1   IN THE SUPREME COURT OF THE UNITED STATES

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3 JUAN BRAVO-FERNANDEZ AND   :

4 HECTOR MARTINEZ-MALDONADO,   :

5   Petitioners   : No. 15-537

6   v.   :

7 UNITED STATES,   :

8   Respondent.   :

9 - - - - - - - - - - - - - - - - - x

10   Washington, D.C.

11   Tuesday, October 4, 2016

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13   The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 10:04 a.m.

16 APPEARANCES:

17 LISA S. BLATT, ESQ., Washington, D.C.; on behalf of

18 Petitioners.

19 ELIZABETH B. PRELOGAR, ESQ., Assistant to the Solicitor

20 General, Department of Justice, Washington, D.C.; on

21 behalf of the United States.

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 1                 P R O C E E D I N G S

 2                                     (10:04 a.m.)

 3            CHIEF JUSTICE ROBERTS:  We'll hear argument

 4   first this morning in Case No. 15-537, Bravo-Fernandez

 5   and Martinez-Maldonado v. the United States.

 6            Ms. Blatt.

 7             ORAL ARGUMENT OF LISA S. BLATT

 8              ON BEHALF OF THE PETITIONERS

 9            MS. BLATT:  Thank you, Mr. Chief Justice,

10   and may it please the Court:

11            For three reasons, acquittals should have

12   full effect under the Double Jeopardy Clause without

13   regard to invalid vacated convictions.

14            First, vacated convictions are legal

15   nullities, including under the Double Jeopardy Clause.

16   Second, vacated convictions are not relevant to what a

17   jury necessarily decided.  And third, the government

18   should bear the consequences when overlapping charges

19   produce split verdicts of acquittals and invalid

20   convictions.

21            JUSTICE KENNEDY:  I take it from that you

22   would agree that there might be cases where, under

23   Ashe v. Swenson, there's an acquittal on one count,

24   conviction on the other count, conviction set aside,

25   government can retry the count that had been set aside,
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1 on the ground that under Ashe v. Swenson the verdict on

2 the other count was just irrelevant.

3   MS. BLATT: That's right. So we -- the

4 defendant always has to meet the burden of just showing

5 that the acquittal necessarily decided a fact that the

6 government wants to prove in a subsequent prosecution.

7   JUSTICE KENNEDY: In this case, could it be

8 argued -- was the argument before the jury on the

9 conspiracy in the travel counts closely intertwined with

10 666 so that it -- you can't say the jury decided most

11 likely on some issue that's irrelevant to 666?

12   MS. BLATT: Right. The only issue -- the

13 only issue that was in dispute was whether there was a

14 bribe. There's no dispute that to get to Las Vegas from

15 Puerto Rico, you have to travel. There was no dispute

16 that they agreed to go to a boxing match together. So

17 the only dispute at all was whether there was a bribe.

18   And so when the jury acquitted on conspiracy

19 and travel to commit Program Section 666, bribery, they

20 necessarily decided there was no bribery.

21   Now, the Court of Appeals did not hold that.

22 It was just Petitioners' argument throughout the case, a

23 point that the government just never disputed, a point

24 that the government never disputed in its brief in

25 opposition, and a point that the government never

1 disputed in its brief on the merits.

2   JUSTICE GINSBURG: Ms. Blatt -- but if we're

3 trying to figure out what this jury found, you know,

4 we're not what talking about claim preclusion. Claim

5 preclusion -- there can never be a new trial on the

6 travel or the conspiracy. But we're talking about issue

7 preclusion.

8   And this jury, we don't know what it decided

9 because of the inconsistency. It said yes to bribery on

10 one; no to bribery on the other. And it might have just

11 decided that conviction of the predicate offense, the

12 bribery, was enough, and that the government had laid it

13 on too strong by adding the conspiracy and the travel

14 count.

15   How do we know that's not what the jury

16 decided?

17   MS. BLATT: Well, we know, just looking at

18 the acquittals alone, that we know what they decided.

19 So the question is -- and it's, I think, under Yeager

20 and under the Double Jeopardy Clause -- is this Court,

21 for the first time in the history of its jurisprudence,

22 going to give any meaning to or relevance to an invalid

23 conviction?

24   You have never held an invalid conviction

25 was relevant to or evidence of anything,

1   Justice Ginsburg, and let me just suggest the last place

2   you should start is the Double Jeopardy Clause, where

3   illegal, invalid, vacated convictions always been legal

4   nullities.

5   JUSTICE KAGAN: Ms. Blatt, it does seem to

6   me that's what your argument rests on in the end: The

7   idea that we shouldn't give any weight or any influence

8   to an invalid conviction. Is that a double jeopardy

9   principle, or does it come from someplace else?

10   MS. BLATT: Both. So we have our main -- I

11   would call it our legal argument, is just that vacated

12   convictions are legal nullities, void ab initio. You

13   pretend that they just don't exist.

14   JUSTICE KAGAN: Yes. Well, why do we do

15   that?

16   I mean, I take it you have -- you know,

17   usually you do pretend that they don't exist. There are

18   not many instances that we can find where we do look to

19   vacated convictions for something or other. But in this

20   case, the vacated conviction surely does tell us

21   something about what the jury did do or what the jury

22   didn't do. It's part of the factual picture, and so the

23   question has to be, well, notwithstanding that, why

24   shouldn't we look at it? And I guess the -- why?

25   MS. BLATT: Right. Well, so, again, there's

1   the legal argument, which I do want to get back to, but

2   on the factual argument, in Yeager, it was never

3   disputed, and it was beyond obvious that a jury that

4   acquits cannot rationally hang. There is this

5   historical fact, and the dissent was all up in arms that

6   the jury decisions were completely inconsistent. And it

7   was at least relevant under 401 that the jury, if it was

8   going to acquit, it could not have hung.

9   And the Court said, I think, three things.

10   But the most -- and I think as a factual matter, you

11   don't know what a jury decides when there's an illegal

12   conviction. Just like a hung count, which a jury

13   doesn't decide anything in a hung count. That's what

14   the Court said in Yeager.

15   JUSTICE KAGAN: You know, I think you're

16   contesting the premise of my question. Because the

17   premise of my question is that this vacated conviction

18   does tell you something about what the jury did. Now

19   what it tells you is that the jury did inconsistent

20   things, because the vacated conviction tells you that,

21   on the one hand, the valid convictions, the jury said

22   that there was not bribery. And on the other hand, the

23   vacated conviction, the jury said there was bribery.

24   And let's assume for the moment that that's

25   true, that that is exactly what the vacated convictions

1 tell you. They tell you that the jury went in two

2 inconsistent ways.

3   MS. BLATT: Right.

4   JUSTICE KAGAN: And now you're saying,

5 notwithstanding that the vacated conviction tells you

6 something about what the jury did or didn't do about how

7 the jury reasoned, we shouldn't look at it.

8   And there's something very powerful,

9 rhetorically, in your statement. But I guess what I'm

10 trying to figure out: Is it anything more than

11 rhetoric? Is --

12   MS. BLATT: Yeah, let me --

13   JUSTICE KAGAN: -- there, like, a legal

14 principle here about why we shouldn't look to vacated

15 convictions to tell us something about the facts, when

16 they can tell us something about the facts?

17   MS. BLATT: Sure. Let me prove it to you.

18 I mean, I'm happy to prove it, that the only reason you

19 vacate a conviction is because the conviction is a

20 worthless piece of paper and unreliable. And at looking

21 how an error inversely affects acquittals and

22 convictions proves the point. Because whereas errors

23 render the conviction completely worthless and

24 unreliable, an error in the face of an acquittal has the

25 opposite effect of making the acquittal all that more

1   meaningful, reliable, and worthy of respect.

2   JUSTICE ALITO: I'm not sure that really

3   answers the question. Because the vacated conviction

4   may be worthless for a reason that is irrelevant to the

5   point that Justice Kagan was making, which seems to be

6   the situation here. It's -- it's a wrongful conviction

7   because an element was missing, but that doesn't

8   undermine the argument that the two verdicts were

9   inconsistent.

10   MS. BLATT: So the reason why Yeager -- I

11   mean, Yeager said -- I don't think any dispute, and this

12   is the government's whole argument. Yeager, all that

13   mattered was there was no jury decision. And the only

14   reason why you care about jury decisions --

15   JUSTICE GINSBURG: But the Yeager case

16   was -- the jury didn't reach any decision. Here, your

17   jury did reach a decision. The decision was vacated

18   because, in the court's view, the charge was erroneous.

19   By the way, that's not -- it's not clear

20   that the charge was erroneous, is it? There's a split

21   on that issue.

22   MS. BLATT: It's clear as it comes to this

23   Court, but I think, you know, I'd have to go back and

24   read Sun Diamond, which is --

25   JUSTICE GINSBURG: The question is --

1   MS. BLATT: Is whether to quid pro quo.

2   JUSTICE GINSBURG: Is it quid pro quo, or is

3 it gratuity as well? As I understand it, there's a

4 circuit split.

5   MS. BLATT: Right. And the government's

6 position is, if the court had directed a verdict and

7 said, you must find guilty, and the jury both acquit and

8 convict, you still have a piece of relevant information

9 that the jury acted inconsistency -- inconsistently.

10   And what I'm trying to say about a jury

11 verdict is that it doesn't count in our legal system

12 unless it's imbued with finality and validity.

13   JUSTICE SOTOMAYOR: But why is that true

14 when you can have a set-aside of the verdict that's

15 independent of the jury charge? You can have a

16 situation, like in the State of Michigan, where the

17 conviction was set aside because the defendant was

18 deprived of his right to proceed pro se. There, there's

19 still a complete inconsistency between the acquittal and

20 the conviction. The set-aside had nothing to do with

21 the nature of the charge. Why would you say in that

22 situation we should be ignoring --

23   MS. BLATT: So I think for errors like

24 Feretta and Gonzalez-Lopez, right to counsel and a few

25 other kind of nutty structural errors, where the Court

11

1   has never said it's prejudicial, but we're going to

2   treat it as such, because you can't unwind the apple

3   cart. But for all other errors, including a biased

4   judge, absences of counsel, you know, a Brady violation,

5   a directed verdict, a reasonable doubt instruction, they

6   are prejudicial. And when a --

7   JUSTICE SOTOMAYOR: But what do they have to

8   do to impeach the inconsistent act of the jury?

9   MS. BLATT: Okay. So what -- exactly what

10   they had to do in Yeager, because then the other reason

11   that Yeager held that hung counts were not relevant is

12   because they were indecipherable. And this part is key.

13   It is because they are indecipherable the defendant

14   can't be put to the impossible burden of reconciling

15   with the acquittal, even though they may be reconcilable

16   in ways that don't undermine the acquittal.

17   And vacation -- vacated convictions are the

18   same. Let me explain why. The instructional error,

19   because of it, no one knows and no one can know why the

20   jury convicted. And therefore, the defendants should

21   not be put in the impossible burden of explaining that

22   the consistency -- that the inconsistency is on a point

23   that's not relevant to the acquittals.

24   And so here's the example we gave in the

25   brief, is that all 12 jurors -- and the -- this is

1   the -- this is the point of the -- the error itself

2   causing the inconsistency. All 12 jurors could have

3   thought Petitioners were not guilty of a crime, of a

4   quid pro quo exchange. And the only inconsistency, the

5   only inconsistency, is they were divided on whether

6   there was a lawful gratuity.

7   And so in that case, it's completely

8   possible that the verdicts are consistent on the only

9   relevant question.

10   JUSTICE KAGAN: I'm sorry. I --

11   CHIEF JUSTICE ROBERTS: Yeah, but we don't

12   know.

13   MS. BLATT: Exactly.

14   CHIEF JUSTICE ROBERTS: I mean, that's the

15   whole point. And then it -- well, exactly, except you

16   have the burden, as I understand it, under the law, of

17   carrying the burden of indicating that -- a double

18   jeopardy violation. And if you don't know, you can't

19   carry that burden.

