statutes applied in *Turner*, Ark. Stat. Ann. §§ 43-1009, -1010 (Repl. 1964), were rooted in a common law rule requiring all criminal charges to be indicted and tried separately. Robert A. Leflar, *The Criminal Procedure Reforms of 1936—Twenty Years After*, 11 Ark. L. Rev. 117, 127-28 (1957); *see also* Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 Yale L.J. 339, 343 (1956) ("[A]t common law an indictment could charge only a single felony . . . ."). That limitation was intended to aid defendants, "lest [joinder] should confound the prisoner in his defence, or prejudice him in his challenge to the jury." 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 252-53 (1836).

The Court held yet again in *Yeager* that issue preclusion is available regardless of whether the prosecution seeks sequential trials. The defendant in that case stood trial on several factually related charges. 557 U.S. at 113-14. The jury acquitted on some counts but hung on others. The defendant then faced retrial on some of the hung counts. *Id.* at 115. When he argued that issue preclusion should apply at the second trial, the Government responded that retrial "present[ed] 'none of the governmental overreaching that double jeopardy is supposed to prevent.'" Brief for the United States at 26, *Yeager*, 557 U.S. 110 (No. 08-67) (quoting *Ohio v. Johnson*, 467 U.S. 493, 502 (1984)). The Government stressed that it had "attempted to bring all the charges in a single proceeding, but it was forced to retry some of the charges because the jury hung." *Id.*

This Court was unmoved. Consistent with *Turner* and *Harris*, it held that the "vitally important interest[]" in the finality of acquittals—regardless of their perceived fairness or accuracy—is alone sufficient to trigger the issue preclusion doctrine. *Yeager*, 557 U.S. at 117; *see also id.* at 122-23. The Court recalled that our criminal justice system is built on the premise that "[a] jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it." *Id.* at 123. Defendants may invoke issue preclusion whenever they face a second trial following an acquittal, regardless of prosecutorial overreaching. *See id.* at 122-23.

2. The Virginia Court of Appeals did not mention *Turner* or *Harris*, and it did little more than recite the specific holding of *Yeager*. *See* Pet. App. 10a. Instead, it construed *Ohio v. Johnson*, 467 U.S. 493

(1984), to dictate that issue preclusion is unavailable in the absence of prosecutorial overreaching. Pet. App. 8a-9a. *Johnson*, however, poses no impediment to applying the issue preclusion doctrine here.

a. *Johnson* is inapposite because it involved the right against multiple trials, not the right to the issue-preclusive effect of an acquittal. Indeed, Johnson was not acquitted at all.

In *Johnson*, the defendant was charged in a single indictment with murder and aggravated robbery as well as lesser-included offenses. 467 U.S. at 494. Over the prosecutor's objection, the defendant pleaded guilty to the two lesser-included offenses. *Id.* He then argued that his double jeopardy right against multiple trials for the same offense precluded the prosecution from trying him on the two greater charges. *Id.* This Court disagreed, explaining that "[n]o interest . . . protected by the Double Jeopardy Clause [wa]s implicated by continuing prosecution on the remaining charges." *Id.* at 501. Most pertinent here, the Court stressed that because Johnson had pleaded guilty to the initial charges, the case did not implicate the interest in the finality of an acquittal. *Id.* at 501-02.

Here, by contrast, petitioner secured an acquittal in his initial trial. And unlike the defendant in *Johnson*, petitioner is not attempting to prevent the Commonwealth from trying him for all the offenses with which he has been charged. That is, petitioner makes no claim that the Double Jeopardy Clause should have prevented his second trial as such. Rather, petitioner argues merely that the Clause's issue preclusion component barred the Commonwealth from convincing the second jury of factual

allegations it had already tried and failed to prove at the first trial.

Under these circumstances, *Turner*, *Harris*, and *Yeager*—not *Johnson*—control. Indeed, as the *Johnson* Court itself recognized, "the principles of collateral estoppel applied in *Ashe* ha[d] no relevance" in that case. 467 U.S. at 497 n.6 (internal citation omitted).

b. The Commonwealth also points to a footnote of dicta in *Johnson*. *See* BIO 27. Even though *Johnson* did not involve issue preclusion, the footnote states without citation or elaboration that "in a case such as [*Johnson*], where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Johnson*, 467 U.S. at 500 n.9. The language cannot bear the weight the Commonwealth places on it.

As an initial matter, nothing in *Johnson*'s footnote abrogated the prior holding in *Turner* that issue preclusion is available where—as here—state law creates the need for separate trials. *See supra* at 20-21. In *Johnson*, the defendant alone insisted that the charges be tried separately—and the trial court granted that request "[o]ver the State's objection." *Johnson*, 467 U.S. at 496. That is a far cry from the situation in *Turner* and this case, where the prosecution agreed that separate trials were necessary to comply with state law. J.A. 101. Thus, whatever exactly the *Johnson* footnote meant with respect to "a case such as [*Johnson*]," 467 U.S. at 500 n.9, the footnote cannot apply here.

