

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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TIMOTHY J. SMITH,)
)
) Petitioner,)
)
) v.) No. 21-1576
)
) UNITED STATES,)
)
) Respondent.)
)
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TIMOTHY J. SMITH,)
Petitioner,)

v.) No. 21-1576

UNITED STATES,)
Respondent.)

- - - - -

Washington, D.C.

Tuesday, March 28, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

SAMIR DEGER-SEN, ESQUIRE, New York, New York; on behalf of the Petitioner.

SOPAN JOSHI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-1576, Smith versus United States.

Mr. Deger-Sen.

ORAL ARGUMENT OF SAMIR DEGER-SEN

ON BEHALF OF THE PETITIONER

MR. DEGER-SEN: Mr. Chief Justice, and may it please the Court:

The government agrees that when it elects to take the question of venue before a jury and fails to satisfy its burden of proof, a judgment of acquittal is the appropriate result and the government is barred from seeking reprosecution. The jury instruction it agreed to in this case, on JA 113, states exactly that. If the government fails to establish proper venue for any count, you must find the defendant not guilty as to that count.

The government's position is that this result should somehow differ when an appellate panel reviewing a Rule 29 motion for judgment of acquittal finds that the jury erred in its determination and there is insufficient evidence

1 to sustain the conviction.

2 Put another way, the government's
3 position is that when a jury does its job
4 correctly and acquits, a defendant may not be
5 reprosecuted, but, when the jury fails to
6 correctly discharge its duty, the government
7 gets a do-over.

8 That is what this Court in Burks
9 called a purely arbitrary distinction. The
10 government has no real explanation for that
11 result. It anchors its view on what it
12 describes as a settled and unbroken practice of
13 permitting retrials when a jury acquits for lack
14 of venue.

15 But there was no such practice. At
16 both the common law and at the founding, the
17 government's failure of proof as to venue
18 resulted in a general verdict of acquittal,
19 which carried all of the ordinary consequences
20 of an acquittal. The rule the government relies
21 on is instead the one this Court squarely
22 rejected in Ball, that a prosecutor was entitled
23 to a second bite at the apple even after a
24 general verdict of acquittal on any ground by
25 challenging the insufficiency of the indictment

1 in the first trial.

2 But, if the framers rejected that rule
3 for purposes of the Fifth Amendment, they
4 absolutely would have done so for violations of
5 the venue right. As Justice Story explained,
6 the venue right was an area where the framers
7 sought to leave as little discretion in the
8 government's hands as possible.

9 There is no reason to think that the
10 framers would have singled out venue as the one
11 issue that goes to a jury, but the government's
12 failure of proof does not yield an acquittal but
13 rather a do-over.

14 At bottom, an insufficiency-of-the-
15 evidence determination, whether by a jury, a
16 judge, or an appellate panel, must lead to a
17 judgment of acquittal.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: When we have --
20 normally have constitutional errors at trial,
21 isn't our rule a -- a -- a -- a mistrial or a
22 retrial?

23 MR. DEGER-SEN: That's correct, Your
24 Honor. But the venue right is, I think,
25 fundamentally different to all other kinds of

1 rights because what it means to violate the
2 venue right is that the government fails to
3 satisfy its burden of proof before a jury. So
4 that's -- it's not that the defendant has to
5 show his right was violated. The meaning of the
6 violation is the failure to satisfy the
7 government's burden.

8 And then the question is, what should
9 the consequences of that be? And the
10 consequences of that, you know, at common law
11 and at the founding were the same as when the
12 government fails to satisfy its burden of proof
13 --

14 JUSTICE THOMAS: How is it different
15 --

16 MR. DEGER-SEN: -- any other way.

17 JUSTICE THOMAS: -- from other
18 constitutional errors?

19 MR. DEGER-SEN: It -- it's different
20 in that sense, that the meaning of the violation
21 is that the government has a burden that it
22 takes to the jury as to establish -- to
23 establish venue, and if it fails to do that,
24 that is a violation of the venue right. And so
25 no other constitutional violation looks like

1 that.

2 JUSTICE THOMAS: So how do you know
3 that in a general -- in a general verdict?

4 MR. DEGER-SEN: You -- you don't know
5 in a general -- in a general verdict, and you
6 didn't know it at the founding. The
7 longstanding practice has always been to take
8 the question of venue to a jury, and that yields
9 a judgment -- a general verdict and a judgment
10 of acquittal.

11 And so, at the founding, venue had
12 equal status to anything else. If for any
13 reason --you know, if the government fails on
14 one of the conduct elements, if the government
15 fails as to an affirmative defense, if the
16 government fails as to a venue, the result was a
17 general verdict of acquittal.

18 And the government agrees that's what
19 happened in this case. You know, that was the
20 jury instruction it submitted to in this case.
21 It said you must find the defendant not guilty.
22 That's very likely what happened as to one of
23 the counts here.

24 JUSTICE JACKSON: So is it your
25 position that venue is an element? I mean, I

1 saw that assertion in your cert petition, but,
2 for some reason, it wasn't in your briefs here.

3 So is -- is that the position that
4 you're taking in this case?

5 MR. DEGER-SEN: I -- I think the word
6 "element" is sort of a word of many meanings,
7 but if by "element" you mean something that the
8 government bears the burden of proof, if it
9 fails the burden -- you know, they must
10 establish that and if it fails that, to
11 establish that --

12 JUSTICE JACKSON: Well, I guess I
13 mean, you know, you're setting up an argument
14 that, you know, if a jury decides it, and as a
15 result, you say, if the jury was wrong because
16 it's reversed on appeal, then there would be no
17 retrial.

18 We've said that with respect to
19 elements, but elements have to be presented to a
20 jury, and they have to be proven beyond a
21 reasonable doubt. I don't know that venue has
22 to be presented to a jury in every case.

23 Is that your position?

24 MR. DEGER-SEN: No, it doesn't. It's
25 similar to an affirmative defense in that sense.

1 It has to be put at issue.

2 JUSTICE JACKSON: All right. So, if
3 venue is not presented because it's not an
4 element, I guess, what result? Does your
5 argument change?