20   MS. BLATT: So unlike an acquittal, this is

21   just Yeager all over again. Yeager said we -- because

22   you can't ask the jury what transpired in the courtroom,

23   the burden is not on the defendant to reconcile it. You

24   know when you have a final invalid jury verdict,

25   Mr. Chief Justice, what the jury found. And that's the

1   only reason that final invalid jury verdicts have

2   ever -- have ever counted under our system at all.

3   Without the finality --

4   JUSTICE KENNEDY: I don't understand why

5   you're saying we don't know why the jury convicted on

6   666. It convicted because the evidence was

7   overwhelming.

8   MS. BLATT: Well, it convicted on 666 --

9   JUSTICE KENNEDY: That's why it convicted.

10   MS. BLATT: -- on a charge that allowed it

11   to convict based on completely lawful conduct. So if

12   the jury -- the evidence could have been overwhelming.

13   JUSTICE KENNEDY: I understand there was an

14   instructional error. But we know why the jury

15   convicted.

16   MS. BLATT: No. The jury could have --

17   JUSTICE KENNEDY: Because under the --

18   because under the erroneous instruction, they clearly

19   found the facts of a violation. All of the factual

20   elements the government asserted were found to be true.

21   MS. BLATT: Under the wrong -- under

22   something that's not a crime. If they had charged the

23   jury that if the defendant were wearing glasses, they

24   committed a crime, and the jury returns a guilty

25   verdict, you shouldn't care. You can't just say, well,

1   it's a guilty verdict.

2   JUSTICE GINSBURG: Well, the jury was

3   operating under the same charge with respect to the

4   compound crimes. So in order to convict, it would have

5   had to find there was neither quid pro quo nor gratuity.

6   That's what it would have had to find, which would be

7   inconsistent with finding --

8   MS. BLATT: So it's actually inverse. To

9   convict, all the jury had to do was find one out of two

10   possibilities. The jury could have convicted either if

11   they found a lawful gratuity or an unlawful bribe. But

12   to acquit, Justice Ginsburg, the jury had to reject and

13   consider all of the government's theories of criminal

14   liability. So you know the acquittals, there's no way

15   to -- there's no way to read them other than the jury

16   acquitted Petitioners of a crime.

17   JUSTICE GINSBURG: What about the question I

18   asked you before? If we're trying to find out what this

19   jury did, isn't it a reasonable assumption that they

20   convicted on the bribery for which there was much

21   evidence? They thought that having the compound crimes,

22   the conspiracy and the travel, was just laying it on too

23   thick, so they weren't going to convict on those. Why

24   couldn't that have been?

25   MS. BLATT: Yeah. I think -- I mean, it's

1   the same case in Yeager where the Court said, look,

2   there's an apparent inconsistency. No one questioned

3   that the verdicts were irreconcilable, and that who --

4   who knows?

5   JUSTICE GINSBURG: I thought that in Yeager,

6   the Court said there was no -- there was no conflict

7   because there was no decision. A hung jury doesn't

8   decide anything.

9   MS. BLATT: Right.

10   JUSTICE GINSBURG: This jury, we know, did

11   decide something.

12   MS. BLATT: We know the jury decided

13   something that is completely irrelevant. We know the

14   jury decided something that the law finds anathema. We

15   know the jury found that Petitioners may have committed

16   lawful conduct. There is a reason why this Court has

17   never, ever, ever treated an invalid conviction of

18   evidence or -- or relevant to anything. If the Court

19   had directed a verdict of guilty, I would just be

20   astonished if you were saying, well, we know they

21   convicted; we know they found him guilty.

22   JUSTICE KENNEDY: Under your argument, the

23   trial court could instruct the jury: If you find guilt

24   on 666 and if you find that there was travel, you must

25   find that there was guilt under the travel section as

1 well. That's what you're saying.

2   MS. BLATT: I'm actually -- that one, I'm

3 lost on what you're asking. Sorry.

4   JUSTICE KENNEDY: Well, you're saying in

5 answer to Justice Ginsburg's question that the jury

6 can't make different decisions with multiple counts. So

7 based on your theory, the trial court can instruct the

8 jury: If you find guilt on 666, you must find guilt on

9 the others, if you find there was travel.

10   MS. BLATT: Right. And our position works

11 no matter what kind of error you have. When you have an

12 acquittal --

13   JUSTICE KENNEDY: But I think that's an

14 improper instruction.

15   MS. BLATT: It is an improper instruction.

16 And the question is, is if the instruction is

17 prejudicial in a way that renders the decision not

18 final, invalid, it can't be any more relevant evidence

19 than the jury's just refusal to find anything.

20   And it's kind of like -- I'll give you an

21 example. If I say I need a car and you give me one

22 without any brakes or steering wheel, it's not that

23 helpful. And here you just have something on its face

24 that's invalid. On its face, it's a worthless piece of

25 paper. It's never been recognized of anything. And I

1   do think I'll get back to legal argument because the

2   factual argument doesn't seem to be moving you.

3   On the legal argument is -- the only reason

4   I'm even here -- the only reason we're here and that

5   these vacated convictions don't themselves bar retrial

6   under the Double Jeopardy Clause is because this Court

7   has, over and over and over, called them complete

8   nullities.

9   JUSTICE KAGAN: Maybe one way I can figure

10   out the scope of your argument is just to ask, do you

11   think that the government is always unable to use a

12   vacated conviction, that is for any purpose, or do you

13   think that the government is unable to use a vacated

14   conviction only for double jeopardy purposes?

15   MS. BLATT: This Court has never used a

16   vacated conviction for any purpose, period. Yes.

17   JUSTICE KAGAN: So you have the history on

18   your side, most of it. Do you think that that's because

19   the government, you know, cannot use a vacated

20   conviction for any purpose?

21   MS. BLATT: Yes. I mean, since Blackstone,

22   I don't know, in the 1600s is it -- when it's -- when

23   it's void ab initio, it disappears.

24   JUSTICE KAGAN: This isn't a double jeopardy

25   argument. This is a something else argument.

1   MS. BLATT: True.

2   JUSTICE KAGAN: But what is it? What is the

3   something else? Why can't the government use a vacated

4   conviction for any purpose?

5   MS. BLATT: Well, I mean, we have -- we have

6   it's void ab initio and then it's void ab initio under

7   the Double Jeopardy Clause. Well, why --

8   JUSTICE KAGAN: Look at the label. It's

9   void ab initio, but I mean, it's void in the sense that

10   you can't be punished for a vacated conviction. But the

11   question is, can we use what the vacated conviction

12   tells us about a historical fact, or can we use it for

13   some other purpose that, you know, that I'm not thinking

14   about right now?

15   MS. BLATT: But -- but that's --

16   JUSTICE KAGAN: But -- but, you know,

17   what's -- what part of the Constitution are we looking

18   to to tell us this?

19   MS. BLATT: Just because I'm not going to

20   let Yeager go like this, I mean, there's historical fact

21   of the hung jury, and the entire government brief and

22   the entire dissent is they're not reconcilable. It's --

23   you just can't ignore reality. That's why Justice --

24   JUSTICE KAGAN: That's not the question I'm

25   asking.

1   MS. BLATT: Well, except that I a.m. saying

2   Yeager does defeat what you're saying. But on the void

3   ab initio, there's a reason that invalid convictions are

4   void ab initio -- and I don't want to leave the Double

5   Jeopardy Clause -- is if their -- the government wants

6   its cake and eat it -- eat it too. It wants to say that

7   they're complete nullities under United States versus

8   Ball, otherwise we wouldn't be here.

9   JUSTICE SOTOMAYOR: But they are not

10 complete nullities. I'm sorry.

11   CHIEF JUSTICE ROBERTS: Justice Alito.

12   JUSTICE ALITO: They lack legal effect, but

13 it is a historical fact that it occurs. So surely they

14 can be used to prove a historical fact. For example,

15 suppose there's a case in which the -- in which the

16 question is whether a witness who testified for the

17 prosecution was bribed. Surely the -- the conviction

18 could be used in that situation, right?

19   MS. BLATT: I guarantee you if that

20 testimony was struck from the record, it's gone. It

21 disappeared. And here that's what we're talking about.

22 No, it didn't --

23   JUSTICE SOTOMAYOR: I'm sorry. You're

24 suggesting that if there's a retrial in a vacated

25 conviction that you can't use the testimony that was

1 elicited during that conviction?

2   MS. BLATT: That was bribed, and the court

3 struck from the record. And they say -- the government

4 wants to introduce bribe testimony. I don't know of a

5 case that says you can do that.

6   JUSTICE KENNEDY: That -- that wasn't

7 Justice --

8   MS. BLATT: Well, maybe I misunderstood the

9 question.

10   JUSTICE KENNEDY: -- Alito's hypothetical,

11 as I understand it. His hypothetical is the juror

12 lied -- pardon me -- the witness lies. Conviction set

13 aside for instructional error.

14   MS. BLATT: All right.

15   JUSTICE KENNEDY: Can that witness be

16 prosecuted for perjury?

17   MS. BLATT: Oh, yeah. Sorry. Yes.

18 Absolutely. Our question is --

19   JUSTICE KENNEDY: So then -- and then his

20 point could follow this; the conviction can be used for

21 some things.

22   MS. BLATT: You're not using the conviction.

23 You're using the witness's testimony. You can use

24 evidence that's introduced in an invalid conviction for

25 other purposes. The question is are you -- the only

1   thing we're talking about is the verdict on its face

2   that's invalid. The same way if you had said you can

3   convict on preponderance of the evidence. It's just the

4   piece of paper that the government's relying on in

5   saying the jury necessarily found guilt. It's not guilt

6   in the way the law recognizes.

7   But I do think there's something quite

8   unseemly about when the Court in Yeager said if you have

9   the continuing -- if hung counts are void and a nonevent

10   under the continuing jeopardy principle, they're also

11   void and nonevents under Ashe. And here the government

12   has it -- well, they got to count -- they at least count

13   for something when it helps us, in it's not only

14   rendering the clause incoherent but kind of perverse.

15   CHIEF JUSTICE ROBERTS: Well, but the basic

16   point that was made in Yeager made over and over again

17   is that when the jury is hung, the jury hasn't done

18   anything. So the defendant in that case was able to

19   carry the burden that the jury hasn't done anything. So

20   we're right back to the typical Ashe case.

21   But this is very different. Now what you're

22   saying -- and the way you phrase things, I think, is

23   significant. You said, well, what do we know? We know

24   the jury might have done this. Well, that means you

25   don't know what the jury did. And again, it seems to me

1   that, I guess, everybody agrees it's the defendant's

2   burden, and it's different than a hung jury. The hung

3   jury, the jury hasn't done anything. When there's a

4   conviction, the jury has done something. They may have

5   done something under erroneous understanding of the law

6   or they may have done something under the correct

7   understanding of the law. But either way, I don't know

8   that you can put that much reliance on Yeager.

9   MS. BLATT: I think -- I mean, what our

10   argument does depend on is that the reason why the Court

11   cares about jury verdicts is they come with a stamp of

12   finality and validity. And let me look at -- let's look

13   at Powell. Powell is a case where you had a valid

14   conviction and a valid acquittal. It was basically

15   apples and apples. And this case is apples and rotten

16   apples. And if you can't use even a valid verdict to

17   impeach another verdict, you sure shouldn't be able to

18   use an invalid verdict either.

19   It's just -- that is what Yeager said, that

20   Powell means acquittals can't be undermined by hung

21   counts. Well, they shouldn't be able to be undermined

22   by invalid verdicts either.

23   JUSTICE GINSBURG: When the acquittal isn't

24   undermined in that it has claim preclusive effect, those

25   acquittals are final. They are done. These people can

1 never be prosecuted for the travel offense or the

2 conspiracy offense. So it's not -- I think you're not

3 right to say the acquittals don't count under the

4 government -- I mean, yes, they do count.

5   MS. BLATT: And that was the very argument

6 made by, you know, the government in Yeager, is who

7 cares about the acquittals, because they are going to

8 count. But the Court said, no, to really count, you

9 have to have the full effect with Ashe --

10   JUSTICE GINSBURG: Because there was nothing

11 on the other side in Yeager. If you say a hung jury, a

12 hung -- the jury says we can't decide.

