

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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

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Washington, D.C.

Tuesday, February 20, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

JEFFREY L. FISHER, Stanford, California; on behalf of the Petitioner.

MATTHEW R. McGUIRE, Deputy Solicitor General of Virginia, Richmond, Virginia; on behalf of the Respondent.

ERICA L. ROSS, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, in support of the Respondent.

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1 Nevada law, and just I'm -- without getting  
2 into the weeds of exactly what any particular  
3 other state law than Virginia requires, but all  
4 I'm saying is state law required severance  
5 under the circumstances here without --

6 JUSTICE SOTOMAYOR: Well, it requires  
7 --

8 MR. FISHER: -- respect to what the  
9 parties --

10 JUSTICE SOTOMAYOR: -- severance  
11 unless both parties agree.

12 MR. FISHER: That's what Virginia law  
13 says, Your Honor.

14 JUSTICE SOTOMAYOR: Right.

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

20 JUSTICE SOTOMAYOR: I don't know why  
21 that's not the same.

22 MR. FISHER: Oh, I think --

23 JUSTICE SOTOMAYOR: Meaning --

24 MR. FISHER: We think it is the same,  
25 Your Honor. So what I'm trying to say is, is

1 that in a state that demands severance, all  
2 agree, even my opponents agree, that issue  
3 preclusion would be available.

4 JUSTICE SOTOMAYOR: That's Turner.

5 MR. FISHER: That's Turner.

6 JUSTICE SOTOMAYOR: All right.

7 MR. FISHER: Our case --

8 JUSTICE SOTOMAYOR: Turner says that.  
9 Why is this any different? This says --

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

11 JUSTICE SOTOMAYOR: Okay.

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

18 JUSTICE ALITO: Well, what to  
19 default --

20 MR. FISHER: And we think --

21 JUSTICE ALITO: To sort of bracket  
22 this problem, what about a jurisdiction like  
23 the U.S. courts, where severance is not  
24 required, whether -- it says nothing about  
25 severance?

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

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

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

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

22          JUSTICE GINSBURG: Mr. Fisher --

23          MR. FISHER: And the second --

24          JUSTICE GINSBURG: -- is that -- is  
25          that distinction, that it's not like claim

1 preclusion, more academic than real? That is,  
2 in this case, suppose you're right and there  
3 can be no retrial of the breaking and entering  
4 or of the theft.

5 What's left? What would a prosecutor  
6 -- could a prosecutor realistically put on any  
7 case for the felon-in-possession charge?

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

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

23 But in other cases, like the Wittig  
24 case, there will be the opportunity for the  
25 government to go forward in the second trial.



1 And that alone defeats the other side's waiver  
2 argument because inconsistency is required for  
3 a waiver by conduct, and that's the holding of  
4 Jeffers and all of the other double jeopardy  
5 cases they cite.

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

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

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

25 JUSTICE ALITO: Yeah, but in Jeffers,

1 the Court held that when the second trial  
2 involves the same offense under the Blockburger  
3 test and the defendant consents, the second  
4 trial can go forward. So why should it not  
5 follow that when the defendant consents, if, in  
6 fact, that is done, and the second trial  
7 involves the same offense under Ashe, this rule  
8 should be the same?

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

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

22 JUSTICE ALITO: But wouldn't it be odd  
23 to say that the defendant in Jeffers has a  
24 lesser double jeopardy right when what he is  
25 asserting is consistent with what the Double

1 Jeopardy Clause was originally understood to  
2 mean, whereas, in a situation like this, what  
3 the defendant is asserting is something that  
4 was developed by our cases in the modern era  
5 but was not what the Double Jeopardy Clause was  
6 originally intended to mean.

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

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

23 And so what the Court said in Ashe and  
24 what Judge Friendly said in Kramer before it  
25 was the core of the Double Jeopardy Clause does

1 indeed preclude retrials following acquittals,  
2 and to have that guarantee, that historical  
3 guarantee, have meaning in modern times, it  
4 needs to apply under the circumstances here.

5 JUSTICE KAGAN: Mr. Fisher --

6 CHIEF JUSTICE ROBERTS: Well, what --  
7 go ahead.

8 JUSTICE KAGAN: First, you had a  
9 second point you wanted to make, and then I  
10 have a question.

11 MR. FISHER: Thank you.

12 JUSTICE KAGAN: But I just wanted to  
13 hear your second point.

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

20 And if I could give one more sentence  
21 on that, the reason why is because here we're  
22 dealing with an acquittal as opposed to a  
23 conviction or simply a mistrial. And on the  
24 other hand, because we're dealing with an  
25 acquittal and because we're just imposing issue

1 preclusion, the prosecution has a full and fair  
2 opportunity to prove all of its charges. And  
3 so that's what's being taken away from the  
4 prosecution in cases like Jeffers and why the  
5 Court says it's not fair.

6 But here, the prosecution by  
7 definition has an opportunity to prove all of  
8 its allegations in the second trial is  
9 precluded only to the extent that the  
10 prosecution would try to retread that ground.

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

21 MR. FISHER: Well, first of all,  
22 Justice Kagan, it would not be okay under  
23 Virginia law. But setting that part aside, I  
24 think that would be a very different question  
25 for two reasons.

1           One is you'd have express waiver in  
2           that hypothetical if Mr. Currier agreed to that  
3           procedure, and here, I think all agree this is  
4           a waiver by conduct case.

5           JUSTICE KENNEDY: Do all parties --

6           MR. FISHER: So what you would --

7           JUSTICE KENNEDY: Please, continue.

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

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

22          MR. FISHER: Well, as I said, if you  
23          establish the background rule in our favor, I  
24          think everything is fine. If you were to  
25          establish the background rule the other way or

1 if a state were --

2 (Laughter.)

3 MR. FISHER: -- if a state were to,  
4 you'd have an unconstitutional conditions  
5 question.

6 JUSTICE KENNEDY: Is it clear that  
7 under Virginia law there could not be a joint  
8 trial?

9 MR. FISHER: There could be a joint  
10 trial, Justice Kennedy, both --

11 JUSTICE KENNEDY: Is it -- is it clear  
12 that severance had to be -- had to be ordered?

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

17 And here, both parties consented to  
18 the default severance procedure. That's at JA  
19 47 and 48.

20 JUSTICE SOTOMAYOR: Mr. Fisher, the  
21 government --

22 JUSTICE KENNEDY: But -- but isn't --  
23 isn't -- doesn't that really set up a waiver?  
24 Isn't that something like a waiver if he  
25 doesn't agree?

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

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

13           And the -- the equities or the  
14 competing interests are completely different  
15 than all the double jeopardy cases in which  
16 they find waiver.

17           It's important to recognize, Justice  
18 Kennedy, all the other side's cases that deal  
19 with waiver or waiver by conduct or whatever  
20 the Court calls it in those cases, all deal  
21 with the right to multiple trials. They all  
22 deal with people who are convicted or there was  
23 a mistrial.

24           They don't have a single case and the  
25 Court has never held that the right to the



1 preclusive effect of an acquittal in any form,  
2 whether it's claim preclusion or issue  
3 preclusion, can be waived. And so --

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

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

17 JUSTICE SOTOMAYOR: Mr. Fisher, what  
18 would happen in those bifurcated trials where  
19 it happens routinely in the Second Circuit:  
20 Same jury, you try the breaking and entering  
21 first or the robbery first, and then you try  
22 the felon-in-possession.

23 Would double jeopardy bar the trial of  
24 the gun once there's been a conviction on the  
25 first charge, on the robbery or the breaking

1 and entering?