6 MR. DEGER-SEN: If -- if -- if the
7 defendant doesn't ever present venue, then venue
8 is waived. Indeed, it -- it could never even go
9 to the jury. So that I don't --

10 JUSTICE JACKSON: So you're saying, if
11 a judge -- because I -- I -- I understood your
12 original comments to say, you know, if the judge
13 got it wrong as well, you would have the same
14 answer. But --

15 MR. DEGER-SEN: If it's a sufficiency
16 determination. So, if -- if when it is put in
17 issue by the defendant and the government takes
18 it to the jury, like it did in this case, so we
19 put it in issue at the indictment stage and said
20 this indictment should be dismissed for lack of
21 venue. The government said, no, no, no, this is
22 actually a fact question, and we should take it
23 to the jury, the jury should decide. The
24 government went to the jury.

25 The government agrees that if the jury

1 had then acquitted, that's the end of the story.
2 It bars reprosecution.

3 JUSTICE JACKSON: Does it matter that
4 it's -- do you -- do you contest that the
5 standard of proof is different for venue than it
6 is for elements?

7 MR. DEGER-SEN: No, but the standard
8 of proof for affirmative defenses is different
9 than it is for elements, and affirmative
10 defenses are also something where you have --
11 the defendant has an initial burden to put it in
12 issue, and then, if the government fails to
13 satisfy its burden of rebutting the defendant's
14 affirmative defense, then --

15 JUSTICE JACKSON: It's a mistrial and
16 you could do it over, no?

17 MR. DEGER-SEN: No. It's a -- it's a
18 -- it's an acquittal. That's this Court's
19 decision in Burks. And so that -- that leads to
20 an acquittal. And just as in Burks here, this
21 case, I think, is in that sense on all fours
22 with Burks. The jury in Burks got it wrong.
23 They said that the government had satisfied its
24 burden. And then the appellate court said, you
25 know, no, that was incorrect, the government

1 failed on the sufficiency of the evidence, there
2 was a sufficiency-of-the-evidence ruling, and
3 then the appellate court said but the result
4 here could be a retrial.

5 This Court granted certiorari from
6 that decision and said, no, when you have a
7 sufficiency-of-the-evidence determination by an
8 appellate court, that is exactly the same thing
9 as a Rule 29 determination by a judge, and
10 that's exactly the same thing as a judgment of
11 acquittal by the jury. It would be a purely
12 arbitrary distinction to say, because the jury
13 got it wrong the first time, suddenly the
14 government has a chance to re prosecute.

15 JUSTICE JACKSON: And was Burks a
16 double jeopardy case? Was it a Sixth Amendment
17 case --

18 MR. DEGER-SEN: It was a double
19 jeopardy case.

20 JUSTICE JACKSON: -- a Fifth Amendment
21 case?

22 MR. DEGER-SEN: A double jeopardy
23 case.

24 JUSTICE JACKSON: You don't make a
25 Fifth Amendment arguing -- argument here, do

1 you?

2 MR. DEGER-SEN: Oh, I -- I think our
3 argument is interwoven with the Fifth Amendment
4 because our point is, just as in Burks, that the
5 remedy here -- the remedy for a violation of the
6 -- of the venue right should be a judgment of
7 acquittal that then is going to have -- you
8 know, bear all the ordinary consequences of a
9 judgment of acquittal, which would include
10 barring reprosecution --

11 JUSTICE JACKSON: But, in your brief
12 --

13 MR. DEGER-SEN: -- under double
14 jeopardy.

15 JUSTICE JACKSON: -- you said they
16 were separate, so I'm trying to understand. I
17 mean, I did not appreciate from the question
18 presented that you were making a Fifth Amendment
19 argument, and then, in your brief, at page 44,
20 you're very clear that the Fifth Amendment
21 argument and the Article III and Sixth Amendment
22 arguments are independent.

23 MR. DEGER-SEN: I -- there is sort of
24 an independent Fifth Amendment argument if you
25 think of the Fifth Amendment just standing

1 alone. You know, with the Fifth Amendment
2 standing alone without the venue right, you
3 know, we don't necessarily raise that argument.

4 But our Sixth Amendment argument
5 itself is interwoven with the Double Jeopardy
6 Clause. It has to be because the thing we're
7 asking for is a judgment of acquittal, which
8 bears the ordinary consequences of a judgment of
9 acquittal, and that includes preclusion and
10 objecting.

11 JUSTICE JACKSON: But it's not
12 interwoven just because of that. I mean, you
13 can't make a Sixth Amendment argument in this
14 case, I think, because the government hasn't put
15 you in jeopardy, or has he?

16 MR. DEGER-SEN: Well, it's exactly
17 like Burks. I mean, in Burks, that was
18 certiorari from a decision by the court of
19 appeals that said retrial is permitted in this
20 circumstance. There wasn't a reprosecution, but
21 there was a decision by the court of appeals
22 saying you can be retried.

23 And that's essentially what we're
24 coming to court and asking for, is we want that
25 judgment of acquittal. We want that piece of

1 paper that says you can't reprosecute us.

2 And the -- and what the Eleventh
3 Circuit gave us is the opposite. It gave us a
4 piece of paper that says the government can
5 reprosecute you. You don't have the ordinary
6 effects that you'd get with a judgment of
7 acquittal.

8 And so that's the injury that we're
9 suffering here. And so what we're saying is the
10 remedy here should be that judgment of
11 acquittal, that piece of paper that allows us to
12 -- entitle -- you know, entitles us to the
13 subsequent defense.

14 JUSTICE SOTOMAYOR: Counsel --

15 JUSTICE ALITO: Do you have --

16 JUSTICE SOTOMAYOR: No, go ahead.

17 JUSTICE ALITO: Do you have any
18 decision from the founding era that actually
19 precluded retrial based on a prior verdict of
20 improper venue?