13   MS. BLATT: Right. And I think a rotten

14 apple is worse than, you know, the orange in Yeager.

15 You basically had an apple and an orange. Here you have

16 something infected with reversible error. And just the

17 irony that it has never been counted by this Court --

18   JUSTICE GINSBURG: The error had nothing to

19 do with the inconsistency.

20   MS. BLATT: Yes, it -- well, it could have.

21 It definitely could have. It could have caused the

22 inconsistency, but it was precisely because we can't

23 know, the defendant could never meet the burden of

24 reconciling the acquittals with the hung counts.

25   And that was what Yeager was saying, is,

1   sure, the defendant has the burden, but we're not going

2   to give them the impossible burden of explaining, well,

3   if the jury acquitted, what were they doing hanging? No

4   one could ever reconcile that imponderable. It was a

5   complete inconsistency. And the Court said, yeah, it

6   looks kind of inconsistent, but we just -- we're not

7   really sure what a hung count is. You can't really tell

8   what they did. It could have been an exhaustion; who

9   knows? And here --

10   JUSTICE GINSBURG: It didn't say we're not

11   really sure. It said a hung count is equivalent to no

12   decision at all.

13   MS. BLATT: And I think an invalid verdict

14   on a legally relevant question is worse than no decision

15   at all. Again, the government's position is the jury

16   convicted. Sure, it was a coerced confession that

17   withheld the crucial confession of the real killer.

18   They didn't have a lawyer. But it's a piece of paper.

19   They unanimously found him guilty. Oh, and there was a

20   preponderance of the evidence instruction too.

21   But it sure says, well, it has a lot of

22   meaning to us, because it's evidence of inconsistency.

23   And it should -- and the jury acquits. And you say, oh,

24   well, that's just an acquittal. Okay. Well, they can't

25   retry him.

1   Acquittals -- I mean, the acquittal has to

2   mean something under Ashe more than just, you know, the

3   jury -- you have to assume that the jury necessarily

4   found him not guilty of the elements. That is the

5   supposition of this case.

6   JUSTICE KENNEDY: You're -- you're saying it

7   is highly doubtful if the government had charged just

8   counts 2 and 3 and got an acquittal, and that they could

9   then have had a second trial under 666. You're saying

10   that just couldn't happen under Ashe v. Swenson.

11   MS. BLATT: That's exactly right. Yes.

12   Yes. Yes. Yes, yes, yes.

13   And the point I'm making about once you have

14   the acquittal is that -- and I do think this was going

15   on in Yeager, because the whole point of the

16   government's brief is we get one complete opportunity.

17   Yeah, I know it's a nullity, but let's pretend it's not

18   really a nullity here. But at least we need one

19   complete opportunity.

20   And there were a lot of questions about why

21   should the principles of Ashe outweigh? And the answer

22   was because of sort of the -- the special status

23   acquittals have. They're sacrosanct. The Court has

24   said their unassailability is the most fundamental rule

25   in the history of double jeopardy law, and the primary

1   purpose of the clause is to protect their integrity.

2   And the Court said the fact you've already

3   got an acquittal after running the gauntlet and staring

4   down the barrel of the government's gun -- and here it

5   was really a firing squad -- that should count for

6   something. It should count for barring retrial instead

7   of permitting it. And because acquittals are so

8   special, our position is the government should give you

9   something pretty good if they're going to impeach it.

10   And if the hung count nondecisions weren't

11   good enough in Yeager, it's hard to see how the rotten,

12   infected apple with a worm should be good enough here.

13   Can I reserve the rest?

14   CHIEF JUSTICE ROBERTS: Thank you, counsel.

15   Ms. Prelogar.

16   ORAL ARGUMENT OF ELIZABETH S. PRELOGAR

17   ON BEHALF OF THE UNITED STATES

18   MS. PRELOGAR: Mr. Chief Justice, and may it

19   please the Court:

20   The most essential prerequisite for applying

21   collateral estoppel is that the jury must have actually

22   decided an issue in the defendant's favor, and that

23   prerequisite isn't satisfied here.

24   Petitioner's jury returned inconsistent

25   verdicts, convicting them of the standalone bribery

1 offense that they're seeking to preclude relitigation of

2 now, but also acquitting them of offenses involving

3 bribery as a predicate. And it's undisputed that those

4 verdicts cannot be reconciled. They are indisputably

5 inconsistent. Because of that, we know that error

6 occurred, and that the jurors must have neglected to

7 follow the instructions with respect to that count.

8   Because of that, this case falls within

9 Powell's recognition that when a jury issues

10 inconsistent verdicts, a defendant can't point to the

11 acquittal and say that that acquittal necessarily

12 resolved any facts in the defendant's favor.

13   JUSTICE KENNEDY: But suppose the

14 hypothetical were -- just conspiracy and travel are

15 charged, and there's an acquittal. Could you then try

16 on 666?

17   MS. PRELOGAR: No, because in that

18 situation, there would be nothing in the record to

19 indicate that the jury had done anything other than

20 follow their instructions, apply a lot of facts, and

21 make factual findings in the defendant's favor. But the

22 situation is different when the jury returns

23 inconsistent verdicts, because there, we have conclusive

24 evidence that something went wrong; the jury erred, it

25 wasn't following its instructions. And so when the

1 charges are brought at the same time, as they were here,

2 and the jury acts inconsistently, we lack that

3 confidence that the acquittal is actually a reflection

4 of findings in the defendant's favor.

5   CHIEF JUSTICE ROBERTS: Do you agree with

6 Ms. Blatt's statement that the government has never

7 before sought to gain a benefit from a vacated

8 conviction?

9   MS. PRELOGAR: Well, I think that it's

10 important to separate out the use of the vacated

11 conviction. It's certainly the case that a vacated

12 conviction can't be used to establish the defendant's

13 guilt of that charge. The -- the fact that the

14 conviction is vacated forecloses reliance on the

15 conviction for that purpose.

16   But we're not relying on the conviction for

17 that purpose here. We're looking at it to establish

18 only the jury's inconsistency. That's a historical

19 fact. It's -- it's a matter on this historical record

20 that actually occurred.

21   JUSTICE KAGAN: What other purpose could you

22 use a vacated conviction for? Is there anything else

23 that the government can use a vacated conviction for, or

24 is this the only thing?

25   MS. PRELOGAR: I think it can use it to

1 establish any kind of historical fact when -- when

2 that's the purpose to which the conviction is being put.

3 And we cite a number of lower court cases that look at

4 vacated convictions to establish things like motive for

5 a -- for a subsequent crime, which would establish the

6 defendant's plan or intent.

7 So there are situations where it's really

8 the existence of the conviction that tells us something

9 about what actually happened with facts on the ground,

10 that I think the conviction is relevant for.

11 JUSTICE KAGAN: Who -- who's not --

12 JUSTICE KENNEDY: Could you use it in a

13 civil case? Could a -- could a -- a party use it in a

14 civil case to impose civil liability? Say, well, you

15 know, the jury obviously found that you did this; there

16 was an instruction on the criminal aspect but didn't --

17 but you did this act, and that's collateral estoppel, or

18 it's issue preclusion, in a civil case for damages.

19 MS. PRELOGAR: No. It wouldn't be

20 appropriate to rely on it there, because as a Federal --

21 JUSTICE KENNEDY: Why not?

22 MS. PRELOGAR: -- civil collateral estoppel

23 principle, the verdict has to be final, and it would

24 lack finality if the conviction had been reversed. But

25 I think that actually points up Petitioner's primary

1   argument here, which is to focus on what the conviction

2   necessarily established, and that's not actually the

3   correct focal point of this inquiry, because we're not

4   the ones trying to rely on the conviction to

5   collaterally estop Petitioners from doing anything.

6   Rather, they're the ones invoking collateral

7   estoppel, and they're relying on the acquittal to do so.

8   So the proper focal point of the inquiry here is what

9   did that acquittal actually decide? And in light of the

10   inconsistency, we can't know that it resolved any issues

11   in the defendant's favor.

12   CHIEF JUSTICE ROBERTS: But you don't know

13   based on the conviction. You don't know that the

14   verdicts are inconsistent. What you know -- it's the

15   same problem I was raising with your friend on the other

16   side. What you know is they might be. And so it seems

17   to me that what we're being asked to decide, if the

18   possibility that they might be is enough to allow the

19   government to relitigate the substantive -- the

20   substantive count. And it does seem to me that's a

21   little bit of a -- an extension of what our precedents

22   have said.

23   MS. PRELOGAR: We do know, though, that

24   these verdicts definitely were inconsistent. It's not

25   just a possibility, because the jury was instructed on

1 the same theories of liability for all of the counts

2 involving Section 666.

3   The First Circuit considered this issue --

4   CHIEF JUSTICE ROBERTS: Well, but if the

5 jury -- if the jury relied on the part of the

6 instruction that was legally invalid, then you don't

7 know that they reached a -- a verdict inconsistent with

8 what was the acquittal in the prior case.

9   MS. PRELOGAR: We can't rely --

10   CHIEF JUSTICE ROBERTS: A valid conviction.

11   MS. PRELOGAR: That's true we can't rule out

12 that possibility, but it's equally possible that the

13 jury validly convicted on a quid pro quo bribery theory

14 and decided to acquit on the other offenses out of

15 lenity or mistake or confusion.

16   And when we're in this world where we just

17 don't know, and Petitioners concede that we can't be

18 certain what other verdict rested on, then in that

19 situation the -- the general collateral estoppel

20 principle is that they cannot preclude that issue from

21 further litigation. Because it's not just whether

22 there's a possibility that the jury resolved issues in

23 their favor. There has to be a certainty that the jury

24 did that.

25   And I think it's actually something notable

1   that it's not at all unusual for acquittals to lack

2   preclusive effect when there's some ambiguity about what

3   the jury had actually decided.

4   JUSTICE KAGAN: Ms. Blatt suggested that

5   there's something -- I think she used the word

6   "unseemly" -- about using a vacated conviction for this,

7   or indeed for any other purpose, given the traditions of

8   our legal system where it's just very hard to find

9   instances in which we have done so.

10   So, you know, I'm not sure I understand

11   where the unseemliness prohibition comes from, but it

12   does seem, you now, quite out of kilter with the

13   traditions of our legal system to use vacated

14   convictions in a manner that affects individuals'

15   constitutional rights. So, I guess, tell me why we

16   shouldn't be concerned about that?

17   MS. PRELOGAR: You shouldn't be concerned

18   about it because the tradition is limited to looking at

19   convictions to stand in for the defendant's guilt. And

20   we acknowledged here that we are -- we can't rely on the

21   convictions to establish that.

22   JUSTICE KAGAN: I think the tradition goes

23   further. I mean, you have a tough time in your brief

24   coming up with any instances, and the only times you do

25   are -- are some -- a couple of scattered lower court

1   decisions. But you have, other than that, a really

2   tough time coming up with any instances in which courts

3   have used vacated convictions for any purpose.

4   MS. PRELOGAR: Those lower court examples,

5   though, I think are particularly relevant, because what

6   a number of them are doing are using the vacated

7   conviction to answer precisely the question that we have

8   at issue here, which is to try to ascertain the basis

9   for a jury's other verdict.

10   And when the whole question is what did the

11   jury actually necessarily decide. The jury's verdicts

12   are quite obvious relevance in answering that question.

13   And in fact, it's -- it's also the case that the

14   conviction can be relevant to help the defendant, not

15   just harm the defendant, by actually clarifying the

16   basis of an accompanying verdict that might otherwise be

17   ambiguous.

18   We cite a case that does this, the Velasquez

19   case from the Third Circuit. The way that that

20   situation works is that if a defendant, for example, has

21   defended on multiple theories, let's say it's a

22   conspiracy case and he said there was no agreement and

23   no overt act, he won't be able to establish, in

24   acquittal, which basis the jury accepted in returning

25   that verdict.

1   But if there's a separate conviction in the

2   case, maybe overlapping with the overt act, even if that

3   conviction is set aside, the defendant could point to it

4   and say this shows that the jury must have resolved the

5   agreement issue in my favor on that separate verdict of

6   acquittal.