2 MR. FISHER: Not if there's a  
3 conviction, Your Honor, but if there's an  
4 acquittal.

5 JUSTICE SOTOMAYOR: Under Jeffers.

6 MR. FISHER: Under Jeffers.

7 JUSTICE SOTOMAYOR: But what you're  
8 saying is if there's not, if there's an  
9 acquittal, that issue preclusion would bar the  
10 second trial?

11 MR. FISHER: That's right. And I  
12 think maybe it's --

13 JUSTICE SOTOMAYOR: That's Turner?

14 MR. FISHER: That's Turner. It's also  
15 Yeager. I think it's important for the Court  
16 to understand how close this case is to Yeager.  
17 And --

18 JUSTICE SOTOMAYOR: By the way, it was  
19 the government who went to the defendant and  
20 said consent to or agree to the severed trials?

21 MR. FISHER: So my understanding is,  
22 is that during pre-trial proceedings, the  
23 government -- or, I'm sorry, the state, the  
24 Commonwealth --

25 JUSTICE SOTOMAYOR: Yes.

1 MR. FISHER: -- reached out to the  
2 defense and said it looks like we have to sever  
3 in this case, do you agree. The defense said  
4 yes. And so that's reflected, as I said, at  
5 pages 47 and 48 of the Joint Appendix.

6 JUSTICE SOTOMAYOR: And just so we  
7 state the default rule clearly, to have a -- to  
8 have a joint trial, both parties have to agree;  
9 otherwise, law mandates severance?

10 MR. FISHER: Correct. And that's  
11 clearly in Hackney.

12 CHIEF JUSTICE ROBERTS: I thought --

13 MR. FISHER: But if I could return  
14 to --

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

20 MR. FISHER: That is, Your Honor. I'm  
21 glad you asked about Powell, because it brings  
22 me back to Yeager. And so let me distinguish  
23 the two cases.

24 What Powell says is that if a jury  
25 simultaneously convicts and acquits on counts

1 that are in an inconsistent manner, we accept  
2 that verdict in all of its form, as you know.  
3 And the reason why is because the acquittal  
4 cannot be taken to establish any facts against  
5 the prosecution.

6 But what Yeager holds is that even in  
7 a circumstance where the prosecution brings --

8 CHIEF JUSTICE ROBERTS: All right.  
9 Just to -- just to pause, why is that?

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

13 In Powell, the court said the jury  
14 might have been exercising mercy, as is its  
15 right, and so we're not going to upset the  
16 acquittal any more than we're going to upset  
17 the conviction in the other direction.

18 CHIEF JUSTICE ROBERTS: So we have  
19 respect for the same jury but not for two  
20 different ones --

21 MR. FISHER: Well --

22 CHIEF JUSTICE ROBERTS: -- in the same  
23 -- in the same -- under the same indictment?

24 MR. FISHER: Yeah, but it brings me  
25 right back to Yeager. So we haven't had the

1 second jury at the time issue preclusion is  
2 invoked. And so remember what happened in  
3 Yeager. The prosecution brought all of its  
4 charges at once. The jury came back with  
5 acquittals on some counts and hung on the other  
6 counts. So the -- so the government tried to  
7 prosecute everything at once, was unable to get  
8 a verdict out of the jury on some counts.

9 What the court said there is that when  
10 we can look at an acquittal alone, without a  
11 conviction, and say that acquittal establishes  
12 certain facts against the prosecution, issue  
13 preclusion applies.

14 JUSTICE KENNEDY: Suppose you --

15 MR. FISHER: And so really --

16 JUSTICE KENNEDY: Suppose you prevail  
17 in this case. Would a state then say, okay,  
18 what we'll do is we'll just try both -- both of  
19 them together, and the jury will hear all the  
20 evidence about the felony.

21 Don't -- do you -- are you happy with  
22 what you wish for here?

23 MR. FISHER: Justice Kennedy, that's  
24 not been the experience in states that have our  
25 rule. So, as we lay out in -- at our -- at a

1 footnote in our reply brief, Florida and Iowa  
2 are two states that have had our rule for  
3 decades, and there have been no change in the  
4 way severance has --

5 JUSTICE BREYER: Why? Why? That's --  
6 I mean, that's the part -- the point that was a  
7 very practical point.

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

16 And so what was worrying me is that  
17 the prosecution, if we -- if we adopt something  
18 like you say, and the defendant comes in and  
19 says, I want to be severed here at least as to  
20 some of the counts, the prosecutor thinks, if I  
21 agree to that, I don't know what's going to  
22 happen.

23 You know, we'll get some kind of a  
24 verdict in this first case. And all I know in  
25 the second case is that his lawyer is going to

1     argue that there are various aspects of it that  
2     are inconsistent with going ahead with this and  
3     we're not going to be ahead with it. At worst,  
4     there will be some appeals. It's going to be a  
5     nightmare. And the best thing for me to do is  
6     just say no.

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

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

19                   MR. FISHER: Well, as -- as I say, to  
20    the extent we have empirical evidence, it -- it  
21    -- it supports my position. Let me give you --

22                   JUSTICE BREYER: Why wouldn't it work  
23    out that way?

24                   MR. FISHER: Let me tell you two  
25    reasons --

1 JUSTICE BREYER: Yeah.

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

11 And, secondly, even from a research  
12 management standpoint, which sounds to me more  
13 like what you're thinking about here, the  
14 prosecution may well agree to severance for a  
15 couple of reasons.

16 One is because, if -- if the  
17 prosecution gets a conviction, the prosecution  
18 can choose to try its stronger claim first. If  
19 the prosecution gets a conviction, the  
20 prosecution can do just what the state  
21 suggested it was going to do here, which is  
22 just drop the second charge because it's a --

23 JUSTICE BREYER: And there will be  
24 reasons.

25 MR. FISHER: -- less important crime.



1 JUSTICE BREYER: What I'm worried  
2 about --

3 MR. FISHER: And it will run  
4 concurrent.

5 JUSTICE BREYER: I'm worried about  
6 other -- that there are other situations. And  
7 the most common claim was I should have been  
8 severed and I wasn't, or vice versa, they never  
9 win. I mean, the claim hardly ever wins.

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

12 MR. FISHER: Well, we don't have a  
13 problem leaving severance decisions to trial  
14 judges according to the various rules across  
15 the country. All we're saying is for a  
16 defendant --

17 JUSTICE BREYER: Yeah, I'm not -- that  
18 isn't -- I'm just so worried about this  
19 prosecutor who now is going to take the  
20 government's position against and throw, in a  
21 very big trial with 19 defendants, some guy who  
22 happened to be on the corner, you know, and the  
23 jury isn't going to distinguish among them, and  
24 you see where I'm going.

25 MR. FISHER: Remember, though, Justice

1 Breyer, I don't think prosecutors are going to  
2 necessarily act that way because they have an  
3 interest in justice just like the defense does.

4 And, secondly, I think if they play it  
5 out in their minds, if they get a conviction in  
6 the first case, they're very likely to just  
7 drop the second case or, if the second case is  
8 also important, the defense at that point --

9 JUSTICE BREYER: I see, I see.

10 MR. FISHER: -- is likely to plead  
11 because he's already been to trial on roughly  
12 the same facts.

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

16 MR. FISHER: Yes, you do, Justice  
17 Sotomayor, so I --

18 JUSTICE SOTOMAYOR: And we have a case  
19 that says, if another defendant gets an  
20 acquittal, that doesn't help you?

21 MR. FISHER: That's Standefer. That's  
22 right. And so, Justice Breyer, I think, it's  
23 -- to the extent you're asking about other  
24 defendants, that's a separate problem, but I  
25 think you're also asking about same defendants.