21 MR. DEGER-SEN: I -- I don't think
22 that there's any -- the dominant practice at the
23 founding is that it always went to a general
24 verdict. And so that would have the ordinary
25 consequences of a general verdict. In the mine

1 run of cases, the government's not going to
2 retry.

3 The rule that they point to, the rule,
4 is the one rejected in Ball, which is, if you
5 have a general verdict of acquittal, even if
6 that's on a conduct element, you know, the jury
7 -- somehow we know the jury said they really
8 didn't do it, you know, he's completely
9 innocent, even in that situation, the government
10 was allowed to subsequently collaterally attack
11 that and say there was a deficiency in the
12 indictment, including a deficiency in venue.

13 JUSTICE ALITO: I -- I -- I take it
14 your answer is no, you don't have any case from
15 the founding era that actually precluded retrial
16 based on a prior verdict of improper venue.

17 MR. DEGER-SEN: I mean, I think any --
18 any -- you -- you wouldn't really know whether
19 it's a prior verdict, just like today, a prior
20 verdict of an improper venue, because you have a
21 general verdict of acquittal. So you wouldn't
22 know if that verdict of acquittal was based on,
23 you know, venue or something else.

24 JUSTICE ALITO: Do you dispute the
25 argument that many -- that there are many

1 treatises from the founding era and extending
2 into the 19th Century that say quite from
3 respective authorities, Blackstone, et cetera,
4 that say that a -- a reversal based on improper
5 venue does not preclude retrial?

6 MR. DEGER-SEN: We do dispute that.
7 So I think what the government does is it has
8 sort of a mishmash of two kinds of cases, one of
9 a motion to arrest judgment cases, and that's
10 Arundel's Case, that's Tharbeau, that's the Coke
11 treatise.

12 And a motion to arrest judgment was,
13 after a conviction, a defendant challenges the
14 indictment, and that's how this Court described
15 it in -- in United States versus Sisson. That's
16 a -- that's a challenge to the indictment, not
17 -- so that doesn't involve any determination
18 that the government failed its proof. That's
19 not an insufficiency context.

20 In that situation, we completely
21 agree. The same thing would be true. If we had
22 an appeal where we were challenging the
23 sufficiency of the indictment or instructional
24 error or anything other than sufficiency and
25 then that was the -- you know, the -- the -- we

1 got a reversal from the court of appeals,
2 absolutely, the government could re prosecute.
3 That would be the modern analogy to the motion
4 to arrest judgment and that would be a mistrial.
5 But that's not a sufficiency situation.

6 And in the other kind of case that the
7 government relies on are the cases I was just
8 describing, which is the Ball case, and -- and
9 -- which is the rule rejected in Ball, and that
10 is that you can collaterally attack even any
11 kind of judgment of acquittal by saying there
12 was no venue.

13 What the government does not have is
14 anything, any case in the common law or at the
15 founding that treats a venue acquittal as a
16 lower status than other kinds of acquittals.
17 They were treated in -- in equal status and had
18 exactly the same kinds of effects. Those
19 effects may now have changed over time as double
20 jeopardy jurisprudence has changed, but they
21 were always of equal status.

22 And the government agrees they're of
23 equal status today when it goes to a jury. It
24 just says on appeal somehow the rule should be
25 different.

1 And I don't -- I almost think it's a
2 non sequitur to use this --

3 JUSTICE ALITO: Well, part of your --
4 part of your argument seems to be based on the
5 original understanding of the Venue and Vicinage
6 Clauses, but it doesn't seem to me that that is
7 sufficient -- you -- that you can win on that
8 alone. But you try to buttress it by injecting
9 elements of our modern double jeopardy
10 jurisprudence. So you have kind of a hybrid
11 argument.

12 If we look just at our modern double
13 jeopardy case law, have we said that retrial is
14 barred when there is a reversal on appeal on a
15 ground that does not concern the culpability of
16 the defendant?

17 MR. DEGER-SEN: I mean, I think it
18 depends what you mean by culpability, but I
19 don't think that venue is any less about
20 culpability than, for example, a jurisdictional
21 element. You know, whether a bank is operating
22 in -- in -- in interstate commerce just doesn't
23 seem like it goes to inherent culpability
24 either. And then, if it's about elements, well,
25 we know we have affirmative defenses.

1 So, you know, what -- what -- what is
2 the thing that unifies affirmative defenses,
3 jurisdictional elements, and conduct elements?
4 The only thing I think that substantively
5 unifies them is they are things that go to a
6 jury and the government bears the burden of
7 proof, and when the government fails that burden
8 of proof, there's a judgment of acquittal.

9 And that's exactly the same thing for
10 the venue right. And what the government is
11 basically saying is the venue right has some
12 special status where it just is exempt from
13 that, and they're saying, in addition, it only
14 has that special status on appeal.

15 You know, if it went to the jury,
16 we're happy to treat it in exactly the same way.
17 We're happy to submit jury instructions that
18 allow for general verdicts, that allow for
19 preclusion. But, on appeal, the results somehow
20 could be different. And I just don't think that
21 follows.

22 CHIEF JUSTICE ROBERTS: Can a judge
23 dismiss a prosecution because of erroneous venue
24 in its discretion presumably?

25 MR. DEGER-SEN: I mean, it depends at

1 which stage. A judge, if -- if -- if you move
2 to dismiss the indictment because it's
3 insufficiently alleged, then the judge can do
4 that, and that wouldn't have preclusive effects.

5 If it's after the close of the
6 government's evidence and it's a Rule 29 motion
7 for judgment of acquittal, then that would --
8 you know, that's the sort of -- that, as this
9 Court said in Evans, is basically the same thing
10 as a jury acquittal, and so that would have
11 preclusive effect.

12 CHIEF JUSTICE ROBERTS: And can he do
13 that dismissal with prejudice or without
14 prejudice depending upon the particular
15 circumstances?

