No. 16-1348

In the Supreme Court of the United States

MICHAEL NELSON CURRIER, PETITIONER

v.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether petitioner, who expressly consented to two separate trials on distinct charges arising from the same set of facts, may invoke the issue-preclusion component of the Double Jeopardy Clause to bar or limit the second trial.

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INTEREST OF THE UNITED STATES

This case presents the question whether a defendant who expressly consents to severance of multiple charges into sequential trials may later invoke the issue-preclusion component of the Fifth Amendment's Double Jeopardy Clause to bar or limit the second trial. The resolution of that question will affect federal criminal cases because the Double Jeopardy Clause applies to the federal government and Federal Rule of Criminal Procedure 14(a) permits a federal judge to order separate trials of counts against a single defendant when joinder of the offenses would be prejudicial to either the defendant or the government.

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person "shall * * * be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

Following a jury trial in the Circuit Court for the County of Albemarle, petitioner was convicted on one count of possession of a firearm by a felon, in violation of Va. Code Ann. § 18.2-10 (2009); *id.* § 18.2-308.2 (Supp. 2012). J.A. 6, 99. He was sentenced to five years of imprisonment. Pet. App. 5a. The Court of Appeals of Virginia and the Supreme Court of Virginia affirmed. *Id.* at 1a, 2a-13a.

1. On March 7, 2012, a break-in occurred at the home of Paul and Brenda Garrison in Albemarle County, Virginia. A large gun safe containing approximately $70,000 in cash, personal papers, and 20 guns was stolen from the home. The safe was later located in the Rockfish River in Nelson County, Virginia. When police recovered the safe, the lock mechanism had been destroyed and removed. The safe still contained the 20 firearms, but the cash was gone. Pet. App. 3a; see Pet. 3; Br. in Opp. 1.

A police investigation identified Bradley Wood, the Garrisons' nephew, as a suspect. Wood implicated petitioner as an accomplice in the crime. Pet. App. 3a. In addition, a neighbor who had been at home on the day of the break-in identified petitioner as one of the passengers in a pickup truck she had seen exiting the Garrisons' driveway after hearing "a lot of 'loud banging' and 'loud noises' coming from the Garrison residence." *Ibid.* A cigarette butt recovered from the truck contained petitioner's DNA. *Id.* at 4a.

A state grand jury indicted petitioner for breaking and entering the Garrisons' home, grand larceny, and possession of a firearm by a convicted felon. Pet. App. 4a; see J.A. 48-49. The firearm charge was based on the allegation that petitioner and Wood had opened the safe

at the river and that petitioner handled the guns while removing the cash. Pet. 4; Br. in Opp. 3-4, 11.

2. Before trial, petitioner and the prosecution agreed to sever the felon-in-possession charge from the other two charges. Pet. App. 4a. Virginia courts have interpreted state-court rules to require that "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." *Hackney* v. *Commonwealth*, 504 S.E.2d 385, 389 (Va. Ct. App. 1998) (en banc); see Va. Sup. Ct. R. 3A:6(b), 3A:10. They have recognized, however, that the procedure is not based in either the state or federal constitutions. See *Commonwealth* v. *Smith*, 556 S.E.2d 223, 225-227 & n.2 (Va. 2002) (treating due process challenge as distinct from any argument concerning Rule 3A:10(c)); *Purvis* v. *Commonwealth*, 522 S.E.2d 898, 902 (Va. Ct. App. 2000) ("Because appellant alleges only a violation of Rule 3A:10, we apply the standard for determining whether non-constitutional error is harmless.").

Petitioner was tried first on the breaking-and-entering and larceny charges. Br. in Opp. 3; see J.A. 47 (joint motion of the Commonwealth and petitioner "to continue the Felon in Possession of a Firearm trial" until after completion of the first trial). A jury acquitted petitioner of those counts. Pet. App. 4a.

3. Petitioner subsequently claimed that the Double Jeopardy Clause imposed a barrier to the second of the two trials. Pet. App. 5a; see J.A. 47. In his view, the jury at the first trial had necessarily concluded that he was not present at the Garrisons' home. Va. Sup. Ct.

App. 291.[1] He contended that the second trial, which necessarily involved the same set of facts, should therefore not be allowed to proceed, or, in the alternative, that the prosecution should be precluded from introducing "any evidence of [his] alleged involvement in the theft and burglary at the Garrisons' home." *Ibid.*; see *id.* at 286-293.

The trial court denied petitioner's motions. Pet. App. 5a. It reasoned that while the Double Jeopardy Clause "prevents the Commonwealth * * * from using the prosecution of a minor offense as * * * a dress rehearsal for a more serious later prosecution" or "subjecting the accused to the hazards of vexatious multiple prosecutions," such "concerns are not applicable in this case." J.A. 50-51. The court observed that petitioner's charges had been tried separately not because of prosecutorial overreaching but because, under state rules, his consent to severance meant that they could not be tried simultaneously. J.A. 51.

A jury found petitioner guilty of unlawful possession of a firearm by a felon, and he was sentenced to five years of imprisonment. Pet. App. 5a.