7   So this isn't an argument that -- that

8   convictions are relevant only when they benefit the

9   government, or that we're able to use them to the

10   defendant's disadvantage. It's an argument about the

11   nature of the inquiry. And I think that when you're

12   looking at the question of -- of what that jury

13   necessarily decided, its verdicts are quite salient

14   relevance in answering that question.

15   Petitioners' primary argument is based on

16   Yeager. Petitioners contend that because there, the

17   court didn't consider the hung count, the same result

18   has to obtain here. But Yeager is fundamentally

19   different because there, there wasn't a jury decision at

20   all through the hung count, and so there wasn't anything

21   that could actually create a true inconsistency with the

22   one verdict in that case that the jurors had returned,

23   the verdict of acquittal.

24   I think Yeager is a manifestation of this

25   Court's long-standing presumption that jurors follow

1 their instructions, they're presumed to act rationally.

2 And Yeager ultimately concluded that the hung count was

3 just too thin of a reed to attribute irrationality to

4 the jury as a whole. Because by definition, the jury as

5 a whole in that hung count hadn't done anything. They

6 hadn't agreed on anything.

7   The verdicts are differently situated as

8 Yeager itself recognized. Yeager distinguished Powell

9 and said that when you have inconsistent verdicts, there

10 the jury has spoken through its verdicts. And if it

11 reached contradictory results, then what we know is that

12 that inconsistency exists as a matter of the record of

13 the case, and Powell says that in a situation presenting

14 that kind of inconsistency, it wouldn't be appropriate

15 to assume that the verdict of acquittal is the proper

16 verdict, the one that the jury really meant.

17   In fact, Powell said that the most obvious

18 explanation for that kind of inconsistency is that

19 jurors were convinced of guilt and decided to acquit out

20 of lenity.

21   And it would be particularly inappropriate,

22 I think, to accord preclusive effect to that kind of

23 verdict based on lenity, because it would essentially

24 magnify the effects of the jury's nullification and

25 extend it far beyond the compromise the jury itself

1   struck and affect other counts beyond what the jury ever

2   intended.

3   And so I think Powell rightly recognized

4   that when we're in a situation where we can't know that

5   the jury was following its instructions and applying a

6   lot of fact in a rational manner, then the defendant's

7   not able to carry the burden to show that the acquittal

8   is the verdict that -- that the jury truly meant and

9   intended to resolve the factual disputes in the case.

10   I think that we cite a number of examples as

11   well where it's clear that there are a number of

12   examples where there will be ambiguity in what an

13   acquittal resolved, even separate and apart from

14   inconsistent verdict. And so petitioners' suggestion

15   that this fails to accord respect to verdicts I think is

16   out of sync with how general preclusion principles

17   operate.

18   Imagine again my conspiracy example where

19   the defendant offers two defenses and says there was no

20   agreement and no overt act. In that situation, if the

21   jury acquits and we have a general verdict of acquittal,

22   we won't be able to ascertain the exact argument that

23   the jury adopted. In that situation we know they must

24   have decided something in his favor, but the inability

25   to identify which issue was resolved in the defendant's

1   favor provides a basis to avoid collateral estoppel.

2   And I think this is just a recognition that

3   collateral estoppel is something of an extraordinary

4   remedy here, and yet we need to be satisfied that its

5   most fundamental prerequisite is satisfied, that

6   something was actually resolved in the defendant's

7   favor.

8   JUSTICE GINSBURG: Do you agree with

9   Petitioner that if you have a jury finding, jury makes a

10   finding, but that finding is infected by race

11   discrimination, you can't use that for anything even

12   though it's a jury finding?

13   MS. PRELOGAR: Certainly you can't use it to

14   establish that the jury found the defendant guilty,

15   because in that situation, that kind of error would

16   establish that the jury wasn't basing that conviction on

17   any relevant circumstance. And to the extent that that

18   error itself results in apparent inconsistency in

19   verdicts and establishes that the -- what seems to be an

20   inconsistency was actually based on the error itself,

21   then, of course, collateral estoppel wouldn't apply

22   because that would restore our presumption that the jury

23   did act rationally and find facts in reaching its

24   verdict of acquittal.

25   But to the extent that the error doesn't

1   explain the inconsistency, doesn't resolve the verdicts,

2   then we'd still be in a world where, as Powell

3   recognized, we simply can't see that through the verdict

4   of acquittal the jury necessarily resolved facts in the

5   defendant's favor.

6   JUSTICE ALITO: Well, does that position

7   extend to anything that affects the evidence in the

8   case, so that if any prosecution evidence is improperly

9   admitted or any defense evidence is improperly excluded,

10   the same would follow?

11   MS. PRELOGAR: So long as it creates

12   reversible error, then, of course, the conviction would

13   have to be set aside based on that evidence. But

14   assuming that the evidence applied across the board --

15   JUSTICE ALITO: I thought your answer to

16   Justice Ginsburg was that if there was a particular kind

17   of error that resulted in the reversal, then the

18   conviction could not be used to show inconsistency in

19   the verdicts.

20   Did I misunderstand your answer?

21   MS. PRELOGAR: No, I apologize. Let me try

22   to clarify.

23   I was trying to distinguish between those

24   errors that are actually confined to the count of

25   conviction and those errors that would apply across the

1   board to all counts. So if there's a particular error

2   in the case, say an instructional error that only

3   affects the count of conviction, then that might

4   actually resolve the apparent inconsistency, because if

5   the jury received two different instructions on the

6   overlapping charges, then we might think by looking at

7   the instructions that we can actually clear up the

8   inconsistency that would otherwise exist. So to that

9   extent, that type of error could resolve the

10   inconsistency and provide that the predicate for

11   collateral estoppel is satisfied.

12   But putting aside that class of errors, and

13   we're not in that world here, then I don't think the

14   type of error at all affects the analysis, because so

15   long as it's disconnected from the inconsistency itself,

16   then it doesn't do anything to clarify what that jury,

17   that we know must have disregarded its instructions,

18   what that jury was doing.

19   And I think that there's actually -- the

20   sole reason that Petitioners say that the Court should

21   disregard the inconsistency here is because of the legal

22   error in this case.

23   But it bears emphasis that they have a

24   remedy for that legal error. The remedy is a new trial.

25   It's the ordinary remedy in this circumstance, and,

1 Justice Ginsburg, in your hypothetical, there too, the

2 defendant would be entitled to a new trial.

3   But what petitioners are attempting to do in

4 this case is actually gain complete immunity from

5 further prosecution on these charges. They want to

6 extend the effects of the acquittal on those independent

7 counts to this situation and prevent retrial of the very

8 count that the jury itself convicted them on. And they

9 are not entitled to that much greater remedy unless they

10 can satisfy the prerequisites for collateral estoppel.

11   JUSTICE KAGAN: But that is the greater

12 remedy that Yeager gave, and I understand your

13 distinction between Yeager and this case, but it does

14 leave you with a fundamental anomaly, which is, in a

15 case in which there's an acquittal and a hung count, the

16 acquittal is the only thing that matters. And in a case

17 where there's an acquittal and a vacated conviction, you

18 know, where a court has said this has got to be -- this

19 has got to be reversed and it no longer exists, in that

20 case the person comes up with a far less good situation.

21   MS. PRELOGAR: But that result makes sense

22 in light of the way Yeager reasoned through the issue in

23 the case, because in Yeager you could look to the

24 acquittal and identify that it must have made factual

25 finding --

1   JUSTICE KAGAN: It makes sense in terms of

2   parts of Yeager's reasoning, but not in terms of other

3   parts of Yeager's reasoning.

4   Another part of Yeager's reasoning just said

5   hung counts have never been accorded respect as a matter

6   of law or history. And similarly, one could say vacated

7   convictions have never been accorded respect as a matter

8   of law or history. They are vacated. They are

9   nullities. You don't get respect for that.

10   MS. PRELOGAR: I understand that portion of

11   Yeager, though to just simply confirm what the Court had

12   already said, which is that hung counts are evidence of

13   nothing because they don't represent jury decisions at

14   all. A jury doesn't speak through its -- a jury speaks

15   only through its verdict. And so something that signals

16   just disagreement or a failure to agree or even

17   extraneous --

18   JUSTICE KAGAN: Well, I guess I see -- when

19   I read Yeager, I see two different rationales, and on

20   one you're exactly right. There's a real distinction

21   with this case.

22   On the other, seems you're exactly wrong.

23   There's no distinction in this case at all because both

24   have never been accorded respect as a matter of law or

25   history.

1   MS. PRELOGAR: But I think that Yeager

2   itself signaled that the issue on which the case turned

3   is that we didn't have the kind of true inconsistency

4   that existed in a case like Powell, and the finality of

5   the conviction, its validity doesn't erase the

6   inconsistency that existed in Powell or provide any

7   greater clue about what that jury was actually thinking

8   and what it actually decided through its verdicts.

9   And so I think Yeager itself emphasized that

10   although we do have these finality concerns, a verdict

11   of acquittal is final only with those issues that it

12   actually decided, and Yeager was able to conclude that

13   the jury in that case, through the acquittal, did decide

14   issues in the defendant's favor as opposed to, for

15   example, deciding to acquit out of compassion, exercise

16   lenity, or neglect to follow instructions through the

17   count of acquittal.

18   That's not the case here where we have

19   conclusive evidence. We know for sure this jury didn't

20   follow its instructions, and that brings the case in

21   line with Powell, notwithstanding the fact that the

22   convictions had to be vacated for unrelated reasons.

23   I think it's -- it's important to emphasize

24   too the weighty interests that land on the side of

25   retrial in this circumstance. Thus, the ordinary remedy

1   here and it's for good reason, because when there's a

2   legal error in a trial, that doesn't signal that the

3   government necessarily failed to prove its case and

4   there's still a strong societal interest in ensuring

5   that the government has an opportunity to enforce the

6   criminal laws against that person, and if it can prove

7   its case under proper instructions, obtain a guilty

8   verdict to punish the criminal misconduct.

9   JUSTICE ALITO: The question on which we

10   granted review refers to a vacated unconstitutional

11   conviction.

12   But is that what we have here? Is this an

13   unconstitutional conviction?

14   MS. PRELOGAR: I think that we -- that the

15   conviction, if it were based on proper theory, would not

16   be unconstitutional, and so we don't necessarily know.

17   That was the reason why the conviction had to be

18   vacated, was because it wasn't clear what basis the jury

19   had resolved the verdict on.

20   JUSTICE ALITO: Well, it was an erroneous

21   instruction, so it was instructional error. Is that a

22   constitutional error?

23   MS. PRELOGAR: It's a -- I think it rises to

24   the level of a constitutional error insofar as the First

25   Circuit held that the defendants -- that the

1 instructional error would have permitted criminal

2 conviction based on conduct that doesn't constitute a

3 crime, putting, of course, to one side, as Justice

4 Ginsburg noted, the circuit split on that issue. It's

5 by no means an issue that's been fully resolved. And

6 the majority of circuits have found that the gratuity

7 theory that the jury was instructed on here is a proper

8 interpretation of Section 666.

9   JUSTICE ALITO: Sorry. Is every

10 instructional error a constitutional error?

11   MS. PRELOGAR: I don't think that all of

12 them would necessarily rise to the level of a

13 constitutional error. I guess any error that ultimately

14 is prejudicial and where we can't know for certain

15 whether the defendant was properly convicted based on

16 that charge, I think at the very least would of course

17 warrant setting aside the conviction and vacating it.

18   JUSTICE ALITO: So if there were a harmless

19 error issue in this case, what would the standard be?

20   MS. PRELOGAR: If there were a harmless

21 error --

22   JUSTICE ALITO: It would have to be harmless

23 beyond a reasonable doubt because it's a constitutional

24 error?

25   MS. PRELOGAR: I'm not sure whether the

1 lower court applied a Chapman standard here, and I think

2 ultimately the potential difference in standards

3 wouldn't have affected the analysis, because the court

4 concluded that there was -- that there was sufficient

5 evidence on the proper quid pro quo theory, also

6 evidence that would have supported a bribery theory.