Lest there be any doubt, the Commonwealth's reading of the dictum in *Johnson* as "control[ling]"

here, BIO 27, is impossible to square with this Court's subsequent decision in *Yeager*. There, Justice Scalia expressly referenced the *Johnson* footnote in dissent, advancing it for the proposition that the defendant could not assert issue preclusion because the prosecution had not caused the multiple trials. 557 U.S. at 131 (Scalia, J., dissenting). But the majority rejected his position. It held that the Double Jeopardy Clause's interest in preserving the finality of acquittals bars the prosecution from relitigating issues a jury decided against it, even if no prosecutorial overreaching created the need for a second trial. *See id.* at 118, 122-23. That holding governs here.

B. There is no waiver of the right to issue preclusion under the circumstances here.

This Court has observed that the term "waiver" can refer to a "great variety" of things. *Green v. United States*, 355 U.S. 184, 191 (1957). Only one of its multiple meanings is at issue here. The Commonwealth makes no claim that petitioner expressly renounced his right to issue preclusion, *see Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Nor does it contend that he "fail[ed] to make the timely assertion of [the] right," *see United States v. Olano*, 507 U.S. 725, 733 (1993). Instead, the Commonwealth asserts that petitioner, *through his conduct*, implicitly surrendered his right to the issue-preclusive effect of the first jury's acquittal. BIO 27, 29.

The Commonwealth is mistaken. Consenting to severance does not waive the right to issue preclusion. This is especially so where, as here,

severance is necessary to avoid undue prejudice to the defense.

1. Consenting to separate trials does not waive the issue-preclusive effect of an acquittal.

According to the Commonwealth, the plurality opinion in *Jeffers v. United States*, 432 U.S. 137 (1977), dictates that when defendants agree to separate trials, they waive their right to issue preclusion. BIO 27. The Commonwealth, however, seriously misconstrues *Jeffers.* That case—like *Johnson*—concerns only the right against multiple trials. And the *Jeffers* plurality's reasoning does not carry over to the right to the issue-preclusive effect of an acquittal.

Indeed, two of the Justices in the *Jeffers* plurality (including its author) explicitly acknowledged as much. In a later writing, these Justices explained: "There is no doubt that had the defendant in *Jeffers* been acquitted at the first trial, the collateral-estoppel provisions embodied in the Double Jeopardy Clause would have" applied. *Green v. Ohio*, 455 U.S. 976, 980 (1982) (White, J., joined by Blackmun & Powell, JJ., dissenting from the denial of certiorari).

a. Waiver analysis proceeds on a right-by-right basis; a defendant who waives one constitutional right—even one double jeopardy right—does not necessarily waive another. *See, e.g.*, *Burks v. United States*, 437 U.S. 1, 17 (1978) (even if a defendant waives the right against multiple trials by requesting a retrial, he does not also waive the right to the finality of an acquittal). It is thus critical to focus in any waiver case on exactly what right is at stake.

In *Jeffers*, the defendant was charged with two offenses, one of which was a lesser-included offense of the other. He "expressly ask[ed]" for separate trials on these charges. 432 U.S. at 152; *see also id.* at 142-43. At his first trial, Jeffers was convicted on one charge. *Id.* at 143. He then argued that a second trial on the remaining charge would violate his double jeopardy right "against multiple prosecutions." *Id.* at 150; *see also id.* at 144. A plurality of this Court rejected this argument, holding that Jeffers had waived that right because he was "solely responsible for the successive prosecutions." *Id.* at 152.[2]

That is as far as *Jeffers* goes. The opinion says nothing about issue preclusion. Jeffers was not even acquitted at his first trial. Thus, even if a defendant in petitioner's position waives the right *against multiple trials* when he consents to severance, *Jeffers* does not establish that this consent also relinquishes the distinct double jeopardy right *to the issue-preclusive effect of an acquittal*. The latter question must be analyzed on its own terms.

---

[2] Four justices disagreed that Jeffers was in fact solely responsible for the separate trials, 432 U.S. at 159 (Stevens, J., dissenting in part and concurring in the judgment in part), and the final Justice did not reach the issue. But no Justice disputed that a defendant who *is* solely responsible for causing multiple trials on greater and lesser-included offenses waives his right to have those offenses tried together. And subsequent cases treat *Jeffers* as having established this general principle. *See Rutledge v. United States*, 517 U.S. 292, 303 (1996); *Sanabria v. United States*, 437 U.S. 54, 75-76 (1978).