4. The Court of Appeals of Virginia affirmed. Pet. App. 2a-13a.

The state court of appeals noted that because "the crime of possessing a firearm as a convicted felon is not the 'same offense' as burglary or larceny[,] * * * a plain language reading of the [Double Jeopardy Clause] would lead to the conclusion that [petitioner] could be tried on the firearm charge after acquittal on the other charges." Pet. App. 6a. It recognized, however, that this Court has interpreted the Double Jeopardy Clause

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[1] Va. Sup. Ct. App. refers to the Appendix filed in the Supreme Court of Virginia in No. 160102.

to incorporate a "collateral estoppel doctrine" under which a later prosecution for a separate offense may be barred by an earlier jury determination of an "'ultimate fact'" in the defendant's favor. *Id.* at 7a (quoting *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970)). But it explained that the Double Jeopardy Clause "is not 'simply res judicata dressed in prison grey.'" *Ibid.* (quoting Notes & Comments, *Twice in Jeopardy*, 75 Yale L.J. 262, 277 (1965)). "Its aim," the court reasoned, "is to prevent 'oppressive practices' by the prosecution." *Ibid.* (quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)).

The state court of appeals determined that this case involved none of the "prosecutorial overreaching" with which the Double Jeopardy Clause is concerned. Pet. App. 9a (citation omitted). The charges were "brought on the same date by the same grand jury," and one was "severed for the benefit of the defendant and with his consent." *Id.* at 8a. Petitioner thus could not rely on the issue-preclusion aspect of the Double Jeopardy Clause "as a sword to prevent the State from completing its prosecution on the remaining charge[]." *Id.* at 9a (quoting *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984)); see *id.* at 10a.[2]

5. The Supreme Court of Virginia summarily affirmed "for the reasons stated in the opinion of the Court of Appeals." Pet. App. 1a.

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[2] In light of its holding, the state court of appeals declined to address the Commonwealth's alternative argument that the two sets of charges were factually distinct, such that even if issue preclusion were applicable, petitioner's acquittal on the breaking-and-entering and larceny charges did not necessarily preclude a finding of guilt on the felon-in-possession charge. See Pet. App. 10a n.1; Resp. Br. 14.

SUMMARY OF ARGUMENT

A defendant who voluntarily agrees to sever multiple charges arising from a common set of facts into separate trials cannot invoke the issue-preclusion component of the Double Jeopardy Clause to bar the prosecution or limit the evidence introduced at his second trial.

A. The Double Jeopardy Clause's protection against being "twice put in jeopardy" for the "same offence," U.S. Const. Amend. V, guards against government oppression in the form of multiple trials designed to give the government repeated opportunities to convict a defendant of the same crime. It does not relieve a defendant of the foreseeable consequences of his own voluntary litigation choices. For example, the Court has held that if a defendant asks for and obtains severance of two charges into separate trials and is convicted at the first, he has no right under the Double Jeopardy Clause to bar the second trial on the ground that the charges are for the "same offence" because one is a lesser-included offense of the other. *Jeffers* v. *United States*, 432 U.S. 137, 150-152 (1977) (plurality opinion); see *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984).

B. A defendant who has consented to two trials and is acquitted, rather than convicted, at the first trial does not acquire any double-jeopardy right to bar or limit the second trial. The issue-preclusion component of the Double Jeopardy Clause protects acquittals by treating even legally distinct charges as the "same offence" where the defendant's acquittal on the first charge necessarily reflects the prosecution's failure to prove an "ultimate fact" required for conviction on the second charge. *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). But that doctrine modifies only the meaning of "same of-

fence" following an acquittal. It does not free a defendant from his own litigation choices or create a freestanding right to avoid the consequences of those decisions. As this Court has held, a defendant who has agreed to multiple trials on related charges cannot invoke the Double Jeopardy Clause to assert that he is being impermissibly subjected to multiple trials for the "same offence."

Petitioner suggests that the issue-preclusion component of the Double Jeopardy Clause is distinct from the protection against multiple trials. That is incorrect. Because issue preclusion's sole double-jeopardy function is to modify the definition of the "same offence" in multiple-trials analysis, it is part of the multiple-trials protection, not distinct from it. Indeed, this Court's decisions have treated it as such. The only remedy that this Court has ever provided or suggested would be appropriate for a claim invoking issue preclusion is a prohibition of the second trial. And in the federal system, an issue-preclusion claim, like any other double-jeopardy claim, is subject to interlocutory appeal because it raises the right not to be tried twice for the "same offence," a right that is best vindicated before the second trial occurs. This Court also has specifically rejected the argument, made by petitioner here, that the Double Jeopardy Clause's issue-preclusion component might simply limit the evidence presented at a second trial, rather than prohibit the proceeding altogether. *Dowling* v. *United States*, 493 U.S. 342, 347-350 (1990).

The Court's decisions holding that the Double Jeopardy Clause is not violated when a defendant faces a second trial due to his own litigation decisions do not depend on the concept of "waiver." Instead, the Court has held that the Double Jeopardy Clause confers no

protection when a defendant's voluntary choice logically entails a second trial. Even if waiver analysis applied, however, the result would be the same. A defendant who elects two trials arising from the same set of facts, and is then subject to two trials arising from the same set of facts, receives exactly what he agreed to.

C. The foregoing principles prevent petitioner from invoking the Double Jeopardy Clause's issue-preclusion component to bar or limit the second trial to which he consented in this case. Petitioner's charges arose from a series of events that took place on a single day. When he consented to sever the charges for his own benefit, he necessarily agreed to a full second proceeding that might include similar evidence as, but yield a different outcome from, the first.