1 And let me just continue to play that out for  
2 you.

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

9 JUSTICE ALITO: But do you think the  
10 result --

11 MR. FISHER: When an acquittal happens  
12 --

13 JUSTICE ALITO: I'm sorry.

14 MR. FISHER: Oh, I'll just finish my  
15 sentence. When an acquittal happens, the  
16 prosecution then may well drop the second  
17 charges. But if the prosecution pushes ahead,  
18 that's exactly what the Double Jeopardy Clause  
19 is concerned with.

20 JUSTICE ALITO: Is -- is there  
21 anything to indicate that the result would be  
22 different -- would have been different in  
23 Jeffers if the first trial had been an  
24 acquittal?

25 MR. FISHER: Well, the justice who

1 wrote Jeffers, Justice Blackmun, signed on to  
2 Green as --

3 JUSTICE ALITO: Yeah. He said --

4 MR. FISHER: -- later on, saying yes,  
5 it would have been different.

6 JUSTICE ALITO: He said it later.

7 MR. FISHER: Yeah.

8 JUSTICE ALITO: But the Double  
9 Jeopardy Clause doesn't draw a distinction  
10 between convictions and -- and acquittals, does  
11 it?

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

19 Just -- just take, for example, an  
20 appeal for -- appeal for sufficiency of the  
21 evidence. If an appellate court finds that  
22 there's insufficient evidence and therefore the  
23 defendant should have been acquitted, he cannot  
24 be retried. On the other hand, if the  
25 appellate court finds that simply there was

1 some other error in the case, he can be  
2 retried.

3 So the Double Jeopardy Clause does  
4 already distinguish in multiple ways between  
5 acquittals and convictions.

6 CHIEF JUSTICE ROBERTS: Well, but not  
7 entirely. The -- the distinction doesn't hold  
8 up in Bravo-Fernandez.

9 MR. FISHER: Well, Bravo-Fernandez, as  
10 I said, is a case like Powell. And so let me  
11 be clear what I mean --

12 CHIEF JUSTICE ROBERTS: Yeah, I think  
13 so.

14 MR. FISHER: -- when I say acquittal.  
15 What I mean by an acquittal is not simply the  
16 piece of paper of an acquittal but an acquittal  
17 that we can say establishes an issue of  
18 ultimate fact against the prosecution.

19 And so, when we have an acquittal like  
20 that, which is what we had in Yeager and which  
21 was distinguished from the situation in Powell  
22 and later distinguished from Bravo-Fernandez,  
23 then that acquittal has issue-preclusive  
24 effect. And the Court has never held to the  
25 contrary on those facts and that are clearly

1 our facts here, and it's clearly Turner as  
2 well.

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

15 JUSTICE KENNEDY: Suppose --

16 JUSTICE GINSBURG: Here -- here, we're  
17 not --

18 JUSTICE KENNEDY: I'm still interested  
19 in what happens if you prevail. Why wouldn't  
20 the prosecution have the option then to try the  
21 felon-in-possession charge first?

22 MR. FISHER: Sure. We don't have a --  
23 the prosecution is the -- is -- is the  
24 plaintiff. And so the prosecution presumably  
25 can choose which case it wants to try first.

1 All we're saying, Justice Kennedy --

2 JUSTICE KENNEDY: Would you do that in  
3 a bifurcated trial?

4 MR. FISHER: Pardon me?

5 JUSTICE KENNEDY: Would you do that in  
6 a bifurcated trial anywhere?

7 MR. FISHER: Well, I think you might  
8 have a challenge -- if your bifurcation dealt  
9 with the same jury --

10 JUSTICE KENNEDY: Yes.

11 MR. FISHER: -- once you got the --  
12 once you got the prior conviction out in front  
13 of the jury, I think then you might have a --  
14 you might have a problem under state law in --  
15 in dealing with the prior convictions. But in  
16 general, Justice Kennedy, remember, this  
17 question is going to come up in scenarios that  
18 don't deal with prior convictions.

19 And this brings me back to Justice  
20 Alito's question, I think. You know, the other  
21 side's position here is not just that in a case  
22 like this issue preclusion wouldn't be  
23 available; the other side's position, I think,  
24 leads inevitably to the conclusion that if  
25 there were a greater and lesser offense and the

1 first trial was for the lesser offense and the  
2 defendant was acquitted, that in this situation  
3 the defendant would not even be able to invoke  
4 the right to issue preclusion.

5 And that I think is a highly unjust  
6 result. And so the prosecution --

7 JUSTICE GINSBURG: Mr. Fisher, the  
8 issue preclusion was taken over into the  
9 criminal context in Ashe, but it originated in  
10 civil cases.

11 Is there any difference between issue  
12 preclusion as it would apply in a civil case  
13 and in a criminal case?

14 MR. FISHER: Well, not for purposes of  
15 this case, Justice Ginsburg. As -- as -- as  
16 the Court wrote in Bravo-Fernandez, you have to  
17 be careful in criminal cases when you decide  
18 what issues of ultimate fact the first jury  
19 decided because of the nature of general  
20 verdicts in criminal cases.

21 But as to the scope of issue  
22 preclusion once you establish what issues of  
23 ultimate fact were decided against the  
24 prosecution in the first case, it's exactly the  
25 same rule that carries over to --



1 JUSTICE GORSUCH: Mr. Fisher, are we  
2 confident that civil issue preclusion would  
3 apply in circumstances like these, where a  
4 party consents to a bifurcated trial, or might  
5 it be more law of the case where it's more  
6 equitable?

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

15 So what do we do about that?

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

20 JUSTICE GORSUCH: An unpublished New  
21 York district court opinion.

22 MR. FISHER: We cited what we found.

23 JUSTICE GORSUCH: Yeah.

24 MR. FISHER: The other side I don't  
25 think disputes -- you can ask them, but I

1 didn't take them to dispute our -- our  
2 representation based on civil law, the civil  
3 side of things.

4 And also I'd point you to Judge  
5 Friendly's opinion in Kramer, where, on page  
6 917, he surveys older cases from this Court  
7 that are civil, and those cases, the Keokuk  
8 case is one.

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

17 MR. FISHER: Well, we --

18 JUSTICE GORSUCH: -- you'd agree that  
19 your research did not prove that this would be  
20 obviously precluded even in a -- in a civil  
21 matter?

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

25 JUSTICE GORSUCH: Fair --

1 MR. FISHER: -- absolute answer.

2 JUSTICE GORSUCH: Fair enough.

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

10 JUSTICE GORSUCH: But what do we do  
11 about --

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

13 JUSTICE GORSUCH: What do we do about  
14 the fact that claim preclusion in the criminal  
15 context isn't as robust, in the criminal  
16 context, under Blockburger as it would be in  
17 the civil context. We use a transaction test  
18 in the civil context and an elements test in  
19 the criminal context. We shouldn't be  
20 concerned that it's anomalous that it would be  
21 creating a -- an issue preclusion doctrine that  
22 may be more robust than in the civil context  
23 here, even though in claim preclusion it's less  
24 robust?

25 MR. FISHER: Well, I think, Justice

1 Gorsuch, it's perhaps helpful to separate --  
2 separate out the substantive boundaries of the  
3 doctrine, whether it be claim preclusion and  
4 issue preclusion, from the -- from the question  
5 whether they can be waived.

6 And so we leave the substantive  
7 boundaries of issue preclusion and, obviously,  
8 claim preclusion where we found them, but as to  
9 waiver, we don't think it's anomalous to say  
10 that an acquittal -- the preclusive effect of  
11 an acquittal is harder to waive than the right  
12 to claim preclusion for the competing interests  
13 I've mentioned and because of the lack of  
14 inconsistency.