7 And so the court just couldn't tell either way on what

8 ground the jury would have possibly grounded this

9 verdict.

10   Ultimately, though, I think in light of that

11 error, the appropriate result is the ordinary remedy

12 here, a retrial. Petitioners are only entitled to avoid

13 that remedy if they can carry their burden, and it's a

14 stringent one, of showing that the jury actually

15 resolved issues in their favor in this litigation.

16   They haven't carried that burden here. They

17 seek to be excused from it based on the legal error.

18 But they haven't actually carried the error -- carried

19 the burden of showing that that jury that returned those

20 inconsistent verdicts necessarily thought they were not

21 guilty of committing quid pro quo bribery.

22   Unless the court has further questions, we'd

23 respectfully ask that you affirm the judgment of the

24 First Circuit.

25   CHIEF JUSTICE ROBERTS: Thank you, counsel.

1   Ms. Blatt, you have five minutes remaining.

2   REBUTTAL ARGUMENT OF LISA S. BLATT

3   ON BEHALF OF THE PETITIONERS

4   MS. BLATT: Thanks. Thank you, Mr. Chief

5   Justice.

6   Justice Alito, any instructional error that

7   allows a jury to convict on something that's not a crime

8   violates the due process clause, but not all

9   instructional errors violate the due process clause. I

10   wouldn't want to be convicted for something that wasn't

11   a crime. So I don't -- that doesn't surprise me.

12   I'm going to start sort of backwards.

13   Justice Ginsburg, on your question about an all-white

14   jury where blacks are excluded, I'd go back and look at

15   the transcript, because she said, oh, well, that

16   might -- that might resolve the inconsistency.

17   And there's a real discomfort that she had

18   there, because she didn't want to say, well, they

19   acquitted him of murder, but because they also convicted

20   him of murder, maybe it was because they were -- they

21   were all white.

22   It's -- it's the same argument here, is --

23   she's saying, well, maybe that did cause the

24   inconsistency.

25   And it's our same argument too. Nobody

1 knows if the inconsistency is because they were

2 irreconcilably divided on whether he was not guilty of a

3 crime, or maybe it was purely a result of the

4 instructional error.

5   And it's because Yeager said it's

6 impossible, we could never meet that burden, and neither

7 could that -- the poor African American in her example,

8 he could never show that burden either, which is why the

9 burden shouldn't be on us.

10   Justice Kagan, your bit about unseemliness,

11 I'll take unseemliness. Every single government brief

12 on don't you dare reverse a conviction; convictions are

13 final, they bring closure to our community unless --

14 unless the error is so foul that it makes our country

15 not have fairness and integrity in our criminal justice

16 system.

17   You just -- we can't -- we can't have any

18 confidence in the verdict. That is the whole

19 supposition behind the prejudicial-error doctrine, is we

20 take a jury's decision as sacrosanct unless it just --

21 it's that bad. And that's the -- that's the premise of

22 your structural-error doctrine. So unseemliness is

23 written into your structural error, your prejudicial

24 error, your plain error. It's written into all of your

25 case law on the criminal law.

1   On the third point about civil, I think it's

2   fascinating. There are no cases. The government

3   doesn't cite any. The 2009 brief in Yeager is identical

4   to this brief. There are no civil cases saying you have

5   two inconsistent verdicts, but one is invalidated and

6   then somehow that cancels it out.

7   There's no settled common law of if you have

8   something invalid, you still get to look at it. In

9   fact, the law -- and of course we're going to defer to

10   Justice Ginsburg, but the law has always been an invalid

11   conviction just disappears for collateral estoppel.

12   The other point I want to make, there was a

13   lot of talking about, well, juries are just lean --

14   lenity, and they're just being nice. But we know since

15   Powell that overlapping charges skyrockets the

16   conviction rate. With each additional charge, a

17   conviction rate starts out at 68 percent and it jumps to

18   88 percent. So the opposite is true, in reality, is the

19   more charges the government brings, the more likely that

20   there is a --

21   JUSTICE GINSBURG: The jury might have taken

22   care of that in this case. The jury might have reacted

23   to the overcharging by saying we're not -- we will

24   convict on the predicate offense, but we're not going to

25   convict on these compound offenses.

1   MS. BLATT: Right. But I just -- that's not

2   a basis to dismiss the otherwise collateral estoppel

3   effect under Ashe. I mean, the question is, is are we

4   going to count illegal invalid verdicts as relevant

5   evidence of inconsistency. And almost the entirety of

6   the government's argument, at least the last ten

7   minutes, were just complete verbatim recounts of the

8   oral argument in Yeager and the brief in Yeager, is that

9   we have to have one free chance. The defendant didn't

10   meet her burden. After all, collateral estoppel, you

11   got to meet your burden. There was no way he could

12   reconcile the verdicts. The jury obviously didn't

13   follow the law, and you should presume they followed the

14   law. If they followed the law, they had to acquit.

15   It just -- this is definitely a broken

16   record. And yes, they have a formalistic distinction

17   that there is no jury decision. But it's worse when

18   what you have is a jury decision that on its face is

19   offensive to our legal system.

20   On the historical record, the only thing

21   they came up with -- I don't know how many -- 30,000

22   volumes was the two cases in the lower courts. But the

23   majority, the cases they were talking about are more,

24   like, for civil. You can't get civil damages if there

25   was an illegal conviction. It disputes probable cause,

1 and the courts are split.

2   But this Court -- and this court has been

3 around for a while, and I think it counts more than the

4 two lower court decisions they have, has said it is

5 impeached, full stop. It's void ab initio. It's a

6 legal fiction for a reason. It's not something that

7 prosecutors get to dig up from the grave and visit from

8 time to time even though it was invalid. It's cremated.

9 Its gone.

10   And again, it is something astonishing to

11 say, well, we're going to treat it, even though it's

12 unconstitutional under the due process clause, it's a

13 legal nullity under the double jeopardy clause. And

14 even though we're not letting the government use it to

15 prove our conviction, I mean, our guilt or innocence,

16 it's just that if we otherwise had a double jeopardy

17 right because we were found not guilty, they can negate

18 it and take it away.

19   JUSTICE ALITO: Are you really arguing that

20 it can't be used to prove a historical fact, that it's

21 not a -- it cannot be a relevant historical fact?

22   MS. BLATT: In the same way that Yeager --

23 the relevant historical fact is a finding of guilt.

24 That's why they couldn't get through their brief without

25 finishing up with historical fact on what the jury

1   thought about the defendant's guilt.

2   And I noticed she didn't once say "legal

3   conviction." If she had to give her argument saying the

4   jury legally convicted, it was an invalid verdict, it

5   was an unconstitutional verdict, her argument doesn't

6   sound so attractive.

7   CHIEF JUSTICE ROBERTS: Thank you, counsel.

8   The case is submitted.

9   (Whereupon, at 10:55 a.m., the case in the

10   above-entitled matter was submitted.)

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bribe 4:14,17
14:11 20:4
bribed 19:17
20:2
bribery 4:19,20
5:9,10,12 7:22
7:23 14:20
26:25 27:3
31:13 45:6,21
brief 4:24 5:1
11:25 18:21
25:16 32:23
47:11 48:3,4
49:8 50:24
bring 47:13
brings 42:20
48:19
broken 49:15
brought 28:1
burden 4:4
11:14,21 12:16
12:17,19,23
21:19 22:2
23:23 24:1,2
36:7 45:13,16
45:19 47:6,8,9
49:10,11

_____
C
_____
C 2:1 3:1
cake 19:6
call 6:11
called 17:7
cancels 48:6
car 16:21
care 9:14 13:25
48:22
cares 22:11 23:7
carried 45:16,18
45:18
carry 12:19
21:19 36:7
45:13
carrying 12:17
cart 11:3
case 3:4 4:7,22
6:20 9:15 12:7

15:1 19:15
20:5 21:18,20
22:13,15 25:5
27:8 28:11
29:13,14,18
31:8 33:13,18
33:19,22 34:2
34:22 35:13
36:9 38:8 39:2
39:22 40:4,13
40:15,16,20,23
41:21,23 42:2
42:4,13,18,20
43:3,7 44:19
47:25 48:22
51:8,9
cases 3:22 29:3
48:2,4 49:22
49:23
cause 46:23
49:25
caused 23:21
causing 12:2
certain 31:18
44:14
certainly 28:11
37:13
certainty 31:23
chance 49:9
Chapman 45:1
charge 9:18,20
10:15,21 13:10
14:3 28:13
44:16 48:16
charged 13:22
25:7 27:15
charges 3:18
28:1 39:6 40:5
48:15,19
Chief 3:3,9
12:11,14,25
19:11 21:15
26:14,18 28:5
30:12 31:4,10
45:25 46:4
51:7
circuit 10:4 31:3

33:19 43:25
44:4 45:24
circuits 44:6
circumstance
37:17 39:25
42:25
cite 29:3 33:18
36:10 48:3
civil 29:13,14,14
29:18,22 48:1
48:4 49:24,24
claim 5:4,4
22:24
clarify 38:22
39:16
clarifying 33:15
class 39:12
clause 3:12,15
5:20 6:2 17:6
18:7 19:5
21:14 26:1
46:8,9 50:12
50:13
clear 9:19,22
36:11 39:7
43:18
clearly 13:18
closely 4:9
closure 47:13
clue 42:7
coerced 24:16
collateral 26:21
29:17,22 30:6
31:19 37:1,3
37:21 39:11
40:10 48:11
49:2,10
collaterally 30:5
come 6:9 22:11
comes 9:22
32:11 40:20
coming 32:24
33:2
commit 4:19
committed
13:24 15:15
committing

45:21
common 48:7
community
47:13
compassion
42:15
complete 10:19
17:7 19:7,10
24:5 25:16,19
40:4 49:7
completely 7:6
8:23 12:7
13:11 15:13
compound 14:4
14:21 48:25
compromise
35:25
concede 31:17
concerned 32:16
32:17
concerns 42:10
conclude 42:12
concluded 35:2
45:4
conclusive 27:23
42:19
conduct 13:11
15:16 44:2
confession 24:16
24:17
confidence 28:3
47:18
confined 38:24
confirm 41:11
conflict 15:6
confusion 31:15
consequences
3:18
consider 14:13
34:17
considered 31:3
consistency
11:22
consistent 12:8
conspiracy 4:9
4:18 5:6,13
14:22 23:2

27:14 33:22
36:18
constitute 44:2
Constitution
18:17
constitutional
32:15 43:22,24
44:10,13,23
contend 34:16
contesting 7:16
continuing 21:9
21:10
contradictory
35:11
convict 10:8
13:11 14:4,9
14:23 21:3
46:7 48:24,25
convicted 11:20
13:5,6,8,9,15
14:10,20 15:21
24:16 31:13
40:8 44:15
46:10,19 51:4
convicting 26:25
conviction 3:24
3:24 5:11,23
5:24 6:8,20
7:12,17,20,23
8:5,19,19,23
9:3,6 10:17,20
15:17 17:12,14
17:16,20 18:4
18:10,11 19:17
19:25 20:1,12
20:20,22,24
22:4,14 28:8
28:11,12,14,15
28:16,22,23
29:2,8,10,24
30:1,4,13
31:10 32:6
33:7,14 34:1,3
37:16 38:12,18
38:25 39:3
40:17 42:5
43:11,13,15,17

44:2,17 47:12
48:11,16,17
49:25 50:15
51:3
convictions 3:13
3:14,16,20 6:3
6:12,19 7:21
7:25 8:15,22
11:17 17:5
19:3 29:4
32:14,19,21
33:3 34:8 41:7
42:22 47:12
convinced 35:19
correct 22:6
30:3
counsel 10:24
11:4 26:14
45:25 51:7
count 3:23,24,25
4:2 5:14 7:12
7:13 10:11
21:12,12 23:3
23:4,8,8 24:7
24:11 26:5,6
26:10 27:7
30:20 34:17,20
35:2,5 38:24
39:3 40:8,15
42:17 49:4
counted 13:2
23:17
country 47:14
counts 4:9 11:11
16:6 21:9
22:21 23:24
25:8 31:1 36:1
39:1 40:7 41:5
41:12 50:3
couple 32:25
course 37:21
38:12 44:3,16
48:9
court 1:1,14
3:10 4:21 5:20
7:9,14 9:23
10:6,25 15:1,6