Petitioner's contention that he faced a difficult choice—between a single trial in which some information about his criminal record would reach the jury and two trials in which one jury might acquit while the other found him guilty—does not entitle him to a different result. In the double-jeopardy context, as in other criminal-procedure contexts, this Court has rejected the argument that simply because a defendant faces a difficult choice, he should be relieved of the consequences of his decision. And petitioner did not face an unresolvable dilemma here. Although Virginia case law gave him the option of separate trials, that option was not constitutionally compelled, and it is not the norm in many jurisdictions, including the federal system. Petitioner might have elected a single trial while requesting any one of a number of procedures to limit any prejudice from his prior convictions. Petitioner's decision to instead seek separate trials does not relieve him of the consequences of that voluntary choice.

ARGUMENT

A DEFENDANT WHO CONSENTS TO TWO TRIALS CANNOT INVOKE THE DOUBLE JEOPARDY CLAUSE TO BAR OR LIMIT THE SECOND TRIAL

Petitioner was not entitled to invoke the Double Jeopardy Clause to prohibit or constrain a second trial to which he had voluntarily consented. Petitioner had the option to try his factually related counts in one proceeding, but he chose instead to stand trial on them separately. The inevitable and foreseeable consequence of that choice was two factually overlapping trials at which the juries might reach different outcomes. Although Virginia's state-law rule permitted petitioner to request a severance, the Constitution did not guarantee him the right to obtain separate trials on separate offenses, yet claim that the issue-preclusion component of the Double Jeopardy Clause rendered those offenses the "same" and thereby precluded or limited the second trial. U.S. Const. Amend. V.

A. The Double Jeopardy Clause Does Not Relieve A Defendant Of The Consequences Of His Own Litigation Choices

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Clause affords a defendant three basic protections: it "protects against a second prosecution for the same offense after acquittal"; it "protects against a second prosecution for the same offense after conviction"; and it "protects against multiple punishments for the same offense." *Ohio* v. *Johnson*, 467 U.S. 493, 498 (1984) (quoting *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977)) (cita-

tion omitted). The Clause does not, however, bar a second trial when "the defendant consents to a disposition that contemplates reprosecution." *Evans* v. *Michigan*, 568 U.S. 313, 326 (2013).

1. The Double Jeopardy Clause "guards against Government oppression." *United States* v. *Scott*, 437 U.S. 82, 99 (1978). It "forbids a second trial *for the purpose of* affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States*, 437 U.S. 1, 11 (1978) (emphasis added). At the same time, the Double Jeopardy Clause does not create "an insuperable obstacle to the administration of justice * * * in * * * cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade* v. *Hunter*, 336 U.S. 684, 688-689 (1949).

The Court has repeatedly applied that principle to hold that the Double Jeopardy Clause does not relieve a defendant of the consequences of his own voluntary litigation choices. In *United States* v. *Dinitz*, 424 U.S. 600 (1976), for example, the defendant sought to prohibit a second trial after the trial judge excluded his lead counsel, and the defendant sought and obtained a mistrial. *Id.* at 601-605. The Court held that the defendant could be retried. *Id.* at 611-612. "[W]hen a defendant persuades the court to declare a mistrial," the Court recognized, "jeopardy continues and retrial is generally allowed." *Evans*, 568 U.S. at 326. The Court observed that "the question whether under the Double Jeopardy Clause there can be a new trial after a mistrial has been declared *without* the defendant's request or consent depends on whether 'there is a manifest necessity for the mistrial, or the ends of public justice would otherwise be defeated.'" *Dinitz*, 424 U.S. at 606-607

(quoting *Illinois* v. *Somerville*, 410 U.S. 458, 461 (1973)) (emphasis added; brackets and citations omitted). But "[d]ifferent considerations obtain * * * when the mistrial has been declared at the defendant's request." *Id.* at 607. The Court reasoned that "the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial," and "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." *Ibid.* (citation omitted).

The plurality opinion in *Jeffers* v. *United States*, 432 U.S. 137 (1977), which this Court has recognized to reflect the holding in that case, see *Johnson*, 467 U.S. at 502, similarly concluded that the Double Jeopardy Clause poses no bar to successive prosecutions if it is the *defendant* who "elects to have the two offenses tried separately and persuades the trial court to honor his election," 432 U.S. at 152; see Pet. Br. 25 n.2 (acknowledging that "subsequent cases treat *Jeffers* as having established th[e] general principle" 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") (emphasis omitted). The defendant in *Jeffers* was charged in separate indictments with offenses that the Court later recognized to be the "same" for double-jeopardy purposes (because one was a lesser-included offense of the other, see 432 U.S. at 147-151 (plurality opinion)), but he successfully opposed the government's motion to try the offenses together. *Id.* at 142-143. The plurality in *Jeffers*

found "no violation of the Double Jeopardy Clause" when a "defendant expressly asks for separate trials," is convicted of a lesser-included offense in the first trial, and is then tried on a greater offense in the second proceeding. *Id.* at 152.

In *United States* v. *Scott*, *supra*, the Court similarly held that a defendant "suffers no injury cognizable under the Double Jeopardy Clause" when he "deliberately choos[es] to seek termination of the proceedings against him" on the basis of pre-indictment delay and then is retried following a successful government appeal. 437 U.S. at 98-99. And in *Ohio* v. *Johnson*, *supra*, the Court held that a defendant may not plead guilty to a lesser-included offense and then assert that the Double Jeopardy Clause should bar trial on a greater offense. 467 U.S. at 494. The Court reasoned that the defendant "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." *Id.* at 502.