Unless otherwise noted, all citations in this brief to *Jeffers* are to the plurality opinion.

b. Turning to the right to issue preclusion on its own terms, there is no basis for finding a waiver of that right in this case. The waiver in *Jeffers*—consistent with other waiver-by-conduct cases—occurred because the defendant took an action that was mutually exclusive with the right he later tried to assert. That is not the situation here.

This Court "indulge[s] every reasonable presumption against waiver of fundamental constitutional rights." *Zerbst*, 304 U.S. at 464 (internal quotation marks and citations omitted). Against the backdrop of this presumption, this Court has found waiver by conduct only when the defendant's conduct is mutually exclusive with exercising the constitutional right at issue. For example, a defendant who causes "the absence of a witness by wrongdoing" cannot then insist on his Sixth Amendment right to confront that witness. *Davis v. Washington*, 547 U.S. 813, 833 (2006); *accord Reynolds v. United States*, 98 U.S. 145, 158-59 (1879). Similarly, a defendant waives his constitutional right to be present during trial by choosing to be absent, *Taylor v. United States*, 414 U.S. 17, 19-20 (1973) (per curiam), or by "conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom," *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

Jeffers illustrates this mutual-exclusivity principle in the double jeopardy context. Specifically, it holds that when a defendant "elects to have the two offenses tried separately and persuades the trial court to honor his election," "his action deprive[s] him of any right that he might have had against consecutive trials." 432 U.S. at 152, 154. Because

demanding two trials is mutually exclusive with invoking the right to a single trial, a defendant who insists upon the former waives the latter.

By contrast, where a defendant's conduct is not mutually exclusive with invoking a double jeopardy safeguard, the conduct does not waive that right. In *Menna v. New York*, 423 U.S. 61 (1975) (per curiam), for example, the defendant was charged with an offense for which he had already been convicted and sentenced. After unsuccessfully objecting on double jeopardy grounds, he pleaded guilty to the second charge. A guilty plea "removes the issue of factual guilt from the case." *Id.* at 62 n.2. The act of pleading guilty, therefore, waives all constitutional rights "logically inconsistent" with disputing one's factual guilt. *Id.* at 63 n.2. But the Court held that a guilty plea "does not waive" the double jeopardy right against multiple prosecutions. *Id.* This is because the right against multiple prosecutions protects against conviction "no matter how validly [the defendant's] factual guilt is established." *Id.* In other words, there is nothing inconsistent about a defendant's admitting that he committed an offense and insisting that the state is constitutionally barred from prosecuting him for it a second time.

Likewise, there is no mutual exclusivity here. Petitioner's consent to two trials is in no way inconsistent with his insistence that his acquittal carry the full legal force that our system affords—including its issue-preclusive effect. This is because issue preclusion does not necessarily prevent a second trial; the prosecution remains free to press forward on any factual theory that the first jury did not reject. *See supra* at 18-19 (citing cases). Since petitioner's conduct was not inconsistent with the

right he seeks to assert, the presumption against waiver holds.

Any other outcome would improperly make the Fifth Amendment right to issue preclusion easier to waive than its civil-law analog. The Restatement (Second) of Judgments lists a handful of "exceptions to the general rule of issue preclusion." *See id.* § 28, at 273-74 (1982). Consenting to multiple trials is not among them. And numerous civil cases expressly hold that mere agreement to bifurcation does not waive the right to issue preclusion. *See, e.g.*, *Butler v. Pollard*, 800 F.2d 223, 224-25 (10th Cir. 1986); *Goldstein v. Cogswell*, No. 85 Civ. 9256 (KMW), 1991 WL 60420, at *15 (S.D.N.Y. Apr. 11, 1991); *see also Clements v. Airport Auth. of Washoe Cty.*, 69 F.3d 321, 329-30 (9th Cir. 1995) (waiving claim preclusion does not thereby waive issue preclusion).

"It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916) (Holmes, J.). The Virginia Supreme Court's holding contravenes this bedrock principle.

2. At a minimum, consenting to severance should not constitute waiver when done to avoid undue prejudice to the defense.

At the very least, equitable considerations dictate that acquiescing to severance under the circumstances here cannot waive the right to the preclusive effect of an acquittal. Petitioner consented to severance to avoid undue prejudice, and applying issue preclusion would not unfairly disadvantage the prosecution.

a. In numerous double jeopardy cases, this Court has refused to infer waiver from an action the defendant had "no meaningful choice" but to take. *Green*, 355 U.S. at 191. In *Green*, for example, the Government argued that the defendant "'waived' his constitutional defense of former jeopardy to a second prosecution on [a] first degree murder charge by making a successful appeal of his improper conviction of second degree murder." *Id.* (emphasis omitted). This Court rejected the argument, explaining that the law "does not[] place the defendant in such an incredible dilemma." *Id.* at 193. "[I]t cannot be imagined that the law would deny to a prisoner" the ability to take an appeal "unless he should waive" his constitutional protection against double jeopardy. *Id.* at 192.

