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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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