15:16,18,23
16:7 17:6,15
20:2 21:8
22:10 23:8,17
24:5 25:23
26:2,19 29:3
32:25 33:4
34:17 39:20
40:18 41:11
45:1,3,7,22
50:2,2,4
court's 9:18
34:25
courtroom
12:22
courts 33:2
49:22 50:1
create 34:21
creates 38:11
cremated 50:8
crime 12:3 13:22
13:24 14:16
29:5 44:3 46:7
46:11 47:3
crimes 14:4,21
criminal 14:13
29:16 43:6,8
44:1 47:15,25
crucial 24:17

_____
D
_____
D 3:1
D.C 1:10,17,20
damages 29:18
49:24
dare 47:12
decide 7:13 15:8
15:11 23:12
30:9,17 33:11
42:13
decided 3:17 4:5
4:10,20 5:8,11
5:16,18 15:12
15:14 26:22
31:14 32:3
34:13 35:19
36:24 42:8,12

decides 7:11
deciding 42:15
decision 9:13,16
9:17,17 15:7
16:17 24:12,14
34:19 47:20
49:17,18
decisions 7:6
9:14 16:6 33:1
41:13 50:4
defeat 19:2
defendant 4:4
10:17 11:13
12:23 13:23
21:18 23:23
24:1 27:10
33:14,15,20
34:3 36:19
37:14 40:2
44:15 49:9
defendant's
22:1 26:22
27:12,21 28:4
28:12 29:6
30:11 32:19
34:10 36:6,25
37:6 38:5
42:14 51:1
defendants
11:20 43:25
defended 33:21
defense 38:9
defenses 36:19
defer 48:9
definitely 23:21
30:24 49:15
definition 35:4
Department
1:20
depend 22:10
deprived 10:18
Diamond 9:24
difference 45:2
different 16:6
21:21 22:2
27:22 34:19
39:5 41:19

differently 35:7
dig 50:7
directed 10:6
11:5 15:19
disadvantage
34:10
disagreement
41:16
disappeared
19:21
disappears
17:23 48:11
discomfort
46:17
disconnected
39:15
discrimination
37:11
dismiss 49:2
dispute 4:13,14
4:15,17 9:11
disputed 4:23,24
5:1 7:3
disputes 36:9
49:25
disregard 39:21
disregarded
39:17
dissent 7:5
18:22
distinction
40:13 41:20,23
49:16
distinguish
38:23
distinguished
35:8
divided 12:5
47:2
doctrine 47:19
47:22
doing 24:3 30:5
33:6 39:18
double 3:12,15
5:20 6:2,8
12:17 17:6,14
17:24 18:7

19:4 25:25
50:13,16
doubt 11:5
44:23
doubtful 25:7
due 46:8,9 50:12

_____
E
_____
E 2:1 3:1,1
eat 19:6,6
effect 3:12 8:25
19:12 22:24
23:9 32:2
35:22 49:3
effects 35:24
40:6
either 14:10
22:7,18,22
45:7 47:8
element 9:7
elements 13:20
25:4
elicited 20:1
ELIZABETH
1:19 2:6 26:16
emphasis 39:23
emphasize 42:23
emphasized
42:9
enforce 43:5
ensuring 43:4
entire 18:21,22
entirety 49:5
entitled 40:2,9
45:12
equally 31:12
equivalent 24:11
erase 42:5
erred 27:24
erroneous 9:18
9:20 13:18
22:5 43:20
error 8:21,24
11:18 12:1
13:14 16:11
20:13 23:16,18
27:5 37:15,18

37:20,25 38:12
38:17 39:1,2,9
39:14,22,24
43:2,21,22,24
44:1,10,10,13
44:13,19,21,24
45:11,17,18
46:6 47:4,14
47:23,24,24
errors 8:22
10:23,25 11:3
38:24,25 39:12
46:9
ESQ 1:17,19 2:3
2:6,9
essential 26:20
essentially 35:23
establish 28:12
28:17 29:1,4,5
32:21 33:23
37:14,16
established 30:2
establishes
37:19
estop 30:5
estoppel 26:21
29:17,22 30:7
31:19 37:1,3
37:21 39:11
40:10 48:11
49:2,10
everybody 22:1
evidence 5:25
13:6,12 14:21
15:18 16:18
20:24 21:3
24:20,22 27:24
38:7,8,9,13,14
41:12 42:19
45:5,6 49:5
exact 36:22
exactly 7:25
11:9 12:13,15
25:11 41:20,22
example 11:24
16:21 19:14
33:20 36:18

42:15 47:7
examples 33:4
36:10,12
exchange 12:4
excluded 38:9
46:14
excused 45:17
exercise 42:15
exhaustion 24:8
exist 6:13,17
39:8
existed 42:4,6
existence 29:8
exists 35:12
40:19
explain 11:18
38:1
explaining
11:21 24:2
explanation
35:18
extend 35:25
38:7 40:6
extension 30:21
extent 37:17,25
39:9
extraneous
41:17
extraordinary
37:3

_____
F
_____
face 8:24 16:23
16:24 21:1
49:18
fact 4:5 7:5
18:12,20 19:13
19:14 26:2
28:13,19 29:1
33:13 35:17
36:6 42:21
48:9 50:20,21
50:23,25
facts 8:15,16
13:19 27:12,20
29:9 37:23
38:4

factual 6:22 7:2
7:10 13:19
17:2 27:21
36:9 40:24
failed 43:3
fails 36:15
failure 41:16
fairness 47:15
falls 27:8
far 35:25 40:20
fascinating 48:2
favor 26:22
27:12,21 28:4
30:11 31:23
34:5 36:24
37:1,7 38:5
42:14 45:15
Federal 29:20
Feretta 10:24
fiction 50:6
figure 5:3 8:10
17:9
final 12:24 13:1
16:18 22:25
29:23 42:11
47:13
finality 10:12
13:3 22:12
29:24 42:4,10
find 6:18 10:7
14:5,6,9,18
15:23,24,25
16:8,8,9,19
32:8 37:23
finding 14:7
37:9,10,10,12
40:25 50:23
findings 27:21
28:4
finds 15:14
finishing 50:25
firing 26:5
first 3:4,14 5:21
31:3 43:24
45:24
five 46:1
focal 30:3,8

focus 30:1
follow 20:20
27:7,20 34:25
38:10 42:16,20
49:13
followed 49:13
49:14
following 27:25
36:5
forecloses 28:14
formalistic
49:16
foul 47:14
found 5:3 12:25
13:19,20 14:11
15:15,21 21:5
24:19 25:4
29:15 37:14
44:6 50:17
free 49:9
friend 30:15
full 3:12 23:9
50:5
fully 44:5
fundamental
25:24 37:5
40:14
fundamentally
34:18
further 31:21
32:23 40:5
45:22

_____
G
_____
G 3:1
gain 28:7 40:4
gauntlet 26:3
general 1:20
31:19 36:16,21
Ginsburg 5:2
6:1 9:15,25
10:2 14:2,12
14:17 15:5,10
22:23 23:10,18
24:10 37:8
38:16 40:1
44:4 46:13

48:10,21
Ginsburg's 16:5
give 5:22 6:7
16:20,21 24:2
26:8 51:3
given 32:7
glasses 13:23
go 4:16 9:23
18:20 46:14
goes 32:22
going 5:22 7:8
11:1 14:23
18:19 23:7
24:1 25:14
26:9 46:12
48:9,24 49:4
50:11
Gonzalez-Lopez
10:24
good 26:9,11,12
40:20 43:1
government
3:17,25 4:6,23
4:24,25 5:12
13:20 17:11,13
17:19 18:3,21
19:5 20:3
21:11 23:4,6
25:7 26:8 28:6
28:23 30:19
34:9 43:3,5
47:11 48:2,19
50:14
government's
9:12 10:5
14:13 21:4
24:15 25:16
26:4 49:6
granted 43:10
gratuity 10:3
12:6 14:5,11
44:6
grave 50:7
greater 40:9,11
42:7
ground 4:1 29:9
45:8

grounded 45:8
guarantee 19:19
guess 6:24 8:9
  22:1 32:15
  41:18 44:13
guilt 15:23,25
  16:8,8 21:5,5
  28:13 32:19
  35:19 50:15,23
  51:1
guilty 10:7 12:3
  13:24 14:1
  15:19,21 24:19
  25:4 37:14
  43:7 45:21
  47:2 50:17
gun 26:4

H

hand 7:21,22
hang 7:4
hanging 24:3
happen 25:10
happened 29:9
happy 8:18
hard 26:11 32:8
harm 33:15
harmless 44:18
  44:20,22
hear 3:3
HECTOR 1:4
held 5:24 11:11
  43:25
help 33:14
helpful 16:23
helps 21:13
highly 25:7
historical 7:5
  18:12,20 19:13
  19:14 28:18,19
  29:1 49:20
  50:20,21,23,25
history 5:21
  17:17 25:25
  41:6,8,25
hold 4:21
hung 7:8,12,13

11:11 15:7
18:21 21:9,17
22:2,2,20
23:11,12,24
24:7,11 26:10
34:17,20 35:2
35:5 40:15
41:5,12
hypothetical
  20:10,11 27:14
  40:1

I

idea 6:7
identical 48:3
identify 36:25
  40:24
ignore 18:23
ignoring 10:22
illegal 6:3 7:11
  49:4,25
Imagine 36:18
imbued 10:12
immunity 40:4
impeach 11:8
  22:17 26:9
impeached 50:5
imponderable
  24:4
important 28:10
  42:23
impose 29:14
impossible
  11:14,21 24:2
  47:6
improper 16:14
  16:15
improperly 38:8
  38:9
inability 36:24
inappropriate
  35:21
including 3:15
  11:3
incoherent
  21:14
inconsistency

5:9 10:9,19
11:22 12:2,4,5
15:2 23:19,22
24:5,22 28:18
30:10 34:21
35:12,14,18
37:18,20 38:1
38:18 39:4,8
39:10,15,21
42:3,6 46:16
46:24 47:1
49:5
inconsistent 7:6
  7:19 8:2 9:9
  11:8 14:7 24:6
  26:24 27:5,10
  27:23 30:14,24
  31:7 35:9
  36:14 45:20
  48:5
inconsistently
  10:9 28:2
indecipherable
  11:12,13
independent
  10:15 40:6
indicate 27:19
indicating 12:17
indisputably
  27:4
individuals'
  32:14
infected 23:16
  26:12 37:10
influence 6:7
information
  10:8
initio 6:12 17:23
  18:6,6,9 19:3,4
  50:5
innocence 50:15
inquiry 30:3,8
  34:11
insofar 43:24
instances 6:18
  32:9,24 33:2
instruct 15:23

16:7
instructed 30:25
  44:7
instruction 11:5
  13:18 16:14,15
  16:16 24:20
  29:16 31:6
  43:21
instructional
  11:18 13:14
  20:13 39:2
  43:21 44:1,10
  46:6,9 47:4
instructions
  27:7,20,25
  35:1 36:5 39:5
  39:7,17 42:16
  42:20 43:7
integrity 26:1
  47:15
intended 36:2,9
intent 29:6
interest 43:4
interests 42:24
interpretation
  44:8
intertwined 4:9
introduce 20:4
introduced
  20:24
invalid 3:13,19
  5:22,24 6:3,8
  12:24 13:1
  15:17 16:18,24
  19:3 20:24
  21:2 22:18,22
  24:13 31:6
  48:8,10 49:4
  50:8 51:4
invalidated 48:5
inverse 14:8
inversely 8:21
invoking 30:6
involving 27:2
  31:2
irony 23:17
irrationality