In *Sanabria v. United States*, 437 U.S. 54 (1978), the Court rejected a similar contention. There, the defendant filed a midtrial motion that the trial judge erroneously granted, causing the defendant to be acquitted. The Government contended that the defendant "waived his double jeopardy right[]" against being retried after an acquittal because he had made the motion that triggered the trial judge's erroneous ruling. *Id.* at 75. Again, this Court would have none of it. Under "the adversary assumption on which our system of criminal justice rests," *id.* at 78, criminal defendants have no reasonable choice but to file motions for various forms of relief, some of which may generate erroneous rulings that lead to acquittals. Defendants, therefore, cannot be forced to choose between filing such motions and waiving their double jeopardy rights. *See id.*

In *Jeffers*, the plurality signaled that this same basic analysis applies when a defendant seeks

severance to avoid "undue prejudice." 432 U.S. at 153. While holding that Jeffers waived his right against multiple trials by requesting severance, the plurality noted that the outcome "might [have] be[en] different" if the defendant had sought separate trials to "ensure that prejudicial evidence . . . would not have been introduced." *Id.* at 153 & n.21.

This case presents that very hypothetical: joining charges that permit the prosecution to introduce evidence of a prior conviction with charges that do not creates a grave risk of undue prejudice. If a jury learns about a defendant's prior conviction, it may "generaliz[e] a defendant's earlier bad act into bad character." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). That is, the jury may "prejudge" the defendant "and deny him a fair opportunity to defend" himself against a charge for which the prior conviction is inadmissible. *Michelson v. United States*, 335 U.S. 469, 476 (1948); *see also Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) (Burger, J.) (introducing prior convictions similar to currently charged offenses places "inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time'"). For the very reason that evidence of prior convictions is "highly prejudicial," the Virginia courts have concluded that "justice requires" trial courts to "sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction."

Hackney v. Commonwealth, 504 S.E.2d 385, 388-89 (Va. Ct. App. 1998) (en banc).[3]

In light of these realities, petitioner had no meaningful choice but to agree to severance. He was charged with being a felon in possession, as well as with larceny and breaking and entering. His prior convictions for larceny and breaking and entering were admissible on the former charge but threatened to be acutely prejudicial on the latter charges. Forcing petitioner to choose between a trial free of this undue prejudice and the constitutional right to the issue-preclusive effect of an acquittal would have placed him in an "incredible dilemma," just as this Court forbade in *Green*. 355 U.S. at 193.

b. What is more, refusing to find waiver here would not unfairly burden the prosecution in any way. The Commonwealth propounds the maxim that it is "entitled to [a] 'full and fair opportunity to convict those who have violated its laws.'" BIO 28 (quoting *Johnson*, 467 U.S. at 502); *see also, e.g.*, *Arizona v. Washington*, 434 U.S. 497, 509 (1978). Put another way, the prosecution should be given "one fair opportunity to offer whatever proof it could

---

[3] Other jurisdictions likewise recognize that a serious risk of undue prejudice exists when felon-in-possession charges are joined with other charges. *See, e.g.*, *Brown v. State*, 967 P.2d 1126, 1131 (Nev. 1998) (severance is necessary "to ensure fairness" to the defendant whenever "the State seeks convictions on multiple counts, including a count of possession of a firearm by an ex-felon"); *United States v. Dockery*, 955 F.2d 50, 53 (D.C. Cir. 1992) (district court abused its discretion by refusing to sever felon-in-possession charge because holding a single trial on all charges unduly prejudiced defendant).

assemble." *Burks*, 437 U.S. at 16. But that principle is in no way imperiled here. Issue preclusion, by its very nature, extends only to issues that the prosecution has fully litigated and that were necessarily decided against it. *See Ashe*, 397 U.S. at 443; 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4416, at 424 (3d ed. 2016). Its invocation presupposes that the prosecution has already had a full and fair opportunity to prove an issue. *See Ashe*, 397 U.S. at 446.

This case illustrates the point. After choosing which charges to try first, the Commonwealth had an uninhibited opportunity at the first trial to prove that petitioner played a role in breaking into the Garrisons' home and stealing the safe. *See* J.A. 33-35; *see also* VA Jt. App. 257-67. The jury, however, rejected these allegations. That being so, there is nothing unfair about denying the prosecution a second chance to prove the very same allegations that it already tried and failed to prove. The Double Jeopardy Clause protects against precisely this sort of injustice.

CONCLUSION

For the foregoing reasons, the judgment of the Virginia Supreme Court should be reversed.

Respectfully submitted,

J. Addison Barnhardt
GRISHAM & BARNHARDT, PLLC
414 E. Market Street, Suite D
Charlottesville, VA 22903

Jeffrey L. Fisher
Counsel of Record
David T. Goldberg
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

November 30, 2017