2. The Court's holdings in *Dinitz*, *Jeffers*, *Scott*, and *Johnson* are grounded in the principle that a defendant "suffers no injury cognizable under the Double Jeopardy Clause" when he is faced only with the "consequences of his voluntary choice." *Scott*, 437 U.S. at 99. Where a defendant is "solely responsible for the successive prosecutions," nothing has "deprived him of any right that he might have had against consecutive trials." *Jeffers*, 432 U.S. at 154 (plurality opinion). The Double Jeopardy Clause "guards against Government oppression," *Scott*, 437 U.S. at 99, not a defendant's voluntary choices. Because no oppressive practices exist when a defendant himself can choose whether he will face one trial or two, see *Dinitz*, 424 U.S. at 607-609, such a cir-

cumstance presents "none of the governmental overreaching that double jeopardy is supposed to prevent," *Johnson*, 467 U.S. at 502.

Even when a trial has been "tainted by prejudicial judicial or prosecutorial error," the "important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." *Dinitz*, 424 U.S. at 609. The defendant himself is in the best position to decide whether "the interests served by the Double Jeopardy Clause," namely, "the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions," *id.* at 608, are outweighed by other considerations. Thus, even where a defendant is otherwise "entitled to have [his] charges * * * resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." *Jeffers*, 432 U.S. at 152 (plurality opinion).

B. A Defendant Who Has Consented To Two Trials Cannot Rely On The Outcome Of The First Trial To Prohibit Or Limit The Second Proceeding

Petitioner contends (Br. 13-17, 26-28), that a different rule applies when a defendant is acquitted, rather than convicted, at his first trial. But the principle that the Double Jeopardy Clause "does not relieve a defendant from the consequences of his voluntary choice," *Scott*, 437 U.S. at 99, governs irrespective of the first trial's outcome. A defendant who consents to severance of a factually related charge into a second trial does not thereby force the prosecution to prevail twice in order to convict him of the severed offense.

1. The double-jeopardy implications of a defendant's consent to two trials do not depend upon conviction at the first trial

The Court's holding in *Jeffers* forecloses "a defendant's claim of double jeopardy based upon a guilty verdict in the first of two successive prosecutions, when the defendant [was] responsible for insisting that there be separate rather than consolidated trials." *Johnson*, 467 U.S. at 502. A claim of double jeopardy based on an acquittal is similarly foreclosed in that circumstance. As the Court has recognized, the Double Jeopardy Clause's general bar on "'repeated attempts to convict an individual for an alleged offense'" "is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution." *Scott*, 437 U.S. at 95-96 (citations omitted).

Although the Double Jeopardy Clause "attaches particular significance to an acquittal," *Scott*, 437 U.S. at 91; see Pet. Br. 13, it does so in two specific ways. First, while a defendant who successfully challenges his conviction on appeal generally may be tried a second time, an acquittal—no matter how "mistaken"—bars retrial completely on the same charge. *Scott*, 437 U.S. at 91; see *id.* at 91-92.[3] That principle is not relevant to a case

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[3] The Court recognized an exception to the general rule that a defendant's successful appeal permits retrial in *Burks* v. *United States*, *supra*, which held that the Double Jeopardy Clause precludes a second trial when a defendant obtains a reversal of his conviction for evidentiary insufficiency. 437 U.S. at 18. Petitioner errs in citing (Br. 24) *Burks* for the proposition that "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." *Burks* addressed the proper scope of appellate relief, not the effect of affirmatively consenting to multiple trials. The Court reasoned that following a successful appeal on evidentiary insufficiency, "the only

like this, in which a defendant was tried separately on legally distinct charges. See *United States* v. *Dixon*, 509 U.S. 688, 696-697 (1993) (treating charges as legally distinct for double-jeopardy purposes where each includes an element distinct from the other) (citing *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)); Pet. App. 6a (noting that charges in this case are legally distinct).

Second, while a prior conviction bars only reprosecution for an offense that is *legally* the same, "'a constitutional policy of finality for the defendant's benefit' * * * protects the accused from attempts to relitigate" the ultimate facts determined by a prior acquittal. *Brown*, 432 U.S. at 165 (quoting *United States* v. *Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion)); see *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). The Double Jeopardy Clause accomplishes this result by borrowing from civil law certain aspects of "collateral estoppel" or "issue preclusion." *Bravo-Fernandez* v. *United States*, 137 S. Ct. 352, 356-358 & n.1 (2016). Under the incorporated issue-preclusion principles, "it is appropriate to treat [separate] charges as the 'same offence'" when a prior acquittal on one charge necessarily reflects the failure to prove an "ultimate fact" that would also be necessary to prove the other charge. *Yeager* v. *United States*, 557 U.S. 110, 119 (2009); see *Black's Law Dictionary* 711 (10th ed. 2014) (defining an "ultimate fact" as "[a]

'just' remedy * * * is the direction of a judgment of acquittal," even if the defendant "sought a new trial as one of his remedies, or even as the sole remedy." 437 U.S. at 17-18. *Burks* thus declined to interpret the defendant's request for a lesser form of appellate relief (a new trial) as foreclosing a grant of greater appellate relief (a directed judgment of acquittal). It did not address whether a defendant may agree to two trials and then seek to rely on a jury acquittal in the first trial to preclude the second.

fact essential to the claim or the defense"); see also *Bobby* v. *Bies*, 556 U.S. 825, 835-836 (2009) (similar). This Court first held that the Double Jeopardy Clause includes an issue-preclusion component in *Ashe* v. *Swenson*, *supra*, in which it concluded that the State could not bring sequential prosecutions for the legally distinct armed robberies of different victims at the same poker game, where the jury at the first trial had "determined by its verdict" of acquittal the "ultimate fact" "that the [defendant] was not one of the robbers." 397 U.S. at 443, 446.