16 MR. DEGER-SEN: I -- I don't think he
17 could do it without -- if -- if he's making a
18 sufficiency-of-the-evidence determination on a
19 Rule 29, and he said the government's evidence
20 is closed, I just don't think the government has
21 provided sufficient evidence to support venue
22 here, then he would --

23 CHIEF JUSTICE ROBERTS: What -- what
24 about -- what about before that?

25 MR. DEGER-SEN: As in mid-trial? I

1 think mid -- I don't know if there's a vehicle
2 --

3 CHIEF JUSTICE ROBERTS: Or at the --
4 or at the indictment stage.

5 MR. DEGER-SEN: Oh -- oh, yeah, at the
6 indictment stage, the government could say the
7 indictment isn't sufficient, that -- the -- the
8 defendant could say, as we tried to say, it's
9 not sufficiently alleged, the government can
10 withdraw and try and go to a different venue,
11 the judge can dismiss the indictment, he can go
12 to a different venue. I think it might have
13 issues with --

14 CHIEF JUSTICE ROBERTS: Well, can he
15 dismiss it with prejudice?

16 MR. DEGER-SEN: He can -- he can
17 dismiss it with prejudice probably as to
18 refiling in the same venue under issue
19 preclusion principles. I don't think he could
20 dismiss the indictment with prejudice as to any
21 other prosecution in another venue, but that's
22 -- that's -- you know, there are basically two
23 kinds of dismissals. There's the indictment
24 stage and there's the sufficiency stage, and the
25 government's cases try to blur that line.

1 But this Court has always said that
2 distinction has fundamental consequences because
3 one is a sufficiency determination, and all
4 agree this was a sufficiency determination, and
5 the other is a question of, you know, the
6 indictment and whether it's sufficiently
7 alleged, and the government does get another
8 chance in that --

9 JUSTICE KAGAN: But -- but, if the
10 government can come back again if a -- if it's
11 dismissed pretrial, why -- why isn't what you're
12 saying, you know, why doesn't the difference lie
13 in the Double Jeopardy Clause, not in the venue
14 provision?

15 MR. DEGER-SEN: I mean, I think the
16 difference lies in the double jeopardy
17 principles that would have animated the -- the
18 framers in thinking through what the remedy was
19 for purposes of the double -- for purposes of
20 the venue clause. I mean, this Court sort of
21 describes --

22 JUSTICE KAGAN: I guess what I'm
23 suggesting is, if -- if the government can
24 refile in another venue pretrial and then you
25 say, well, there's a big difference once the

1 government submits its case, I mean, there might
2 be a big difference, but it might be a double
3 jeopardy difference, not a venue difference.

4 MR. DEGER-SEN: I -- I just think
5 they're -- they're inseparably interwoven here
6 because what it means for the venue right to be
7 violated is for the government to fail its
8 burden of proof before a jury. That is what it
9 has always meant. There's no such thing as a
10 venue violation separate from the government's
11 failure of proof before a jury.

12 And so you only ever really know that
13 the venue right has been violated and requires
14 a -- a remedy once the government has failed its
15 proof in front of a jury.

16 JUSTICE JACKSON: Why can't the remedy
17 just be to vacate the conviction? I mean, what
18 you're asking for is a vacatur plus a statement
19 by the Court that you can't be retried, and I
20 guess Justice Kagan's point is, why don't you
21 get that one when the -- when the government
22 tries to retry you and then you invoke double
23 jeopardy?

24 MR. DEGER-SEN: I mean, in -- in
25 Burks, that's not what this Court did, but I

1 guess, at an absolute minimum, we would need --
2 you know, we couldn't have a decision on the
3 books that the Eleventh Circuit's saying we
4 don't have the ability to assert double
5 jeopardy. So, at a minimum, then the -- the
6 Eleventh Circuit --

7 JUSTICE JACKSON: I don't think that
8 -- is that what the Eleventh Circuit said in
9 this case? It just said you're not entitled to
10 a statement from the judge right now that says
11 you can't be reprosecuted. I don't think it
12 made a double jeopardy holding.

13 MR. DEGER-SEN: I guess I read -- I
14 read the Eleventh Circuit's decision as saying
15 that the remedy is vacated and so the government
16 gets to retry.

17 JUSTICE GORSUCH: Counsel, I want to
18 go back to your discussion with Justice Alito
19 about Arundel's Case and some of the original
20 materials. I understand your -- your position
21 is that those cases allowing retrial for
22 improper venue were challenges essentially to
23 the sufficiency of the indictment.

24 But I would have thought that we'd
25 still have some cases where, as in this case, a

1 jury found venue improperly, and there would
2 have been an appeal taken afterwards by the
3 defendant, as you have, and there would be some
4 evidence that -- that an acquittal would have
5 been the remedy given on appeal. But I didn't
6 see that in your briefs.

7 So what's your -- what's your
8 understanding as to why that -- that evidence
9 doesn't exist?

10 MR. DEGER-SEN: I mean, the criminal
11 appellate right has only existed, you know,
12 since 1891, so the early case, the common law
13 and the founding, there was no criminal right of
14 appeal. So this is sort of all a little bit sui
15 generis. And the way that this Court has
16 aligned that fact is it said, as in Burks, when
17 you have an appellate reversal for insufficiency
18 of the evidence, that functions like a jury
19 acquittal would at the founding.

20 And what we do have is, you know,
21 evidence that jury acquittals at the founding,
22 you know, on the basis of venue, had all the
23 same --

24 JUSTICE GORSUCH: No, I -- I -- I
25 understand that, but your -- your -- your --

1 your -- your answer, I think, is there is no
2 right to appeal until 1891 in this country.