35:3
irreconcilable
  15:3
irreconcilably
  47:2
irrelevant 4:2
  4:11 9:4 15:13
issue 4:11,12,13
  5:6 9:21 26:22
  29:18 31:3,20
  33:8 34:5
  36:25 40:22
  42:2 44:4,5,19
issues 27:9
  30:10 31:22
  42:11,14 45:15

J

jeopardy 3:12
  3:15 5:20 6:2,8
  12:18 17:6,14
  17:24 18:7
  19:5 21:10
  25:25 50:13,16
JUAN 1:3
judge 11:4
judgment 45:23
jumps 48:17
juries 48:13
jurisprudence
  5:21
juror 20:11
jurors 11:25
  12:2 27:6
  34:22,25 35:19
jury 3:17 4:8,10
  4:18 5:3,8,15
  6:21,21 7:3,6,7
  7:11,12,18,19
  7:21,23 8:1,6,7
  9:13,14,16,17
  10:7,9,10,15
  11:8,20 12:22
  12:24,25 13:1
  13:5,12,14,16
  13:23,24 14:2
  14:9,10,12,15

14:19 15:7,10
15:12,14,15,23
16:5,8 18:21
21:5,17,17,19
21:24,25 22:2
22:3,3,4,11
23:11,12 24:3
24:15,23 25:3
25:3 26:21,24
27:9,19,22,24
28:2 29:15
30:25 31:5,5
31:13,22,23
32:3 33:11,24
34:4,12,19
35:4,4,10,16
35:25 36:1,5,8
36:21,23 37:9
37:9,12,14,16
37:22 38:4
39:5,16,18
40:8 41:13,14
41:14 42:7,13
42:19 43:18
44:7 45:8,14
45:19 46:7,14
48:21,22 49:12
49:17,18 50:25
51:4

jury's 16:19
28:18 33:9,11
35:24 47:20

justice 1:20 3:3
3:9,21 4:7 5:2
6:1,5,14 7:15
8:4,13 9:2,5,15
9:25 10:2,13
11:7 12:10,11
12:14,25 13:4
13:9,13,17
14:2,12,17
15:5,10,22
16:4,5,13 17:9
17:17,24 18:2
18:8,16,23,24
19:9,11,11,12
19:23 20:6,7

20:10,15,19
21:15 22:23
23:10,18 24:10
25:6 26:14,18
27:13 28:5,21
29:11,12,21
30:12 31:4,10
32:4,22 37:8
38:6,15,16
40:1,11 41:1
41:18 43:9,20
44:3,9,18,22
45:25 46:5,6
46:13 47:10,15
48:10,21 50:19
51:7

_____
K
_____

Kagan 6:5,14
7:15 8:4,13 9:5
12:10 17:9,17
17:24 18:2,8
18:16,24 28:21
29:11 32:4,22
40:11 41:1,18
47:10

KENNEDY
3:21 4:7 13:4,9
13:13,17 15:22
16:4,13 20:6
20:10,15,19
25:6 27:13
29:12,21

key 11:12
killer 24:17
kilter 32:12
kind 10:25
16:11,20 21:14
24:6 29:1
35:14,18,22
37:15 38:16
42:3

know 5:3,8,15
5:17,18 6:16
7:11,15 9:23
11:4,19 12:12
12:18,24 13:5

13:14 14:14
15:10,12,13,15
15:20,21 17:19
17:22 18:13,16
20:4 21:23,23
21:25 22:7
23:6,14,23
25:2,17 27:5
29:15 30:10,12
30:13,14,16,23
31:7,17 32:10
35:11 36:4,23
39:17 40:18
42:19 43:16
44:14 48:14
49:21

knows 11:19
15:4 24:9 47:1

_____
L
_____

label 18:8
lack 19:12 28:2
29:24 32:1
laid 5:12
land 42:24
Las 4:14
law 12:16 15:14
21:6 22:5,7
25:25 41:6,8
41:24 47:25,25
48:7,9,10
49:13,14,14
lawful 12:6
13:11 14:11
15:16
laws 43:6
lawyer 24:18
laying 14:22
lean 48:13
leave 19:4 40:14
legal 3:14 6:3,11
6:12 7:1 8:13
10:11 17:1,3
19:12 32:8,13
39:21,24 43:2
45:17 49:19
50:6,13 51:2

legally 24:14
31:6 51:4
lenity 31:15
35:20,23 42:16
48:14
let's 7:24 22:12
25:17 33:21
letting 50:14
level 43:24
44:12
liability 14:14
29:14 31:1
lied 20:12
lies 20:12
light 30:9 40:22
45:10
limited 32:18
line 42:21
LISA 1:17 2:3,9
3:7 46:2
litigation 31:21
45:15
little 30:21
long 38:11 39:15
long-standing
34:25
longer 40:19
look 6:18,24 8:7
8:14 15:1 18:8
22:12,12 29:3
40:23 46:14
48:8
looking 5:17
8:20 18:17
28:17 32:18
34:12 39:6
looks 24:6
lost 16:3
lot 24:21 25:20
27:20 36:6
48:13
lower 29:3 32:25
33:4 45:1
49:22 50:4

_____
M
_____

magnify 35:24

main 6:10
majority 44:6
49:23
making 8:25 9:5
25:13
manifestation
34:24
manner 32:14
36:6
Martinez-Mal...
1:4 3:5
match 4:16
matter 1:13 7:10
16:11 28:19
35:12 41:5,7
41:24 51:10
mattered 9:13
matters 40:16
mean 6:16 8:18
9:11 12:14
14:25 17:21
18:5,9,20 22:9
23:4 25:1,2
32:23 49:3
50:15
meaning 5:22
24:22
meaningful 9:1
means 21:24
22:20 44:5
meant 35:16
36:8
meet 4:4 23:23
47:6 49:10,11
merits 5:1
Michigan 10:16
minutes 46:1
49:7
misconduct 43:8
missing 9:7
mistake 31:15
misunderstand
38:20
misunderstood
20:8
moment 7:24
morning 3:4

motive 29:4
moving 17:2
multiple 16:6
    33:21
murder 46:19
    46:20

_____ N _____

N 2:1,1 3:1
nature 10:21
    34:11
necessarily 3:17
    4:5,20 21:5
    25:3 27:11
    30:2 33:11
    34:13 38:4
    43:3,16 44:12
    45:20
need 16:21
    25:18 37:4
negate 50:17
neglect 42:16
neglected 27:6
neither 14:5
    47:6
never 4:23,24,25
    5:5,24 7:2 11:1
    15:17 16:25
    17:15 23:1,17
    23:23 28:6
    41:5,7,24 47:6
    47:8
new 5:5 39:24
    40:2
nice 48:14
nondecisions
    26:10
nonevent 21:9
nonevents 21:11
notable 31:25
noted 44:4
noticed 51:2
notwithstandi...
    6:23 8:5 42:21
nullification
    35:24
nullities 3:15 6:4

6:12 17:8 19:7
    19:10 41:9
nullity 25:17,18
    50:13
number 29:3
    33:6 36:10,11
nutty 10:25

_____ O _____

O 2:1 3:1
obtain 34:18
    43:7
obvious 7:3
    33:12 35:17
obviously 29:15
    49:12
occurred 27:6
    28:20
occurs 19:13
October 1:11
offense 5:11
    23:1,2 27:1
    48:24
offenses 27:2
    31:14 48:25
offensive 49:19
offers 36:19
oh 20:17 24:19
    24:23 46:15
Okay 11:9 24:24
once 25:13 51:2
ones 30:4,6
operate 36:17
operating 14:3
opportunity
    25:16,19 43:5
opposed 42:14
opposite 8:25
    48:18
opposition 4:25
oral 1:13 2:2,5
    3:7 26:16 49:8
orange 23:14,15
order 14:4
ordinary 39:25
    42:25 45:11
outweigh 25:21

overcharging
    48:23
overlapping
    3:18 34:2 39:6
    48:15
overt 33:23 34:2
    36:20
overwhelming
    13:7,12

_____ P _____

P 3:1
PAGE 2:2
paper 8:20
    16:25 21:4
    24:18
pardon 20:12
part 6:22 11:12
    18:17 31:5
    41:4
particular 38:16
    39:1
particularly
    33:5 35:21
parts 41:2,3
party 29:13
people 22:25
percent 48:17
    48:18
period 17:16
perjury 20:16
permitted 44:1
permitting 26:7
person 40:20
    43:6
perverse 21:14
Petitioner 37:9
Petitioner's
    26:24 29:25
petitioners 1:5
    1:18 2:4,10 3:8
    12:3 14:16
    15:15 30:5
    31:17 34:16
    39:20 40:3
    45:12 46:3
petitioners' 4:22

34:15 36:14
phrase 21:22
picture 6:22
piece 8:20 10:8
    16:24 21:4
    24:18
place 6:1
plain 47:24
plan 29:6
please 3:10
    26:19
point 4:23,23,25
    8:22 9:5 11:22
    12:1,15 20:20
    21:16 25:13,15
    27:10 30:3,8
    34:3 48:1,12
points 29:25
poor 47:7
portion 41:10
position 10:6
    16:10 24:15
    26:8 38:6
possibilities
    14:10
possibility 30:18
    30:25 31:12,22
possible 12:8
    31:12
possibly 45:8
potential 45:2
Powell 22:13,13
    22:20 35:8,13
    35:17 36:3
    38:2 42:4,6,21
    48:15
Powell's 27:9
powerful 8:8
precedents
    30:21
precisely 23:22
    33:7
preclude 27:1
    31:20
preclusion 5:4,5
    5:7 29:18
    36:16

preclusive 22:24
    32:2 35:22
predicate 5:11
    27:3 39:10
    48:24
prejudicial 11:1
    11:6 16:17
    44:14 47:23
prejudicial-er...
    47:19
Prelogar 1:19
    2:6 26:15,16
    26:18 27:17
    28:9,25 29:19
    29:22 30:23
    31:9,11 32:17
    33:4 37:13
    38:11,21 40:21
    41:10 42:1
    43:14,23 44:11
    44:20,25
premise 7:16,17
    47:21
preponderance
    21:3 24:20
prerequisite
    26:20,23 37:5
prerequisites
    40:10
presenting
    35:13
presume 49:13
presumed 35:1
presumption
    34:25 37:22
pretend 6:13,17
    25:17
pretty 26:9
prevent 40:7
primary 25:25
    29:25 34:15
principle 6:9
    8:14 21:10
    29:23 31:20
principles 25:21
    36:16
prior 31:8

pro 10:1,2,18
12:4 14:5
31:13 45:5,21
probable 49:25
problem 30:15
proceed 10:18
process 46:8,9
50:12
produce 3:19
Program 4:19
prohibition
32:11
proper 30:8
35:15 43:7,15
44:7 45:5
properly 44:15
prosecuted
20:16 23:1
prosecution 4:6
19:17 38:8
40:5
prosecutors
50:7
protect 26:1
prove 4:6 8:17
8:18 19:14
43:3,6 50:15
50:20
proves 8:22
provide 39:10
42:6
provides 37:1
Puerto 4:15
punish 43:8
punished 18:10
purely 47:3
purpose 17:12
17:16,20 18:4
18:13 26:1
28:15,17,21
29:2 32:7 33:3
purposes 17:14
20:25
put 11:14,21
22:8 29:2
putting 39:12
44:3

Q

question 5:19
6:23 7:16,17
9:3,25 12:9
14:17 16:5,16
18:11,24 19:16
20:9,18,25
24:14 33:7,10
33:12 34:12,14
43:9 46:13
49:3
questioned 15:2
questions 25:20
45:22
quid 10:1,2 12:4
14:5 31:13
45:5,21
quite 21:7 32:12
33:12 34:13
quo 10:1,2 12:4
14:5 31:13
45:5,21

R

R 3:1
race 37:10
raising 30:15
rate 48:16,17
rational 36:6
rationales 41:19
rationally 7:4
35:1 37:23
reach 9:16,17
reached 31:7
35:11
reaching 37:23
reacted 48:22
read 9:24 14:15
41:19
real 24:17 41:20
46:17
reality 18:23
48:18
really 9:2 23:8
24:7,7,11
25:18 26:5
29:7 33:1