The issue-preclusion component of the Double Jeopardy Clause has no application to a second trial that a defendant has voluntarily chosen. Issue preclusion acts to "prevent" "unfair and abusive reprosecutions." *Ashe*, 397 U.S. at 445 n.10; see *Johnson*, 467 U.S. at 500 n.9 ("[W]here 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."). It does so by modifying the circumstances in which a second prosecution is considered a prosecution for the "same offence." *Yeager*, 557 U.S. at 119; see *Brown*, 432 U.S. at 166 n.6. But *Jeffers* makes clear that the Double Jeopardy Clause allows a second trial for the "same offence" when that second trial is the result of the defendant's own voluntary election. The offenses in the two trials in *Jeffers* were found to be the "same" for double-jeopardy purposes, but the plurality recognized that even though "the heart of the Double Jeopardy Clause is the prohibition against multiple prosecutions for 'the same offense,'" a defendant cannot object to such prosecutions "[i]f the defendant expressly asks for separate trials." 432 U.S. at 150, 152.

2. The issue-preclusion component of the Double Jeopardy Clause does not create a right distinct from the right against multiple trials for the same offense

Petitioner acknowledges (Br. 10) that this Court has "held that a defendant who requests separate trials necessarily waives the protection against multiple trials because the former and the latter are mutually exclusive." He contends (Br. 11, 15, 27), however, that the voluntary-choice doctrine does not foreclose a claim of issue preclusion, on the theory that the "issue-preclusive effect of an acquittal" is "distinct" from the "right against multiple trials." That contention is incorrect.

a. As the foregoing discussion illustrates, issue preclusion under the Double Jeopardy Clause is a strand of the Clause's protection against multiple trials for the same offense, not an independent constitutional right. See *Yeager*, 557 U.S. at 119. It defines the circumstances in which a defendant is considered to be on trial for the "same offence," *ibid.*, but does not confer any distinct extra-textual rights, see U.S. Const. Amend. V (providing that no person "shall * * * be subject for the same offence to be twice put in jeopardy of life or limb").

This Court's treatment of issue-preclusion claims under the Double Jeopardy Clause confirms the point. The only relief the Court has ever provided, or suggested would be appropriate, for such a claim is the prohibition of a successive trial. In *Ashe* itself, the Court held that "a second prosecution for the robbery" of a different victim was "wholly impermissible." 397 U.S. at 445; see *id.* at 446. And other decisions of this Court are to the same effect. See, *e.g.*, *Turner* v. *Arkansas*, 407 U.S. 366, 369 (1972) (per curiam) (acquittal on mur-

der charge "negate[d] the possibility of a constitutionally valid conviction" on subsequent indictment "for [a related] robbery"); *Harris* v. *Washington*, 404 U.S. 55, 55-57 (1971) (per curiam) (acquittal on murder charge with respect to one victim barred subsequent trial for murder and assault of different victims); cf. *Dixon*, 509 U.S. at 705 ("The collateral-estoppel effect attributed to the Double Jeopardy Clause * * * may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts.") (emphasis omitted); *Brown*, 432 U.S. at 166-167 n.6 (collateral-estoppel doctrine holds that "[e]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred"). Even the dissent from the denial of a petition for a writ of certiorari in *Green* v. *Ohio*, 455 U.S. 976 (1982) (White, J., dissenting), on which petitioner relies (Br. 24), states that where collateral estoppel applies, it "bar[s] a [second] trial." 455 U.S. at 981.

This Court's assertion of appellate jurisdiction over cases involving "the double jeopardy right to issue preclusion" (Pet. Br. 13) reflects its status as a component of the protection against multiple trials for the same offense. The Court has held that an order denying a defendant's double-jeopardy claim is an immediately appealable "final decision[]" under 28 U.S.C. 1291 because the Double Jeopardy Clause protects a defendant "against being twice put to trial for the same offense." *Abney* v. *United States*, 431 U.S. 651, 661 (1977) (emphasis omitted). A defendant's "double jeopardy challenge to the indictment" therefore "must be reviewable before that subsequent exposure occurs." *Id.* at 662. The Court has never suggested that claims invoking the issue-preclusion component of the Double Jeopardy

Clause are distinct from claims invoking a right to be free of multiple trials, such that they should be treated differently for purposes of appeal. To the contrary, the Court has repeatedly and recently considered pretrial appeals of such claims. See *Bravo-Fernandez*, 137 S. Ct. at 362-363; *Yeager*, 557 U.S. at 115-117.

b. Petitioner thus errs in suggesting (Br. 15-17, 27) that issue preclusion can be distinguished from the right against multiple trials on the ground that issue preclusion "does not necessarily prevent a second trial" and leaves the prosecution "free to press forward on any factual theory that the first jury did not reject."