3 MR. DEGER-SEN: Right. I mean,
4 there's no cases --

5 JUSTICE GORSUCH: How about at common
6 law?

7 MR. DEGER-SEN: -- either way
8 basically for that reason.

9 JUSTICE GORSUCH: Yeah. Right. How
10 about -- how about at common law?

11 MR. DEGER-SEN: Right. There wasn't.

12 JUSTICE GORSUCH: The same thing?

13 MR. DEGER-SEN: Exactly.

14 JUSTICE GORSUCH: Okay. All right.

15 MR. DEGER-SEN: Exactly.

16 JUSTICE SOTOMAYOR: Counsel, your
17 argument today is a bit different than your
18 brief. I think you're right the two are
19 interwound, but this is really not a venue
20 clause, Article III, or a vintage clause of the
21 Sixth Amendment. This is really a double
22 jeopardy argument. Justice Jackson asked that,
23 and you keep saying, well, no, I'm not making an
24 independent one. But it's totally that.

25 A judge can -- on the sufficiency of

1 the element, there could be a motion to dismiss
2 before trial, and if it's denied, we don't
3 require an acquittal then. Or, if the judge
4 grants it, it goes up on appeal and we reverse
5 it and it goes back because there wasn't a trial
6 before the jury, correct?

7 MR. DEGER-SEN: Correct. Right.

8 JUSTICE SOTOMAYOR: So, if there's a
9 motion to dismiss for lack of venue and the
10 judge grants it and there's an appeal by the
11 government and it's not a judgment of acquittal,
12 the government can then retry -- can try the
13 case, correct?

14 MR. DEGER-SEN: Right. It's when --

15 JUSTICE SOTOMAYOR: So, really, the
16 issue is what happens after a jury finds that
17 the government has not met its burden of proof.
18 That's the point you're trying to make, correct?

19 MR. DEGER-SEN: Yes. And that's how
20 we framed it in the petition and throughout our
21 briefs.

22 JUSTICE SOTOMAYOR: So what you're
23 saying is, if for -- the only thing that's
24 generally submitted to the jury is either
25 elements or affirmative defenses or venue. If

1 the jury has acquitted or if the jury has
2 convicted and an appellate court says the
3 evidence was insufficient, we don't permit the
4 government to retry the case.

5 MR. DEGER-SEN: Correct.

6 JUSTICE SOTOMAYOR: And so you're
7 saying this is no different than an affirmative
8 defense that sometimes is proven by a
9 preponderance of the evidence. If the court
10 says the judge was wrong on an affirmative
11 defense because the evidence was in -- was
12 sufficient -- or insufficient to -- to disprove
13 it, then they can't try it again.

14 MR. DEGER-SEN: That's Burks.

15 JUSTICE SOTOMAYOR: And you're saying
16 we should apply the same principle, any issue
17 that has to be submitted to the jury, that the
18 jury finds and then an appellate court says it
19 was insufficient, that should be end -- the end
20 of the case. I think that's your argument.

21 MR. DEGER-SEN: Exactly.

22 JUSTICE SOTOMAYOR: So what do we do
23 with all the statements in the common law, among
24 jurists here, including Justice Story, that do
25 say that if an issue is about insufficient venue

1 or that venue is not right, that retrial is the
2 norm?

3 MR. DEGER-SEN: That's not what the
4 historical sources say. I mean, the government
5 does a sort of crafty job of piecing together,
6 like, a variety -- two different kinds of cases,
7 and, you know, it sort of makes it seem like
8 there is this line --

9 JUSTICE SOTOMAYOR: All right.

10 MR. DEGER-SEN: -- of separation.

11 JUSTICE SOTOMAYOR: Break that down
12 for me because --

13 MR. DEGER-SEN: Right. It --

14 JUSTICE SOTOMAYOR: -- it was more
15 convincing to me than you're let -- letting me
16 believe right now. But go ahead. Break it
17 down.

18 MR. DEGER-SEN: Well -- well -- so --
19 so -- so, first of all, the government starts by
20 talking about the -- the sort of case like
21 Arundel's Case, the Coke treatise, and Tharbeau,
22 which are the motion -- which are the motion-to-
23 arrest-judgment cases. And motion to arrest
24 judgment, as this Court said in -- in United
25 States versus Sisson -- this is what it said:

1 For the purpose of this case, the critical
2 requirement is the judgment can be arrested only
3 on the basis of an error appearing on the face
4 of the record and not on the base of proof
5 offered at trial. And then, at Footnote 10, it
6 explains "face of the record" basically means
7 the indictment and the official documents.

8 So motion-to-arrest-judgment cases
9 necessarily are not insufficiency cases. So the
10 Coke treatise, Arundel's Case, all of those
11 things are totally consistent with our rule,
12 which is the rule you were just describing
13 earlier. If it's at the indictment stage, it's
14 a mistrial. Those are not sufficiency cases.

15 Then the government slips into talking
16 about this rule which says -- which is the rule
17 rejected in Ball, which is that a -- a -- a
18 prosecutor in a second prosecution is always
19 entitled to basically challenge the sufficiency
20 of the indictment not just on venue grounds but
21 on other kinds of grounds too. And even if you
22 have a general verdict of acquittal that goes to
23 culpability, you know, the guy didn't do it, you
24 still get to re-prosecute him based on
25 challenging the sufficiency of the indictment.

1 Their own sources, like the Holmes
2 case, describe that rule as monstrous, and Ball
3 squarely rejects it. So their idea is that that
4 somehow now needs to be imported into thinking
5 about the venue clause, even though we know that
6 the framers thought the venue clause was
7 fundamentally important and required additional
8 protection. So I don't think that makes sense.

9 But even on its own terms, it doesn't
10 make sense because the government doesn't
11 believe in that rule even now. The government
12 doesn't think that when -- that the second
13 prosecution can be initiated on the basis of
14 challenging a venue in the first prosecution
15 when there's a general verdict of acquittal.

16 So it doesn't think that rule applies
17 generally. It somehow thinks it applies just
18 for trying to understand what happens when
19 you're on appeal and you get a reversal on
20 insufficient evidence of venue. And I just
21 don't even see how that follows.

22 And all of that leads to the big thing
23 that's lacking, I think, in the government's
24 case, which is anything which says -- you know,
25 they had lots of cases that said venue

1 conventionally went to special verdicts, and
2 when you got an acquittal just on venue,
3 everyone just reprosecuted.