15 If I can reserve my time.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Mr. McGuire.

19 ORAL ARGUMENT OF MATTHEW R. MCGUIRE

20 ON BEHALF OF THE RESPONDENT

21 MR. MCGUIRE: Mr. Chief Justice, and  
22 may it please the Court:

23 The difficult question presented in  
24 this case can be answered by applying the logic  
25 of three principles this Court has already

1 embraced.

2 First, when a defendant agrees to have  
3 multiple trials, he gives up his right to argue  
4 that the later trial is barred based on double  
5 jeopardy.

6 JUSTICE SOTOMAYOR: How can you call  
7 this an agreement? State law says you're  
8 entitled to severance unless both of you  
9 consent to joinder.

10 So, under state law, they have an  
11 absolute right to severance. So they're  
12 agreeing to what the law gives them?

13 MR. MCGUIRE: I have three responses,  
14 Justice Sotomayor. The first is that the  
15 question presented to the Court in this case  
16 doesn't take account of Virginia's specific  
17 law. It's just whether -- when a defendant  
18 consents to have sequential trials.

19 JUSTICE SOTOMAYOR: Well, that begs --  
20 that begs the question.

21 MR. MCGUIRE: But if the Court does go  
22 beyond sort of the question presented and look  
23 at Virginia law here, the facts in this case,  
24 and you can see this in the November 20, 2013,  
25 brief in support of the motion in limine, and

1 the record here isn't fulsome on the point, but  
2 this is from the defendant himself. The way  
3 this case actually ends up being severed is the  
4 defendant in court with a different  
5 Commonwealth's attorney represents the case  
6 needs to be severed. So, in some sense,  
7 there's a motion.

8 JUSTICE SOTOMAYOR: It needs to be  
9 severed under state law.

10 MR. MCGUIRE: Well, he could have  
11 agreed to go forward to the judge and have a  
12 trial --

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

20 MR. MCGUIRE: Well, Justice Sotomayor,  
21 it --

22 JUSTICE SOTOMAYOR: He's entitled to a  
23 separate trial. Why does he need to give it  
24 up?

25 MR. MCGUIRE: Well, so what Virginia

1 has done is confer an extra benefit on criminal  
2 defendants in cases like this where they can  
3 have the choice --

4 JUSTICE SOTOMAYOR: It's not a --

5 MR. McGUIRE: -- of having severance.

6 JUSTICE SOTOMAYOR: It's not a  
7 benefit; it's a right.

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

15 JUSTICE SOTOMAYOR: So there's no  
16 right to an appeal, but we have said -- no  
17 constitutional right to an appeal, you're  
18 entitled to it statutorily, but we've said it's  
19 unfair, a Hobbesian choice, to force a  
20 defendant to give up his right to appeal to  
21 retain his double jeopardy rights.

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

23 JUSTICE SOTOMAYOR: So why is it not a  
24 Hobson's choice to be forced to give up the  
25 prejudice of a joint trial in order to retain

1 the double jeopardy rights?

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

4 JUSTICE SOTOMAYOR: Uh-huh.

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

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

12 JUSTICE SOTOMAYOR: Well, you've  
13 already been -- you've already been tried.

14 MR. McGUIRE: Right. So, in that  
15 case, there was no act that you -- that we  
16 would say constitutes waiver before the appeal.  
17 The appeal doesn't waive the acquittal that  
18 predates the appeal. But the appeal waives the  
19 conviction piece of that case.

20 Here, we don't think there is a  
21 Hobson's choice at all because the Court has  
22 always looked at the prejudice associated with  
23 prior felony status as a matter of evidentiary  
24 rule.

25 And so there's not a constitutional



1 due process argument on the other side.

2 JUSTICE SOTOMAYOR: The state -- the  
3 state has made a different determination. The  
4 state has said that presumptively these charges  
5 are prejudicial if they're tried together, and  
6 presumptively we won't permit it.

7 MR. MCGUIRE: Well, what Hackney says  
8 ultimately is that Virginia wants to give extra  
9 protections to criminal defendants in this  
10 context, to allow them to have control over the  
11 proceedings, which is what this Court has  
12 generally speaking looked to.

13 JUSTICE SOTOMAYOR: No, but that's not  
14 true, because it gives not just the defendant  
15 but the state the right. The defendant can't  
16 do it by himself or herself. The state has to  
17 agree to it as well.

18 MR. MCGUIRE: Well, there's no  
19 suggestion in this case that the state would  
20 not have wanted a joint trial. The presumption  
21 in Virginia --

22 JUSTICE SOTOMAYOR: Well, it went --  
23 it didn't ask for one. What it said to the  
24 defendant was: We have to sever. Do you  
25 agree? And the defendant said: Yeah, we have

1 to.

2 MR. MCGUIRE: That's the  
3 representation based on Hackney from the  
4 Commonwealth's attorney. If the defendant, for  
5 example, was going to testify at the trial, and  
6 he knew that his prior status was coming in any  
7 way, he may very well prefer to have a single  
8 trial, and he could have brought that forward  
9 to the Commonwealth's attorney's attention, and  
10 there's no sign that they would have said no to  
11 that procedure.

12 And so what we think under Hackney is  
13 you look at what the defendant himself did.  
14 Here, the defendant consented. In the case  
15 where the defendant wants to have a joint trial  
16 but the Commonwealth forces severed trials, we  
17 wouldn't argue waiver by conduct in that case.

18 JUSTICE BREYER: Can I --

19 JUSTICE KAGAN: Well, Mr. -- I'm  
20 sorry.

21 JUSTICE BREYER: I -- I -- it's  
22 complicated. And I keep trying to simplify it.  
23 And -- and tell me what's wrong with this  
24 simplification.

25 All right. Let's take two examples,

1 or three. Example 1, all right, the defendant  
2 is accused of two crimes, A and B. He is tried  
3 first on A and acquitted. Then a few months  
4 later the prosecution decides B.

5 Now, nobody objects, do they, two  
6 totally separate trials, no nothing, that this  
7 issue preclusion thing applies in B, however it  
8 applies. I mean, however it applies, it  
9 applies in B. Is that right?

10 MR. MCGUIRE: That's right, Justice  
11 Breyer.

12 JUSTICE BREYER: Okay. Now let's take  
13 example 2. Example 2 is they decide to try  
14 both A and B in the same trial.

15 Now, here, if he's found guilty of  
16 one, even if it's totally inconsistent, the  
17 verdict stands, right?

18 MR. MCGUIRE: That's right.

19 JUSTICE BREYER: And the reason it's  
20 right is because this is in a sense allowing a  
21 little bit of jury nullification in. We think:  
22 Well, the jury thinks that's a fair thing to  
23 do. Okay?

24 Now, if those are the two examples, we  
25 have here Example 3. It is a different jury,

1 but it once was not. So, since it is a  
2 different jury, our reason for allowing the  
3 inconsistent verdicts in my example no longer  
4 exists.

5 This was not a jury that saw the whole  
6 thing. It was a jury that only saw this case.  
7 And, therefore, let him assert the double  
8 jeopardy, whatever it is, because our reason  
9 for not doing it isn't there.

10 Now, of course, we'd have to have a  
11 corollary, unfortunately, for -- what did you  
12 call it, the -- the bifurcated jury, because  
13 there it is the same jury. I don't know what  
14 to do about that one.

15 But -- but the -- the -- in -- in  
16 these three, see, my three examples, I just say  
17 is the reason for Example 1 there in our case,  
18 answer no, so treat it like two separate  
19 trials.

20 And, by the way, if the prosecutor has  
21 a problem, he can always insist on a written  
22 waiver if the defendant really wants the  
23 separate trial. All right.