As a general matter, when a defendant faces legally distinct charges arising out of the same set of facts, the prosecution "is entirely free to bring them separately." *Dixon*, 509 U.S. at 705. A defendant may bar a successive trial on issue-preclusion grounds only if a later prosecution would require proof of an "ultimate fact" that was necessarily within the scope of a prior acquittal. *Ashe*, 397 U.S. at 443. If such proof would not be required, then the issue-preclusion strand of double-jeopardy law does not apply at all. See *Yates* v. *United States*, 354 U.S. 298, 338 (1957) ("So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative.") (citations omitted). But when a defendant does raise a valid constitutional issue-preclusion objection, the nature of the objection is necessarily that he is being tried twice for the "same offence" such that the second trial cannot proceed. That objection is "logically inconsistent," Pet. Br. 27 (citation omitted), with a defendant's voluntary consent to severance. And, for that reason, it is the same objection

that *Jeffers* holds cannot be raised by a defendant who has agreed to successive trials.[4]

c. Petitioner's argument that the issue-preclusion component of the Double Jeopardy Clause is "distinct" from the right against multiple trials rests primarily on his assertion (Br. 15-17, 27-28) that the Clause's issue-preclusion prong functions as an exclusionary rule with respect to particular evidence, rather than a bar on a successive trial. This Court's decision in *Dowling* v. *United States*, 493 U.S. 342 (1990), forecloses that argument.

In *Dowling*, the Court rejected a bank-robbery defendant's contention that his double-jeopardy rights had been violated by the introduction of evidence, offered to bolster the identification of him as the bank robber, relating to his commission of a home invasion of which he had previously been acquitted. 493 U.S. at 344-349. Like petitioner here, the defendant in *Dowling* did not "claim * * * that the acquittal in the [home-invasion case] barred" his prosecution for bank robbery altogether; he contended instead that "by the same principle" applied in *Ashe*, the acquittal in the home-

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[4] Petitioner attempts to cast doubt on *Jeffers'* applicability to this case by noting (Br. 24) that "two of the Justices in the *Jeffers* plurality" later joined a dissent from the denial of certiorari suggesting that *Jeffers* would have come out differently had the defendant been acquitted rather than convicted in his first trial. See *Green*, 455 U.S. at 980 (White, J., dissenting). That non-precedential statement, in a case in which the arguments were not fully developed, cannot bear the weight petitioner places on it. That is particularly so because *Green* concerned the dismissal of a charge before trial on a ground unrelated to guilt or innocence, see *id.* at 977, but the dissenting statement fails to address this Court's holding in *United States* v. *Scott*, *supra*, that a defendant may be retried following the government's successful appeal of such a dismissal, see 437 U.S. at 98-99.

invasion case "precluded the Government from introducing into evidence" the testimony of the home-invasion victim. *Id.* at 347-348. The Court, however, found that "the collateral-estoppel component of the Double Jeopardy Clause [wa]s inapposite" because "the prior acquittal did not determine an ultimate issue in the [bank-robbery]" proceeding. *Id.* at 348-349. The bank-robbery jury "might reasonably conclude" that the defendant committed the home invasion, "even if it did not believe beyond a reasonable doubt that [he] committed the crimes charged at the first trial." *Ibid.* The Court "decline[d] to extend *Ashe* * * * and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances * * * relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Id.* at 348; see *United States* v. *Felix*, 503 U.S. 378, 387 (1992) (explaining that *Dowling* "endorse[s] * * * the basic, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct").

Dowling makes clear that prior acquitted conduct raises double-jeopardy concerns only if the acquittal "determine[s] an ultimate issue" in a successive case. 493 U.S. at 348. If it does, then the "second prosecution w[ould be] impermissible" under *Ashe*. *Ibid.* If it does not, then normal evidentiary rules govern its admission. *Ibid.* In other words, the double-jeopardy right where a defendant was acquitted on a fact necessary to a successful second prosecution would be a right not to be tried twice for the same offense—but that is the very

right a defendant does not have if he voluntarily consented to the second trial. See *Jeffers*, 432 U.S. at 150-152 (plurality opinion). And when the defendant seeks only to rely on a prior adjudication to preclude the admission of evidence in a later trial, he does not have a valid double-jeopardy claim at all.

Petitioner does not discuss *Dowling*; he identifies no decision of this Court interpreting the Double Jeopardy Clause to bar the admission of evidence; and the government is aware of none. Petitioner instead cites two lower-court decisions for the proposition that the Double Jeopardy Clause imposes its own evidentiary limitations. See Pet. Br. 16 (citing *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)). Neither of those cases, however, squares its analysis with *Dowling*.[5]

d. Petitioner separately cites (Br. 28) civil cases for the proposition that "mere agreement to bifurcation does not waive the right to issue preclusion." If that were true, it would be irrelevant. The governing double-jeopardy precedents do not rely on waiver, see pp. 23-24, *infra*, and in any event, given the differences between criminal and civil proceedings, this Court has cautioned that application of issue prelusion must be more "guarded" in criminal cases. *Bravo-Fernandez*, 137 S. Ct. at 358; see also, *e.g.*, *Standefer* v. *United States*, 447 U.S. 10, 21-25 (1980). Indeed, each of the decisions petitioner cites (Br. 28) rests on concerns particular to the civil context