4 But they don't have anything like
5 that. And, in fact, special verdicts were not
6 that typical at the founding, and a court
7 couldn't even require a jury to enter a special
8 verdict. So there just wasn't any distinction
9 being made between venue and other kinds of
10 elements. They had equal status at the common
11 law and at the founding. And the rule that the
12 government pieces together just isn't accurate
13 when you really dig into those sources.

14 JUSTICE SOTOMAYOR: Thank you.

15 JUSTICE ALITO: Other than the speedy
16 trial right and the double jeopardy right, can
17 you think of any example where a retrial is not
18 sufficient to cure the violation of a criminal
19 right?

20 MR. DEGER-SEN: No, Your Honor, but
21 there is no other --you know, we're already in
22 such different terrain with the venue right
23 because there is no other right where the
24 violation is defined by the government's failure
25 of proof before a jury. And so I think we're

1 already in sort of a strange place. That makes
2 it, I think, similar to double jeopardy
3 principles.

4 And I think there are some, you know,
5 significant analogies to the speedy trial right
6 because, you know, the -- you know, the right
7 here was -- is grounded in trying to avoid the
8 hardship of being -- you know, of having the
9 trial in an alien place. And, to some degree,
10 once that trial in an alien place has occurred,
11 it's not remediable. It's not like the next
12 trial necessarily puts you back to where you
13 were before. You've already had the experience.

14 And we know there's mountains of
15 evidence at the founding that it was the
16 experience of that trial that was the
17 constitutional hardship that trumps overall.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas?

21 Justice Alito?

22 JUSTICE ALITO: Well, you can make the
23 -- the argument that you just made about the
24 violation of many other trial rights.

25 MR. DEGER-SEN: I think that every --

1 every trial is --

2 JUSTICE ALITO: Practically every
3 trial right, you can make that.

4 MR. DEGER-SEN: Right. Absolutely.
5 Every trial is a hardship, but not every
6 constitutional right is concerned with avoid --
7 specifically concerned with avoiding the
8 hardship of trial. And when you have a
9 constitutional right that's based on you don't
10 want that trial -- that hardship to occur in the
11 first place, you need, as with the speedy trial
12 right, something that has some front-end
13 deterrence.

14 So that's our argument on that. You
15 know, you piece it together with the fact that
16 the government does have a lot of unfettered
17 discretion here, You know, as -- as William
18 Grayson described it, an absolute uncontrollable
19 power over venue. I think that requires some
20 more front-end deterrence.

21 But -- and then you add in the fact
22 that, of course, the venue right is already
23 fundamentally different. And when you put all
24 those things together, I think acquittal is the
25 appropriate remedy.

1 JUSTICE ALITO: Are the modern
2 standards for venue in criminal cases the same
3 as the standards for venue that existed at the
4 time of the founding?

5 MR. DEGER-SEN: I mean, I think,
6 broadly speaking, yes. We still look to try and
7 find what the locus delecti is and we look to
8 where the conduct occurred. And that's
9 basically what happened in this case.

10 Obviously, the types of cases that
11 occur, you know, the government now has far more
12 ability to select different kinds of venues.
13 Congress expanded the power of the government to
14 do that. So you have -- this issue arises more
15 and more. But, ultimately, you still look to --
16 to the locus delecti.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 Justice Kagan?

20 JUSTICE KAGAN: Was the right really
21 about the burden of a faraway trial? I thought
22 it was much more about having a jury that knew
23 the details of your crime and was of your
24 community.

25 MR. DEGER-SEN: It was about both.

1 And -- and the -- the -- the founding documents
2 describe a lot of the time the hardship of trial
3 in an alien place. That's how this Court
4 described it in United States versus Johnson.
5 But they also describe it as the unfairness --
6 potential unfairness of the conviction because
7 you can't get your witnesses, because there's
8 all sorts of hardships that come there.

9 And I think, as to both of those, we
10 think that acquittal aligns with the purpose.
11 Acquittal is the only thing that has that
12 front-end deterrence, and acquittal is the only
13 thing that prevents the kind of forum shopping
14 that the framers were acutely aware of. I mean,
15 this is a rare area where we just know that
16 there was egregious governmental abuse,
17 egregious governmental practice that was
18 happening in the founding era.

19 So the idea they would have just
20 thought, well, venue, that's just a thing of
21 lower status that we leave at the government's
22 grace, just seems highly implausible.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: What do you

1 understand the proper burden of proof of the
2 government to be in -- in venue cases?

3 MR. DEGER-SEN: I'm not -- I think
4 that there is -- that the historical evidence on
5 that is extremely muddled. I think it would be
6 great fodder maybe in --

7 JUSTICE GORSUCH: That's why I'm
8 asking you.

9 MR. DEGER-SEN: I -- I -- I -- I think
10 it would be great fodder for another cert
11 petition, Your Honor, but I don't think anything
12 turns on it in this case because, as we've been
13 discussing, there are things like affirmative
14 defenses where the burden of proof is not
15 necessarily beyond a reasonable doubt and it's
16 still the key thing is that it goes to the --

17 JUSTICE GORSUCH: Sufficiency.

18 MR. DEGER-SEN: Exactly.

19 JUSTICE GORSUCH: I got it. Okay.
20 And then what about -- the Chief Justice asked
21 you about transferring the case. As I
22 understand it under the criminal rules of
23 procedure at least currently, that's hard to do
24 without the defendant's consent. What do we do
25 about that?