24 So what's wrong with my examples?

25 MR. MCGUIRE: So, Justice Breyer, I

1 think your -- the way you approached the  
2 hypothetical is to bracket this case with the  
3 issue preclusion cases, Powell, Bravo-Fernandez  
4 and Yeager.

5 What we think the right set of cases  
6 for the Court to look at in deciding the issue  
7 here are the multiple trial right cases where  
8 you don't necessarily look at the acquittal  
9 that came up in the middle of the trial.

10 What you ask -- or in the split  
11 proceedings here. What you ask is, did the  
12 defendant take an act before the acquittal  
13 arose that presupposed he would have two  
14 trials?

15 And so here, consistent with all the  
16 precedent on mistrials or motions to dismiss,  
17 you have a case where the defendant agreed to  
18 have the prosecute -- agreed to have two trials  
19 ever -- before he was acquitted, and he  
20 necessarily undertook the risk --

21 JUSTICE KAGAN: Well --

22 MR. McGUIRE: -- of inconsistent  
23 verdicts.

24 JUSTICE KAGAN: -- Mr. McGuire, I  
25 mean, it's one thing to say, as we've said many

1 times, that when you say I want two trials,  
2 that what you've given up is the right to  
3 object about two trials. Right? That really  
4 is inconsistent. If you're insisting on  
5 multiple trials, or preferring multiple trials,  
6 then you can't assert your right against  
7 multiple trials.

8 But that's not this case. Somebody  
9 can say I want two trials and still have it in  
10 his view that, in that second trial, normal  
11 issue preclusion principles will apply. So  
12 sometimes that will prevent the second trial,  
13 but sometimes it won't prevent the second trial  
14 because the government can prove its case  
15 another way.

16 And so there's no inconsistency of the  
17 kind that exists in claim preclusion in this  
18 kind of case, is there?

19 MR. MCGUIRE: Well, there is, Justice  
20 Kagan, because issue preclusion has to be  
21 understood as part of the three core  
22 protections under the Double Jeopardy Clause.  
23 And so the hypothetical that you spun out there  
24 suggests that issue preclusion does serve to  
25 bar only evidence in some cases and not

1 necessarily preclude a trial.

2           It's important to note that in none of  
3 this Court's cases addressing issue preclusion  
4 has that ever been the result.

5           JUSTICE KAGAN: Well, I don't -- I  
6 don't understand what that means. The -- the  
7 Solicitor General says that as well in its  
8 brief and I didn't understand that either,  
9 because surely the government doesn't mean that  
10 if the government couldn't prove their case  
11 another way, the government could try to do so.  
12 Right?

13           I mean, if the government could prove  
14 their case another way, then the trial isn't  
15 barred. Right? The trial goes forward with  
16 the government proving its case another way.

17           MR. MCGUIRE: What we would say,  
18 Justice Kagan, is that just means issue  
19 preclusion doesn't apply at all in that case  
20 because, when issue preclusion applies in the  
21 criminal context, it serves only to bar the  
22 trial.

23           And Dowling really is a good example  
24 of this dealing with 404(b) identification  
25 evidence. In that case, the defendant had been

1 acquitted there.

2 JUSTICE KAGAN: Well, whatever you  
3 call it, the point still stands that the  
4 defendant is in a position where it's perfectly  
5 consistent to say two things: Yes, I would  
6 like two trials, and in that second trial, I  
7 expect that issue preclusion principles will  
8 apply.

9 That's very different from the kind of  
10 inconsistency that we've pointed out in the  
11 past, where the government can't -- the person  
12 can't say on the one hand I want two trials and  
13 say on the other hand I don't want two trials.

14 MR. MCGUIRE: Well, Justice Kagan, I  
15 think we're maybe speaking past each other just  
16 a little bit.

17 Let me try again to be a little bit  
18 clearer, which is our position is that once the  
19 defendant says in the second trial I want to  
20 argue issue preclusion, issue preclusion  
21 principles would apply to limit the  
22 government's theories, that issue preclusion  
23 doesn't do that, and that this Court has never  
24 held that to be the case.

25 In fact, in the briefing in Ashe, the



1       briefs disclaim that they were ever asking the  
2       court for a rule on that fashion.  So what we  
3       would say is that when you raise issue  
4       preclusion, when you say I want to raise that  
5       to bar -- to do something related to the Double  
6       Jeopardy Clause, the only thing you can be  
7       saying is that the second trial cannot go  
8       forward at all because the same ultimate fact  
9       from the first trial has to be proven in the  
10      second one.

11                 JUSTICE KAGAN:  Well --

12                 JUSTICE ALITO:  And the Commonwealth  
13      could have proved the second offense without  
14      making any reference to the breaking and  
15      entering of the residence or the theft of the  
16      safe.  They could have called Wood and they  
17      say:  Where were you on such and such a date,  
18      such and such a time?  I was by the river.  And  
19      what were you doing?  I had a safe with guns  
20      and money.  And were you by yourself?  No.  
21      Petitioner was with me.  And what did he do?  
22      He took out the guns and he was possessing the  
23      guns.  They could have done that.

24                 But I bet if they had done -- I don't  
25      think Mr. Fisher would say that that would be

1     okay. I think he would say that would still be  
2     barred by -- by issue preclusion.

3             And if that is the case and the  
4     defense understood at the time when they agreed  
5     to the second trial that the prosecution would  
6     not be able to prove the second offense in that  
7     way, then I don't see why they didn't  
8     understand the consequences of agreeing to the  
9     second trial with respect to issue preclusion  
10    to exactly the same extent as they understood  
11    the consequences with respect to a -- a second  
12    trial in the Jeffers situation?

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

17            For example, here, one piece of  
18    evidence that comes up a lot from my friend on  
19    the other side is the cigarette butt with the  
20    DNA that was found in the car. And they say,  
21    well, that didn't get into evidence at the  
22    first trial, but it was introduced at the  
23    second, so in some sense, it's -- you're seeing  
24    the dry run problem.

25            But it's not clear why that evidence

1 wouldn't come in anyway in the second trial.  
2 It's not linked necessarily to the burglary.  
3 It's just a cigarette butt in the truck.

4           And so it's not clear how this would  
5 actually work in practice to a very real  
6 degree, but we do think that the Court should  
7 just link issue preclusion directly with the  
8 multiple trial right. To one of the questions  
9 earlier, it has not been understood generally  
10 as normal civil issue preclusion in this  
11 context.

12           And if you look at the various  
13 opinions, including then Judge Gorsuch's  
14 opinion in Wittig or Kramer, what you see are  
15 really two different strands of issue  
16 preclusion analysis that go on in federal  
17 courts in particular. One is under the Double  
18 Jeopardy Clause where it would serve to bar a  
19 second trial, and another is sort of a federal  
20 judicial -- federal oversight of the judiciary,  
21 as coming under Oppenheimer.

22           JUSTICE GINSBURG: Can we -- can we  
23 clear up one thing about this case? The  
24 Virginia Court of Appeals, which has written  
25 the dispositive opinion, thought that

1 overreaching was an ingredient of issue  
2 preclusion in criminal cases.

3 I see nothing in our cases that  
4 requires overreaching in order to apply issue  
5 preclusion.

6 MR. MCGUIRE: Justice Ginsburg, we  
7 agree that the court of appeals looked at  
8 prosecutorial overreach as an important  
9 component of the Double Jeopardy Clause. We  
10 are not suggesting that the defendant needs to  
11 prove prosecutorial overreaching in order to  
12 assert issue preclusion.