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[5] Before this Court's decision in *Dowling*, the Supreme Court of Virginia held "that collateral estoppel is [not] limited to barring prosecutions" and could instead be used to suppress evidence. *Simon* v. *Commonwealth*, 258 S.E.2d 567, 570 (1979). The Supreme Court of Virginia has not addressed the continued vitality of that holding after *Dowling*.

in which it arose, and which do not apply here. See *Butler* v. *Pollard*, 800 F.2d 223, 224-225 (10th Cir. 1986) (affording issue-preclusive effect to jury factfinding in light of Seventh Amendment concerns); *Goldstein* v. *Cogswell*, No. 85 Civ. 9256, 1991 WL 60420, at *15 (S.D.N.Y. Apr. 11, 1991) (affording issue-preclusive effect due to concerns regarding double recovery); compare *Clements* v. *Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 330 (9th Cir. 1995) (applying issue preclusion to "conserv[e] * * * judicial resources"), with *Standefer*, 447 U.S. at 25 (holding that "competing policy considerations" in criminal case "outweigh[ed] the [judicial] economy concerns that undergird the estoppel doctrine" in civil cases).

3. Waiver doctrine does not control the double-jeopardy implications of a defendant's consent to multiple proceedings

Petitioner further errs in addressing (Br. 24) the issue in this case through the lens of traditional "[w]aiver analysis."

a. As discussed above, pp. 10-13, *supra*, the Court held in *Dinitz*, *Jeffers*, *Scott*, and *Johnson* that the Double Jeopardy Clause is not violated when a defendant faces a second trial due to his own litigation decisions. Those holdings are not grounded in findings of knowing and intelligent waiver, but instead in the principle that "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *Scott*, 437 U.S. at 99.

The defendant in *Dinitz*, for example, contended that his mistrial motion was not inconsistent with his later assertion of a double-jeopardy claim because it was not a "knowing, intelligent, and voluntary" waiver of his double-jeopardy rights. 424 U.S. at 609 n.11. The

Court rejected that contention, *ibid.*, explaining that "traditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error," *id.* at 609. It accordingly held not that the defendant had waived a double-jeopardy right, but that the court of appeals had "erred in finding that the retrial" following the defendant's mistrial motion "violated [his] constitutional right not to be twice put in jeopardy." *Id.* at 611-612; see *Scott*, 437 U.S. at 99 (explaining that in concluding the defendant there "suffer[ed] no injury cognizable under the Double Jeopardy Clause," the Court did not "thereby adopt the doctrine of 'waiver' of double jeopardy").

Although the Court has sometimes "refused to infer waiver" (Pet. Br. 29) in the double-jeopardy context when the government's argument was framed in those terms, the cases petitioner cites are ones in which the defendants did not "elect[] to have [multiple] offenses tried separately," *Jeffers*, 432 U.S. at 152—that is, they failed to take any action that envisioned multiple prosecutions. In *Sanabria* v. *United States*, 437 U.S. 54 (1978), the Court reasoned that a defendant's request for an evidentiary ruling that the district court erroneously granted was not an action that "contemplated a second trial" on the single offense with which he had been charged. *Id.* at 75; see *id.* at 76-77. And in *Green* v. *United States*, 355 U.S. 184 (1957), the Court held that a defendant charged with first- and second-degree murder who was convicted of the lesser charge at an initial trial could not be deemed to have acquiesced in a retrial on the greater charge by appealing his conviction. See *id.* at 185-186, 190-191.

b. Even if waiver doctrine provided the right framework for the question presented here, it would not suggest that a defendant who consents to two trials involving the same set of facts may invoke the issue-preclusion component of the Double Jeopardy Clause to bar or limit the second trial.

A defendant who consents to multiple trials on different charges arising from the same set of facts, and is then subject to multiple trials on different charges arising from the same set of facts, receives precisely what he consented to. He cannot reasonably have been unaware that the evidence at the second trial would overlap with the evidence at the first. Nor could he reasonably have been unaware of the possibility that he would be found guilty in one trial but not the other—indeed, severance is generally predicated on a desire to ensure distinct consideration of multiple charges, see, *e.g.*, Fed. R. Crim. P. 14(a).

A defendant who elects two trials on the same set of facts has no legal right to object to the second trial on the ground that it might result in an inconsistent verdict from the first. Had the defendant proceeded with a single trial on multiple charges, he could not invoke the Double Jeopardy Clause to object to inconsistent verdicts. See *United States* v. *Powell*, 469 U.S. 57, 64-65 (1984). A defendant's intentional pursuit of two trials to maximize his chances of prevailing in at least one should not give him the additional benefit of automatically prevailing in both if the first one goes his way.

C. Petitioner's Double-Jeopardy Claim Is Foreclosed By His Consent To Severance Of The Charges

These principles make clear that petitioner cannot rely on the Double Jeopardy Clause to bar the second trial to which he consented. Petitioner had every reason

to expect that his second trial would involve similar testimony and evidence as the first. He was charged with breaking and entering, larceny, and unlawful possession of firearms following a felony conviction based on events alleged to have taken place in a single day. Thus, when he agreed, for his own benefit, to sever the trials—thereby excluding from the first trial evidence of his prior felony convictions—he necessarily agreed to a full second proceeding on the felon-in-possession charge that might include testimony and evidence about his presence at the Garrisons' home.