1 MR. DEGER-SEN: I -- I think that the
2 defendant -- so a defendant has -- has to
3 basically put venue in issue, and the way it
4 typically does that is by doing it at the
5 indictment stage. And at the indictment stage,
6 if the government says, oh, you know, you're
7 absolutely right, this is in the wrong venue,
8 the government can withdraw the powers and --

9 JUSTICE GORSUCH: Can it -- can it do
10 it unilaterally, or does it require the
11 defendant's consent?

12 MR. DEGER-SEN: I think, at the
13 indictment stage, it can just withdraw the
14 indictment and refile somewhere else.

15 JUSTICE GORSUCH: All right. Okay.
16 Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh?

19 Justice Barrett?

20 Justice Jackson?

21 JUSTICE JACKSON: Yeah. I just think
22 there's something conceptually strange about
23 going from being tried in an improper venue to
24 being fully acquitted, and so can I just go back
25 to -- to Justice Kagan's point, which is, if we

1 assume that the point of venue or at least a
2 point of venue was to ensure that the community
3 in which this crime occurred had some say in
4 how -- how these facts were tried, then why
5 would it be that the only permissible remedy for
6 having tried a person in the wrong venue would
7 be to acquit them entirely and not let the
8 community that is the right venue exercise that
9 prerogative?

10 MR. DEGER-SEN: And -- but I think
11 that's a natural consequence of how it's always
12 been because, at -- at the common law --

13 JUSTICE JACKSON: But, I mean, if --
14 if we assume that part, at least part, is to
15 make sure that the people who were victimized,
16 victimized by the crime, are participating in
17 the trial, it seems to me that your remedy robs
18 them in some sense of the ability to speak to
19 the crime and the issue, because you say the
20 person who may have done this can't be retried
21 if he's tried in a -- in -- in the wrong place.

22 So what do we do about -- about that?

23 MR. DEGER-SEN: I mean, the law has
24 always sort of placed the -- it has -- has --
25 has sort of balanced that and basically said

1 that the defendant's right to venue is more
2 significant. That's the only -- that's the
3 natural --

4 JUSTICE JACKSON: And the community's
5 right to participate in the trial?

6 MR. DEGER-SEN: Well, because that's
7 what would happen. I mean, you would -- at the
8 common law and at the founding, if the
9 government initiates the prosecution in the
10 wrong venue, takes it to the jury and there's an
11 acquittal, that's the end. If there's an
12 acquittal and -- you know, the government
13 doesn't then go and get to say, well, now --

14 JUSTICE JACKSON: Isn't that the --

15 MR. DEGER-SEN: -- those in the
16 community get to try.

17 JUSTICE JACKSON: -- but isn't that
18 the balancing scenario? If he's acquitted in
19 the wrong venue, then we say his right to not be
20 tried takes precedent. But, if he's convicted
21 in the wrong venue, I guess I wonder why that
22 means that the jury that actually has the
23 greatest stake in this situation doesn't get the
24 opportunity.

25 MR. DEGER-SEN: Because, under this

1 Court's precedent, he has been acquitted. A
2 jury acquittal over --

3 JUSTICE JACKSON: All right. So let
4 me -- let me talk to you about that because
5 that's another part that I'm struggling with.

6 You -- you admit that venue doesn't
7 have to be submitted to a jury. I mean, even
8 when you raise it, is it -- does -- is it the
9 kind of thing that has to go to the jury or not?

10 MR. DEGER-SEN: It -- it -- it
11 basically is. I mean, the -- the circuits are a
12 little --

13 JUSTICE JACKSON: Well, no, not
14 basically. I'm saying, okay, we're at trial,
15 pretrial, and the defendant raises a venue
16 objection. Is that something that the judge can
17 resolve, or must it be submitted to the jury?

18 MR. DEGER-SEN: It basically must be
19 submitted to the jury. The circuits are a
20 little divided on how much a defendant has to
21 put it in issue, but everyone agrees that once
22 it's put in issue -- and the threshold is low --

23 JUSTICE JACKSON: Okay. But I thought
24 you said earlier that we had a scenario in which
25 a judge could be ruling on this as a matter of

1 Rule 29, where the judge could be deciding, all
2 right, so you're --

3 MR. DEGER-SEN: On -- on sufficiency
4 grounds, yes.

5 JUSTICE JACKSON: All right. So let's
6 say it was put to the jury and then there's a
7 Rule 29 and the judge resolves it. In that
8 situation, if the judge says no venue, is it
9 your position that the government can't appeal,
10 that's tantamount to an acquittal verdict?

11 MR. DEGER-SEN: Yeah. If -- if --
12 if -- if the government said -- if the -- if
13 the -- if the judge rules that there's a Rule 29
14 motion for judgment of acquittal on venue
15 grounds, absolutely. That's basically Evans.

16 JUSTICE JACKSON: It's -- it's not
17 going to -- I'm saying, do we have cases that
18 say that, or are you just making this analogy?
19 I guess I'm wondering, would I ever find --

20 MR. DEGER-SEN: I mean, it's a natural
21 --

22 JUSTICE JACKSON: -- an appellate --

23 MR. DEGER-SEN: -- consequence of our
24 rule. It's a consequence --

25 JUSTICE JACKSON: It's a natural

1 consequence of your rule, but I'm asking you
2 about the law exactly in this -- in the
3 following sense: Would an appellate court ever
4 be called upon to decide whether the judge was
5 correct on a JNOV Rule 29 motion in the
6 defendant's favor on venue grounds?

7 MR. DEGER-SEN: They shouldn't be. I
8 mean, the circuits are divided on what you can
9 hear.

10 JUSTICE JACKSON: So, if I find those
11 cases, you lose?

12 MR. DEGER-SEN: No. I mean, the
13 circuits currently are divided. I mean, there's
14 lots of circuits that have a retrial rule on
15 appeal, just like the Eleventh Circuit, and so
16 I'm sure there will be lots of examples where
17 judges in those circuits do exactly that, and
18 the result is that it doesn't, you know, qualify
19 as -- as an acquittal in the same way because
20 that's --

21 JUSTICE JACKSON: No, but I guess -- I
22 guess, doesn't that -- why doesn't that
23 undermine your argument? I mean, my -- if it is
24 an acquittal, then it seems to me that -- that
25 there shouldn't be an appellate right for the

1 government to go and ask for a review of the
2 judge's determination that there's no venue on
3 --

4 MR. DEGER-SEN: Right. I mean, I --

5 JUSTICE JACKSON: -- a post-trial
6 motion. So, if we find those, then it would
7 seem as though the law does not treat the venue
8 question as tantamount to --

9 MR. DEGER-SEN: I -- I -- I --

10 JUSTICE JACKSON: -- a judgment of
11 acquittal.

12 MR. DEGER-SEN: -- I think those cases
13 would be wrong just like the circuits that
14 disagree with us would be wrong.