13 But we think the best way to look at  
14 the concept in this case generally is the way  
15 Johnson framed it, which is that issue  
16 preclusion really applies where the state has  
17 made an effort to prosecute you seriatim, and  
18 so where the defendant has the choice to  
19 consent and, in fact, does consent, you don't  
20 have that situation. The state isn't the one  
21 imposing the second trial on you as much as you  
22 have agreed to have that procedure. And --

23 JUSTICE BREYER: It doesn't say the  
24 state in the Constitution. It says "shall not  
25 be subject to." So -- so, I mean, can we do

1 this, which is a more -- I'm trying to get my  
2 hands on this case, which is filled with  
3 complexity.

4 Just say: Look -- Justice Gorsuch  
5 asked this question, and I'll just do it again  
6 -- we're not certain -- we don't have to decide  
7 the contours of issue preclusion. Isn't there  
8 enough agreement among the lower courts and in  
9 this Court that there is something to it in  
10 some cases?

11 And then say: Whatever that is --  
12 we're leaving it, you know, to the research and  
13 so forth, but whatever that is, the question  
14 here is whether the doctrine, in some form or  
15 other, applies when there is the second trial  
16 as a result of the -- the Virginia law or as a  
17 result of the waiver or as a result of  
18 whatever. Can we just do that?

19 MR. MCGUIRE: Well, that's the  
20 question the Court granted certiorari on,  
21 Justice Breyer.

22 JUSTICE BREYER: Which, the second?

23 MR. MCGUIRE: The second one --

24 JUSTICE BREYER: Yeah.

25 MR. MCGUIRE: -- about whether or not,

1 when a defendant consents to sequential  
2 trials --

3 JUSTICE BREYER: Yes.

4 MR. McGUIRE: -- does that forego  
5 their right --

6 JUSTICE BREYER: Yeah. So we just  
7 answer that question, period --

8 MR. McGUIRE: I --

9 JUSTICE BREYER: -- in your opinion?

10 MR. McGUIRE: That's the easiest way  
11 to resolve this case.

12 JUSTICE BREYER: Yeah.

13 MR. McGUIRE: And we think that the  
14 best -- the clearest articulation of the rule  
15 that underlies a lot of this Court's double  
16 jeopardy precedent is that what the Court wants  
17 is for the defendant to have as much control as  
18 possible over the way the course of proceedings  
19 will play out. And so here Virginia has given  
20 him the right to force severance, and Justice  
21 Sotomayor is right, there is a particular  
22 scenario --

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

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

5 JUSTICE SOTOMAYOR: All right. So he  
6 has -- he has no rights under Virginia law, is  
7 what you're saying --

8 MR. MCGUIRE: Well, he has --

9 JUSTICE SOTOMAYOR: -- to maintain his  
10 -- he has to go to trial and suffer the  
11 prejudice to be able to retain his double  
12 jeopardy claims?

13 MR. MCGUIRE: To argue issue  
14 preclusion here and to not have this waiver  
15 argument, he would have to want to go to a  
16 joint trial. And if he wanted to do that, then  
17 the Commonwealth -- and the Commonwealth forced  
18 him into multiple trials, we would not argue  
19 any sort of waiver there.

20 But, as we pointed out on brief, there  
21 is good reasons why a defendant might want one  
22 trial in a case like this one: If he intends  
23 to testify or if he has some awareness that the  
24 evidence might come in under Rule 404(b), for  
25 example. The jury is going to learn anyway in

1 the context of that first trial that he is a  
2 prior felon or has some prior criminal history.

3 And so there, there's no benefit to  
4 the defendant of having two trials. So the  
5 only reason in a sense it looks unfair in this  
6 case is because he's already made some  
7 litigation decisions, that he's not going to  
8 testify or that he doesn't think the evidence  
9 is going to come in that way.

10 And so, once he's made some choices,  
11 he's going to either have one trial where he  
12 now has allowed this to come in to prove the  
13 felon-in-possession charge, or he goes to two  
14 trials, in which case our position is he's  
15 given up his right to argue that the second  
16 trial should be barred.

17 And I want to come back to one thing  
18 Justice Breyer and Justice Kennedy raised  
19 earlier. There -- this case does present an  
20 example of the state doing more than the  
21 Constitution requires in some sense. This  
22 Court has not said that introducing evidence of  
23 prior felony status is a constitutional  
24 violation.

25 And where you have the Court of



1 Appeals of Virginia interpreting a state  
2 judicial rule to have this severance package,  
3 it wouldn't be a stretch to think that if that  
4 necessarily takes away the Commonwealth's right  
5 to try a defendant for all of the charges that  
6 they have brought forward, that the state  
7 supreme court could revisit that judicial  
8 interpretation.

9 Other states may have it as a statute  
10 or there may be a binding decision from the  
11 state's highest court. But you actually don't  
12 have that here. And so, in that case, there is  
13 a -- an unfortunate risk that what is a  
14 pro-criminal defendant measure may ultimately  
15 be retracted if defendants can't be seen as  
16 having given up their right to argue that the  
17 second trial is barred here.

18 I would also just like to note for the  
19 Court that we also briefed the issue of if the  
20 Court finds that there was no waiver, the Court  
21 could go ahead and address whether the  
22 Petitioner carried his burden under Ashe and  
23 Yeager of showing that an issue of ultimate  
24 fact was necessarily decided in this case.  
25 That would have to be proven beyond a

1 reasonable --

2 JUSTICE GINSBURG: But that would --  
3 that would be left over for remand. The only  
4 question we have is the waiver: Does he --  
5 does he waive issue preclusion if he accepts  
6 severance?

7 MR. MCGUIRE: That's the question the  
8 Court granted certiorari on, Justice Ginsburg,  
9 but we understood the Court's precedent to mean  
10 that we can argue for an alternative basis for  
11 affirmance. And here, for the reasons Justice  
12 Alito gave earlier, this case does not present  
13 an issue of ultimate fact that even if he could  
14 carry his burden and argue issue preclusion  
15 under Ashe, that would bar the second trial.

16 Unless there are further questions,  
17 we'd ask the Court to affirm.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Ms. Ross.

21 ORAL ARGUMENT OF ERICA L. ROSS  
22 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
23 IN SUPPORT OF THE RESPONDENT

24 MS. ROSS: Mr. Chief Justice, and may  
25 it please the Court:

1           The Double Jeopardy Clause provides  
2 defendants with a right against multiple trials  
3 for the same offense, but it does not protect a  
4 defendant from the consequences of his  
5 voluntary litigation choices.

6           Whereas here, a defendant agrees to  
7 multiple trials on different charges in order  
8 to obtain a benefit, he cannot thereafter argue  
9 that his charges are, in fact, one offense for  
10 purposes of the Double Jeopardy Clause.

11           JUSTICE KAGAN: Well, Ms. Ross, why  
12 not make sure that it actually is the  
13 defendant's choice? I mean, if it were, that  
14 would be one thing. So why isn't the best rule  
15 a rule that says we're going to insist that  
16 some kind of colloquy takes place where the  
17 judge says to the defendant, you know, if -- if  
18 you want these two trials, here's the result of  
19 that; you lose the ability to argue issue  
20 preclusion? Why isn't that the best way to  
21 think about this kind of problem?

22           MS. ROSS: So I think that's not the  
23 best way to think about this kind of problem,  
24 Your Honor, because the -- this Court's cases  
25 do not generally think about the double

1 jeopardy right in those terms.

2 So, in *Dinitz*, for example, this Court  
3 specifically held that a defendant's claim that  
4 he did not knowingly and intelligently waive  
5 his right to have a double jeopardy claim was  
6 not for -- was not the right way to think about  
7 that issue because, in fact, the Court sort of  
8 presupposes that in these circumstances these  
9 are litigation decisions that may be difficult  
10 that may be made sort of in --

11 JUSTICE KAGAN: But your argument is  
12 all about voluntary choices on the part of the  
13 defendant, and you're essentially arguing a  
14 kind of waiver by conduct.