Petitioner contends (Br. 28) that even if his consent to severance would otherwise foreclose his constitutional issue-preclusion claim, "equitable considerations" specific to his case dictate a different result. In particular, petitioner maintains (Br. 29-31) that he had "no meaningful choice" but to consent to severance in order to avoid "undue prejudice" from the first jury learning of his prior felony convictions. The Court rejected a similar argument in *Dinitz*. In that case, the defendant argued that he "face[d] a 'Hobson's choice'" after the trial judge excluded his lead counsel from the courtroom: if he did not seek a mistrial, he would be forced to undergo "a trial tainted by prejudic[e]" not of his own creation. *Dinitz*, 424 U.S. at 609. This Court held, however, that so long as the defendant himself elects the route that leads to a second trial, his double-jeopardy rights have not been infringed. See *id.* at 611-612.

"The criminal process * * * is replete with situations requiring 'the making of difficult judgments' as to which course to follow," and "the Constitution does not * * * forbid requiring [a defendant] to choose." *McGautha* v. *California*, 402 U.S. 183, 213 (1971) (quoting *McMann*

v. *Richardson*, 397 U.S. 759, 769 (1970)), vacated judgment on other grounds in No. 204 *sub nom. Crampton* v. *Ohio*, 408 U.S. 941 (1972). As the Court has explained, "[a] hard choice is not the same as no choice." *United States* v. *Martinez-Salazar*, 528 U.S. 304, 315 (2000); see also, *e.g.*, *Ohler* v. *United States*, 529 U.S. 753, 754-760 (2000) (defendant who preemptively introduces evidence of prior conviction on direct examination may not claim on appeal that admission of evidence was error); *Texas* v. *McCullough*, 475 U.S. 134, 135-144 (1986) (defendant who successfully appeals from his first conviction may receive a greater sentence following retrial so long as the increase is not based on vindictiveness); *South Dakota* v. *Neville*, 459 U.S. 553, 563-564 (1983) (upholding a state law requiring a suspect to submit to a blood-alcohol test or have his refusal used against him); *Brown* v. *United States*, 356 U.S. 148, 154-157 (1958) (defendant who takes the stand in his own defense cannot claim the privilege against self-incrimination during cross-examination); cf. *Richardson*, 397 U.S. at 769 (noting that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments").

In any event, petitioner faced no unsolvable dilemma here. Although asserting his right to a single trial on all of the charged offenses would have necessitated informing the jury of at least some aspect of his criminal record, the decision was no more difficult than, for example, a defendant's decision whether to assert his right to testify in his own defense and allow the admission of past crimes as impeachment evidence, or, if he does testify, whether to introduce his criminal record on direct examination in order to blunt its effect. See *Ohler*, 529 U.S. at 754-760. Virginia case law allows a defendant to request

severance of a felon-in-possession charge in a case like this, see *Hackney* v. *Commonwealth*, 504 S.E.2d 385, 388-389 (Va. Ct. App. 1998) (en banc), but Virginia cases have not treated that right as constitutionally compelled, and petitioner identifies no decision holding that it is, see *Commonwealth* v. *Smith*, 556 S.E.2d 223, 225-227 & n.2 (Va. 2002); *Purvis* v. *Commonwealth*, 522 S.E.2d 898, 902 (Va. Ct. App. 2000).

Numerous jurisdictions do not view severance as necessary when a defendant faces a felon-in-possession charge in combination with other charges that do not have a prior conviction as an element. See, *e.g.*, *State* v. *Taylor*, 729 A.2d 226, 227-229 (Conn. App. Ct. 1999); *Goodall* v. *United States*, 686 A.2d 178, 181-184 (D.C. 1996); *Frazier* v. *State*, 569 A.2d 684, 687-691 (Md. 1990); *People* v. *Turner*, No. 241591, 2003 WL 22849822, at *1 (Mich. Ct. App. Dec. 2, 2003) (per curiam); *State* v. *Evans*, 456 N.W.2d 739, 744-747 (Neb. 1990) (per curiam). Federal courts, for example, have identified "several safeguards short of severance that a district court may employ to avoid 'undue prejudice,' including a stipulation as to the existence of the prior felony conviction, a bench trial on the [felon-in-possession] charge, or a cautionary jury instruction." *United States* v. *Moore*, 104 F.3d 377, 382 (D.C. Cir. 1997) (citation omitted). The stipulation option reflects this Court's holding in *Old Chief* v. *United States*, 519 U.S. 172 (1997), that a defendant facing felon-in-possession and other charges was entitled under Federal Rule of Evidence 403 to seek exclusion of the record of a prior conviction if he stipulated to the existence of the prior felony conviction. See 519 U.S. at 190-192.

The trial court might have allowed a similar procedure in petitioner's case. See *Boone* v. *Commonwealth*,

740 S.E.2d 11, 14 & n.* (Va. 2013) (leaving open whether to follow *Old Chief* as a matter of Virginia law). But petitioner did not request it, or any other potential safeguard against any prejudicial effect of his prior convictions. He instead selected a course—severance—that expressly contemplated two trials. That he did so because he believed it would increase his chances of acquittal on at least one of the charges "does not relieve [him of] the consequences of his voluntary choice," *Scott*, 437 U.S. at 99—namely, two trials.

CONCLUSION

The decision of the Supreme Court of Virginia should be affirmed.

Respectfully submitted.

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