35:16 50:19
reason 8:18 9:4
9:10,14 11:10
13:1 15:16
17:3,4 19:3
22:10 39:20
43:1,17 50:6
reasonable 11:5
14:19 44:23
reasoned 8:7
40:22
reasoning 41:2,3
41:4
reasons 3:11
42:22
REBUTTAL
2:8 46:2
received 39:5
recognition 27:9
37:2
recognized
16:25 35:8
36:3 38:3
recognizes 21:6
reconcilable
11:15 18:22
reconcile 12:23
24:4 49:12
reconciled 27:4
reconciling
11:14 23:24
record 19:20
20:3 27:18
28:19 35:12
49:16,20
recounts 49:7
reed 35:3
refers 43:10
reflection 28:3
refusal 16:19
regard 3:13
reject 14:12
relevance 5:22
33:12 34:14
relevant 3:16
5:25 7:7 10:8
11:11,23 12:9

15:18 16:18
24:14 29:10
33:5,14 34:8
37:17 49:4
50:21,23
reliable 9:1
reliance 22:8
28:14
relied 31:5
relitigate 30:19
relitigation 27:1
rely 29:20 30:4
31:9 32:20
relying 21:4
28:16 30:7
remaining 46:1
remedy 37:4
39:24,24,25
40:9,12 42:25
45:11,13
render 8:23
rendering 21:14
renders 16:17
represent 41:13
reserve 26:13
resolve 36:9
38:1 39:4,9
46:16
resolved 27:12
30:10 31:22
34:4 36:13,25
37:6 38:4
43:19 44:5
45:15
respect 9:1 14:3
27:7 36:15
41:5,7,9,24
respectfully
45:23
Respondent 1:8
rest 26:13
rested 31:18
restore 37:22
rests 6:6
result 34:17
40:21 45:11
47:3

resulted 38:17
results 35:11
37:18
retrial 17:5
19:24 26:6
40:7 42:25
45:12
retry 3:25 24:25
returned 26:24
34:22 45:19
returning 33:24
returns 13:24
27:22
reversal 38:17
reverse 47:12
reversed 29:24
40:19
reversible 23:16
38:12
review 43:10
rhetoric 8:11
rhetorically 8:9
Rico 4:15
right 4:3,12 6:25
8:3 10:5,18,24
15:9 16:10
18:14 19:18
20:14 21:20
23:3,13 25:11
41:20 49:1
50:17
rightly 36:3
rights 32:15
rise 44:12
rises 43:23
ROBERTS 3:3
12:11,14 19:11
21:15 26:14
28:5 30:12
31:4,10 45:25
51:7
rotten 22:15
23:13 26:11
rule 25:24 31:11
running 26:3

S

S 1:17 2:1,3,9
  3:1,7 26:16
  46:2
sacrosanct
  25:23 47:20
salient 34:13
satisfied 26:23
  37:4,5 39:11
satisfy 40:10
saying 8:4 13:5
  15:20 16:1,4
  19:1,2 21:5,22
  23:25 25:6,9
  46:23 48:4,23
  51:3
says 20:5 23:12
  24:21 35:13
  36:19
scattered 32:25
scope 17:10
se 10:18
second 3:16 25:9
section 4:19
  15:25 31:2
  44:8
see 26:11 38:3
  41:18,19
seek 45:17
seeking 27:1
sense 18:9 40:21
  41:1
separate 28:10
  34:1,5 36:13
set 3:24,25 10:17
  20:12 34:3
  38:13
set-aside 10:14
  10:20
setting 44:17
settled 48:7
show 36:7 38:18
  47:8
showing 4:4
  45:14,19
shows 34:4
side 17:18 23:11
  30:16 42:24

  44:3
signal 43:2
signaled 42:2
signals 41:15
significant
  21:23
similarly 41:6
simply 38:3
  41:11
single 47:11
situated 35:7
situation 9:6
  10:16,22 19:18
  27:18,22 31:19
  33:20 35:13
  36:4,20,23
  37:15 40:7,20
situations 29:7
skyrockets
  48:15
societal 43:4
sole 39:20
Solicitor 1:19
someplace 6:9
sorry 12:10 16:3
  19:10,23 20:17
  44:9
sort 25:22 46:12
SOTOMAYOR
  10:13 11:7
  19:9,23
sought 28:7
sound 51:6
speak 41:14
speaks 41:14
special 25:22
  26:8
split 3:19 9:20
  10:4 44:4 50:1
spoken 35:10
squad 26:5
stamp 22:11
stand 32:19
standalone
  26:25
standard 44:19
  45:1

standards 45:2
staring 26:3
start 6:2 46:12
starts 48:17
State 10:16
statement 8:9
  28:6
States 1:1,7,14
  1:21 2:7 3:5
  19:7 26:17
status 25:22
steering 16:22
stop 50:5
stringent 45:14
strong 5:13 43:4
struck 19:20
  20:3 36:1
structural 10:25
  47:23
structural-error
  47:22
submitted 51:8
  51:10
subsequent 4:6
  29:5
substantive
  30:19,20
sufficient 45:4
suggest 6:1
suggested 32:4
suggesting 19:24
suggestion 36:14
Sun 9:24
supported 45:6
suppose 19:15
  27:13
supposition 25:5
  47:19
Supreme 1:1,14
sure 8:17 9:2
  22:17 24:1,7
  24:11,16,21
  32:10 42:19
  44:25
surely 6:20
  19:13,17
surprise 46:11

Swenson 3:23
  4:1 25:10
sync 36:16
system 10:11
  13:2 32:8,13
  47:16 49:19

— **T** —

T 2:1,1
take 3:21 6:16
  47:11,20 50:18
taken 48:21
talking 5:4,6
  19:21 21:1
  48:13 49:23
tell 6:20 7:18 8:1
  8:1,15,16
  18:18 24:7
  32:15 45:7
tells 7:19,20 8:5
  18:12 29:8
ten 49:6
terms 41:1,2
testified 19:16
testimony 19:20
  19:25 20:4,23
Thank 3:9 26:14
  45:25 46:4
  51:7
Thanks 46:4
theories 14:13
  31:1 33:21
theory 16:7
  31:13 43:15
  44:7 45:5,6
thick 14:23
thin 35:3
thing 21:1 28:24
  40:16 49:20
things 7:9,20
  20:21 21:22
  29:4
think 5:19 7:9
  7:10,15 9:11
  9:23 10:23
  14:25 16:13
  17:1,11,13,18

  21:7,22 22:9
  23:2,13 24:13
  25:14 28:9,25
  29:10,25 31:25
  32:5,22 33:5
  34:11,24 35:22
  36:3,10,15
  37:2 39:6,13
  39:19 42:1,9
  42:23 43:14,23
  44:11,16 45:1
  45:10 48:1
  50:3
thinking 18:13
  42:7
third 3:17 33:19
  48:1
thought 12:3
  14:21 15:5
  38:15 45:20
  51:1
three 3:11 7:9
time 5:21 28:1
  32:23 33:2
  50:8,8
times 32:24
tough 32:23
  33:2
tradition 32:18
  32:22
traditions 32:7
  32:13
transcript 46:15
transpired
  12:22
travel 4:9,15,19
  5:6,13 14:22
  15:24,25 16:9
  23:1 27:14
treat 11:2 50:11
treated 15:17
trial 5:5 15:23
  16:7 25:9
  39:24 40:2
  43:2
true 7:25 10:13
  13:20 18:1

31:11 34:21
42:3 48:18
truly 36:8
try 27:15 33:8
38:21
trying 5:3 8:10
10:10 14:18
30:4 38:23
Tuesday 1:11
turned 42:2
two 8:1 9:8 14:9
36:19 39:5
41:19 48:5
49:22 50:4
type 39:9,14
typical 21:20

U

ultimately 35:2
44:13 45:2,10
unable 17:11,13
unanimously
24:19
unassailability
25:24
unconstitutio...
43:10,13,16
50:12 51:5
undermine 9:8
11:16
undermined
22:20,21,24
understand 10:3
12:16 13:4,13
20:11 32:10
40:12 41:10
understanding
22:5,7
undisputed 27:3
United 1:1,7,14
1:21 2:7 3:5
19:7 26:17
unlawful 14:11
unrelated 42:22
unreliable 8:20
8:24
unseemliness

32:11 47:10,11
47:22
unseemly 21:8
32:6
unusual 32:1
unwind 11:2
use 17:11,13,19
18:3,11,12
19:25 20:23
22:16,18 28:10
28:22,23,25
29:12,13 32:13
34:9 37:11,13
50:14
usually 6:17

V

v 1:6 3:5,23 4:1
25:10
vacate 8:19
vacated 3:13,14
3:16 6:3,11,19
6:20 7:17,20
7:23,25 8:5,14
9:3,17 11:17
17:5,12,13,16
17:19 18:3,10
18:11 19:24
28:7,10,11,14
28:22,23 29:4
32:6,13 33:3,6
40:17 41:6,8
42:22 43:10,18
vacating 44:17
vacation 11:17
valid 7:21 22:13
22:14,16 31:10
validity 10:12
22:12 42:5
validly 31:13
Vegas 4:14
Velasquez 33:18
verbatim 49:7
verdict 4:1 10:6
10:11,14 11:5
12:24 13:25
14:1 15:19

21:1 22:16,17
22:18 24:13
29:23 31:7,18
33:9,16,25
34:5,22,23
35:15,16,23
36:8,14,21
37:24 38:3
41:15 42:10
43:8,19 45:9
47:18 51:4,5
verdicts 3:19 9:8
12:8 13:1 15:3
22:11,22 26:25
27:4,10,23
30:14,24 33:11
34:13 35:7,9
35:10 36:15
37:19 38:1,19
42:8 45:20
48:5 49:4,12
versus 19:7
view 9:18
violate 46:9
violates 46:8
violation 11:4
12:18 13:19
visit 50:7
void 6:12 17:23
18:6,6,9,9 19:2
19:4 21:9,11
50:5
volumes 49:22

W

want 7:1 19:4
40:5 46:10,18
48:12
wants 4:6 19:5,6
20:4
warrant 44:17
Washington
1:10,17,20
wasn't 20:6
27:25 34:19,20
37:16 43:18
46:10

way 9:19 14:14
14:15 16:17
17:9 21:2,6,22
22:7 33:19
40:22 45:7
49:11 50:22
ways 8:2 11:16
We'll 3:3
we're 5:2,4,6
11:1 14:18
17:4 19:21
21:1,20 24:1,6
24:10 28:16,17
30:3,17 31:16
34:9 36:4
39:13 48:9,23
48:24 50:11,14
wearing 13:23
weight 6:7
weighty 42:24
went 8:1 27:24
weren't 14:23
26:10
wheel 16:22
white 46:21
withheld 24:17
witness 19:16
20:12,15
witness's 20:23
word 32:5
works 16:10
33:20
world 31:16
38:2 39:13
worm 26:12
worse 23:14
24:14 49:17
worthless 8:20
8:23 9:4 16:24
worthy 9:1
wouldn't 19:8
29:19 35:14
37:21 45:3
46:10
written 47:23,24
wrong 13:21
27:24 41:22

wrongful 9:6

X

x 1:2,9

Y

Yeager 5:19 7:2
7:14 9:10,11
9:12,15 11:10
11:11 12:21,21
15:1,5 18:20
19:2 21:8,16
22:8,19 23:6
23:11,14,25
25:15 26:11
34:16,18,24
35:2,8,8 40:12
40:13,22,23
41:11,19 42:1
42:9,12 47:5
48:3 49:8,8
50:22
Yeager's 41:2,3
41:4
yeah 8:12 12:11
14:25 20:17
24:5 25:17

Z

0

1

10:04 1:15 3:2
10:55 51:9
12 11:25 12:2
15-537 1:5 3:4
1600s 17:22

2

2 25:8
2009 48:3
2016 1:11
26 2:7

3

3 2:4 25:8
30,000 49:21

4

4 1:11
401 7:7
46 2:10

5

6

666 4:10,11,19
13:6,8 15:24
16:8 25:9
27:16 31:2
44:8
68 48:17

7

8

88 48:18

9