15 And what I'm suggesting is if this  
16 is -- you know, if this -- if the way to think  
17 about this case is what is the defendant giving  
18 up when he agrees to a severance, then the  
19 obvious answer is: Tell the defendant what the  
20 consequences are, and ask him whether he's  
21 willing to suffer them.

22 MS. ROSS: Your Honor, that might be  
23 one way to deal with the problem. I think, as  
24 Justice Kennedy and Justice Breyer were  
25 suggesting earlier, if that is the way that is

1     adopted, it is likely that many states would  
2     choose not to go through that process because,  
3     again, the -- this Court has made very clear  
4     that the introduction of evidence of a  
5     defendant's prior convictions is not itself a  
6     due process violation.

7             So severance is not required as a  
8     matter of -- of federal law here. And so I  
9     think if states are required to go through a  
10    knowing and voluntary waiver process, that then  
11    may -- I mean, we think those waivers would be  
12    completely enforceable, but I take my friend's  
13    argument to be that they might not be, in fact.

14            And so some defendants would, in fact,  
15    challenge those waivers, and the state would be  
16    opening itself up on the back end to at least  
17    litigation and inefficiency that it does not  
18    need to open itself up to.

19            I also think that in this case the  
20    most logical way to have looked at this  
21    agreement ex ante would have been for the  
22    defendant to know that he was giving up his  
23    right to -- to challenge the fact that these  
24    were held in one proceeding.

25            So you can look at this a few

1 different ways. I think one of them is to  
2 think that this agreement was made so that the  
3 evidence of Petitioner's prior felony  
4 convictions would not come in at the first  
5 trial, but aside from that, nothing in this  
6 agreement was meant to or did, by -- by its  
7 terms, say that the other options for potential  
8 outcomes that would have been possible in one  
9 trial would be off the table.

10 So, as some of the discussion earlier  
11 suggested, had this happened in one trial,  
12 Petitioner could have been convicted on all  
13 offenses, acquitted on all offenses, or some  
14 mix thereof, and nothing about saying I want to  
15 have two trials so that this other evidence  
16 doesn't come in logically suggests that he's  
17 retaining the option to keep one of those from  
18 happening.

19 JUSTICE KAGAN: Well, but maybe the  
20 defendant understands that we in our Double  
21 Jeopardy Clause have -- have emphasized pretty  
22 strongly the value of acquittals, and that  
23 acquittals mean something in our system, and  
24 they preclude the government from doing certain  
25 things that are inconsistent with those

1 acquittals.

2           So I guess -- I guess I don't -- don't  
3 understand why in the absence of a colloquy,  
4 and given the backdrop of double jeopardy law  
5 that focuses so much on not doing anything  
6 that's inconsistent with acquittals, the  
7 defendant would, of course, know that he was  
8 giving up his right to issue preclusion?

9           MS. ROSS: Right, Your Honor. I think  
10 that this goes back to some of the discussion  
11 that Justice Alito was having earlier, which is  
12 to say that the question in this case, I think,  
13 is best conceptualized as: What right did  
14 defendant agree not to invoke and what is he  
15 trying to invoke now?

16           And I think that what this agreement  
17 said was that I'm going to have multiple  
18 trials. And so what the Double Jeopardy Clause  
19 protects is multiple -- against is multiple  
20 trials for the same offense.

21           And so when Petitioner made that  
22 agreement, he was essentially saying I am not  
23 going to fight later about this is -- whether  
24 this is one offense or --

25           JUSTICE KAGAN: Well, but --

1 MS. ROSS: -- multiple offenses.

2 JUSTICE KAGAN: -- then you're saying,  
3 when you say the Double Jeopardy Clause  
4 protects multiple trials for the same offense,  
5 that is one thing that the Double Jeopardy  
6 Clause protects.

7 And another thing that the Double  
8 Jeopardy Clause protects -- and this is the  
9 difference between the claim preclusion aspect  
10 of it and the issue preclusion aspect of it, is  
11 the preservation of acquittals.

12 And that's what is involved in this  
13 case.

14 MS. ROSS: So, Your Honor, I would  
15 just note that the way that the Double Jeopardy  
16 Clause protects acquittals is in two specific  
17 ways and we lay this out in our papers.

18 On the one hand, as everyone agrees  
19 here, following an acquittal, a defendant  
20 cannot be tried again. So he can't, on that  
21 particular claim, he cannot -- the government  
22 cannot appeal. There cannot be another trial.  
23 Everyone agrees that is being respected here.

24 The second way that this Court's  
25 decisions in the Double Jeopardy Clause protect



1 acquittals is by modifying the definition of  
2 the same offense for purposes of the multiple  
3 trials analysis.

4 So what -- the way that we give  
5 finality to an acquittal is by saying that, in  
6 fact, that acquitted offense was the same  
7 offense as another offense that is technically  
8 distinct for charging purposes.

9 And in this case when --

10 JUSTICE SOTOMAYOR: I'm sorry, what's  
11 technically distinct about having committed a  
12 robbery against two people? If you rob each  
13 person, those are distinct crimes?

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

15 JUSTICE SOTOMAYOR: But we don't  
16 permit you to try a person for robbing one  
17 person and then try the second crime, which is  
18 not technically distinct, it's distinct  
19 completely, there are different people  
20 involved. We don't let you try that second  
21 person, that second crime.

22 MS. ROSS: That's correct --

23 JUSTICE SOTOMAYOR: If you've been  
24 acquitted.

25 MS. ROSS: That's correct, Justice

1 Sotomayor. And -- and the reason why we don't  
2 allow you to try that second acquittal or that  
3 second offense is because, for purposes of the  
4 Double Jeopardy Clause and for purposes of how  
5 we define the same offense, we say that in  
6 those circumstances, just as in Blockburger we  
7 say that sometimes things that are technically  
8 distinct, meaning they're in different code  
9 sections, are the same offense because they  
10 have overlapping elements.

11 Here we say that they're the same  
12 offense because they have over -- an issue of  
13 ultimate fact that the prosecution necessarily  
14 must prove in both cases.

15 JUSTICE GINSBURG: But they wouldn't  
16 be --

17 JUSTICE BREYER: That's claim  
18 precluded.

19 JUSTICE GINSBURG: They wouldn't be  
20 the same offense, the claim preclusion first,  
21 in the Ashe case, multiple victims. There's no  
22 claim preclusion when there is a second victim  
23 because it's a different -- different party.  
24 But there certainly is issue preclusion because  
25 of what was necessarily determined in the first

1 case.

2 MS. ROSS: That's correct, Justice  
3 Ginsburg. And in Ashe what happens is that the  
4 defendant cannot be tried for the second  
5 offense.

6 Now, I take Petitioner to agree that,  
7 if that were what he were arguing, he could not  
8 go forward with that.

9 JUSTICE BREYER: Okay, so what's the  
10 difference? That is -- I misspoke. It is  
11 issue preclusion. That's how we prevent the  
12 government from prosecuting the second poker  
13 player robbery. Okay?

14 MS. ROSS: Yes.

15 JUSTICE BREYER: The defense in the  
16 first case was I was in Chicago at the time.  
17 The jury accepted it. Okay?

18 Now we're into the second case and he  
19 was just as much in Chicago. All right? And  
20 you're saying he waived that when the only  
21 difference is that you separated the trial.  
22 That's all. They started trying both together  
23 and now it's separate. But it ends up two  
24 separate trials.

25 And what I think I'm having trouble

1 grasping is why you should treat that any  
2 differently? And now your argument is because  
3 he's waived it by conduct.

4 So Justice Kagan says, hey, he's  
5 waived it by conduct. Let's just be sure he  
6 waived it. Let him waive it expressly, if he  
7 wants to waive it, because after all the  
8 Constitution says that no person shall be held,  
9 you know, for jeopardy twice, or whatever it  
10 is.

11 And now we --

12 (Laughter.)

13 JUSTICE BREYER: Okay. You get the  
14 point?

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

16 JUSTICE BREYER: You get the point.  
17 He's waiving a constitutional right and,  
18 therefore, why shouldn't it be express? And  
19 that's -- that is where I think I stop because  
20 I want to know your answer.

21 MS. ROSS: Certainly, Justice Breyer.  
22 So my answer is that the same argument could  
23 have been made and I think, in fact, was made  
24 in Jeffers, that essentially in Jeffers the  
25 defendant said: I want to be tried separately.

1 And then later he said: Well, actually, this  
2 is a lesser included offense than a greater  
3 offense, and that under this Court's precedent  
4 now means that I was actually charged with one  
5 offense. And so I should have had one trial.

6 And this Court said, no, when you made  
7 the agreement to have two separate trials, you  
8 should have said at that point that these might  
9 be the same offense, and actually, I want to  
10 have one trial.

11 The Court said, if there is a right in  
12 the background under the Double Jeopardy  
13 Clause, it is the defendant's to invoke.

14 And for that reason I think that the  
15 same logic would apply here. If when  
16 Petitioner agreed to have two separate trials  
17 he actually thought, well, later I would like  
18 to be able to bar or limit that second trial  
19 because they're, in fact, for the same offense,  
20 that's my right to invoke now.

21 JUSTICE SOTOMAYOR: Well, what would  
22 have happened here if the defendant got up and  
23 said Virginia law requires separate trials. I  
24 won't -- I want what the law gives me. I won't  
25 waive my double jeopardy rights.

1           What then does the court do and what  
2 then does the prosecutor do?

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

4           CHIEF JUSTICE ROBERTS: Sure.

5           MS. ROSS: So if the defendant says I  
6 will not waive and I want separate trials, I  
7 think then the prosecution and The Court would  
8 have to decide sort of what -- what happens  
9 going forward.

10           And the prosecution in that case would  
11 have every reason to oppose severance, as I  
12 think -- as I think that states and prosecutors  
13 might well do going forward if -- if this case  
14 comes out that way. Thank you.

15           CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel. Four minutes, Mr. Fisher.

17           REBUTTAL ARGUMENT ON BEHALF OF  
18 JEFFREY L. FISHER ON BEHALF OF THE PETITIONER

19           MR. FISHER: Thank you. I think I  
20 heard two separate ways to look at this case.  
21 Now I want to respond to each of them.

22           So my friend from Virginia, in  
23 particular with colloquy with Justice Kagan,  
24 says the only way issue preclusion works is  
25 that you invoke it at the outset of the second

1 trial and, if you cannot bar the second trial  
2 at that point, it drops away and the right is  
3 gone.

4 And if that is correct, then Judge --  
5 then Judge Gorsuch's opinion for the Tenth  
6 Circuit in Wittig and all other eight circuits  
7 we cite in Footnote 2 of our reply brief across  
8 the federal court system would all understand  
9 issue preclusion to depend on what happens in  
10 the second trial and to only bar a particular  
11 way of trying the case.

12 And most importantly, as Judge Gorsuch  
13 put it for the Tenth Circuit, to sometimes  
14 force courts to wait and see what happens in  
15 that trial to see whether issue preclusion is  
16 violated, all of that has to be wrong and it  
17 would all be up-ended.

18 JUSTICE ALITO: But could the -- could  
19 the Commonwealth have proven the second charge  
20 the way that I suggested during the prior  
21 argument --

22 MR. FISHER: I think perhaps --

23 JUSTICE ALITO: -- by making no  
24 reference to the breaking and entering of the  
25 --

1           MR. FISHER: I think perhaps yes,  
2 Justice Alito. And so I want to be clear about  
3 that. All we're arguing is that they cannot  
4 try the second case in a manner that would make  
5 Mr. Currier an aider, abettor or participant in  
6 the breaking and entering of which the jury  
7 convicted him.

8           And so that would be a question of  
9 Virginia law whether the stuff down by the  
10 river would have satisfied that.

11           JUSTICE ALITO: Well, why would it --

12           MR. FISHER: But in general --

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

15           MR. FISHER: Well, the way the jury  
16 instructions were laid out in the -- in the --  
17 in the case, it said participate in some way in  
18 the crimes of breaking and entering and the  
19 theft.

20           And so whether handling the guns down  
21 by the river later would be participating in  
22 some way in that would be an argument the  
23 parties could have.

24           But the crucial point, Justice Alito,  
25 and my crucial point to the whole Court, is



1 that issue preclusion does not necessarily bar  
2 a second trial.

3 And the other side doesn't dispute  
4 that the test is inconsistency. And it simply  
5 cannot be inconsistent. If the government is  
6 right, then Wittig is wrong and all the other  
7 cases across the federal courts are wrong.

8 JUSTICE ALITO: I think what you just  
9 said, I don't want to belabor the point, but it  
10 does seem to me inconsistent with the Second  
11 Circuit's opinion in Kramer that you relied on  
12 pretty heavily.

13 MR. FISHER: I will just say not at  
14 all. I just urge the Court to reread that  
15 opinion. We're exactly on all fours with that  
16 opinion. They sent it back down --

17 JUSTICE ALITO: No, I read it. They  
18 could have proven the second offense without  
19 making any reference to what had happened in  
20 the other -- in the other offense.

21 MR. FISHER: Which is why Judge  
22 Friendly does not bar a second trial and sends  
23 certain cases back for retrial with the  
24 government simply not being able to introduce  
25 certain evidence.

1                   JUSTICE GORSUCH: Mr. Fisher, what is  
2 your second point?

3                   (Laughter.)

4                   MR. FISHER: Thank you. Thank you.  
5 My -- my second point is that the other thing  
6 that, particularly the Solicitor General, the  
7 argument they make, is that the government has  
8 a right, so to speak, to try all of its counts  
9 at once, just like in Powell.

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

23                   And there's a good reason why it  
24 applies. One way to think about issue  
25 preclusion and the Court's whole double

1 jeopardy jurisprudence that we've been talking  
2 about today is to let the defendant have a fair  
3 trial and not be tried twice for the same  
4 thing, but also to allow the prosecution one  
5 full and fair opportunity to prove all of its  
6 allegations.

7           And so in all the Jeffers-style cases,  
8 that's what the prosecution would be deprived  
9 of and why the Court has not allowed the Double  
10 Jeopardy Clause to be invoked.

11           In this case, just like in Yeager, the  
12 only thing that's being prevented is the  
13 prosecution having a second bite at the apple  
14 as to particular allegations. It can even --  
15 and I'll just return to my colloquy with  
16 Justice Alito when I -- to conclude, it can  
17 even allow the second trial to go forward, just  
18 simply in a manner that doesn't allow the  
19 prosecution functionally to try the defendant  
20 for the same offense twice.

21           And so if you believe the postulates  
22 that inconsistency is the test and that Wittig  
23 and all the other cases we have cited are  
24 correct, it leads inequitably to our  
25 conclusion. And even if you don't believe that

1 is enough, then the equities in the case and  
2 the competing interests and the right to the  
3 inviolacy of an acquittal should persuade you  
4 to -- to reverse the judgment below.

5 If there's any more questions, I'm  
6 happy to answer them.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel. The case is submitted.

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

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## Official - Subject to Final Review

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