15 JUSTICE JACKSON: So, in ruling in
16 your favor, we'd have to also rule about that, I
17 guess --

18 MR. DEGER-SEN: I -- I -- I -- I --

19 JUSTICE JACKSON: -- that the
20 implication would be --

21 MR. DEGER-SEN: Yeah, I -- I mean, I
22 think, basically, as this Court said in Burks
23 and reaffirmed in Evans, a jury acquittal, a
24 judge acquittal under Rule 29, and an -- an
25 appellate reversal of a Rule 29 motion for

1 insufficiency, those are all insufficiency
2 determinations, and it's a purely arbitrary
3 distinction to say that, you know, because the
4 jury made a mistake, the government now suddenly
5 gets to re prosecute. The -- it's -- it's not
6 fair to say that that is what it all turns on.

7 And that's this Court's holding in
8 Burks. And the government in this case at JA
9 113, 114, said to the jury: Acquit. If you
10 find -- if you find we didn't, you know, bear
11 our burden of proof here, you should acquit.
12 They agreed that bars re prosecution.

13 And they're saying there should be
14 exactly the arbitrary distinction that this
15 Court rejected in Burks for venue, and it
16 doesn't -- there's no basis for thinking venue
17 should be treated differently because venue has
18 never been treated differently historically at
19 the common law. It's always had the --

20 JUSTICE JACKSON: Except insofar as
21 our law might allow the government to raise
22 venue questions on appeal if ruled on by a
23 judge.

24 MR. DEGER-SEN: I don't think I
25 understand.

1 JUSTICE JACKSON: In other words, you
2 say venue has never been treated differently.
3 But I've identified a situation in which it has
4 perhaps. I don't know because I haven't
5 researched it. That's why I'm asking you. It
6 would be treated differently or it has been
7 treated differently if the government could
8 actually bring an appeal on a judicial
9 determination of venue and have that --

10 MR. DEGER-SEN: I mean, I -- I -- I --

11 JUSTICE JACKSON: -- addressed,
12 because motions of acquittal --

13 MR. DEGER-SEN: Right. I -- I --

14 JUSTICE JACKSON: -- or -- or
15 judgments of acquittal would not be appealable.

16 MR. DEGER-SEN: -- I haven't seen a
17 case like that. I don't know if they exist,
18 Your Honor, but, if they do, I would think that
19 they're just basically another instance of the
20 rule that we're challenging in this case, as the
21 court of appeals have, and that rule is itself
22 the thing which violates Burks.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Joshi?

2 ORAL ARGUMENT OF SOPAN JOSHI

3 ON BEHALF OF THE RESPONDENT

4 MR. JOSHI: Mr. Chief Justice, and may
5 it please the Court:

6 The remedy for a defendant convicted
7 in a wrong venue is, one, reversal of his
8 conviction; two, dismissal of the count in the
9 indictment. Petitioner got both of those
10 remedies here.

11 His contention here is that the
12 Constitution requires an additional third
13 remedy, which is immunity from reprosecution.
14 But he hasn't identified a single word of the
15 actual text of the Constitution that mandates
16 that remedy. And we think centuries of
17 prefounding history and precedent belie that
18 contention.

19 Now Petitioner mentioned this morning
20 and in his briefing that juries are instructed
21 to acquit a defendant if the government fails to
22 prove venue, and he says that we haven't shown a
23 founding era federal case in which a jury
24 acquittal was followed by a retrial.

25 I think that's a little bit of a

1 strawman. A general verdict of acquittal always
2 precludes retrial under double jeopardy
3 principles. We have never contested that.

4 But that's not this case. He was not
5 acquitted by the jury. He was convicted. The
6 question is what happens when a reviewing court
7 determines that a conviction was obtained in the
8 wrong venue.

9 Of course, there's no founding era
10 precedent on that because, as my friend
11 mentioned, there was no right of appeal in
12 federal criminal cases until 1889 for defendants
13 and 1907 for the government.

14 But Petitioner's case basically boils
15 down to, from start to finish, a conflation of a
16 jury's general verdict of acquittal and a
17 reviewing Court's determination that a
18 conviction was improper or the result of
19 constitutional error.

20 This Court has squarely rejected that
21 conflation, including in Scott, which was one of
22 the trilogy of double jeopardy cases decided the
23 same day as Burks. And what the Court said in
24 Scott was that, look, a general verdict of
25 acquittal doesn't give reasons, and so we adopt

1 a defendant-friendly categorical rule that a
2 general verdict of acquittal is final and
3 preclusive.

4 That's not true when a court decides
5 something. When a court decides something, the
6 dividing line for whether retrial is or is not
7 permissible is whether the legal basis for the
8 ruling goes to factual guilt or innocence or
9 criminal culpability, as Evans against Michigan
10 said.

11 Venue does not go to factual guilt or
12 innocence. It does not go to criminal
13 culpability. And, therefore, retrial is not
14 forbidden.

15 I welcome the Court's questions.

16 If there aren't any, let me --

17 CHIEF JUSTICE ROBERTS: Well, how many
18 times does the government, for example, get to
19 either mistake or deliberately sue in the wrong
20 venue?

21 MR. JOSHI: If on --

22 CHIEF JUSTICE ROBERTS: You can
23 imagine a situation, perhaps a rare one, but you
24 can imagine it, where what's involved is an
25 abuse of their right to charge whatever they

1 want, not out of the blue, but in any case --
2 many cases, like, take internet crimes and
3 things like that, there must be dozens of places
4 where the government could charge, and why don't
5 they just start with one and go through and wear
6 down the defendant?

7 MR. JOSHI: So let me address a couple
8 of things there.

9 First of all, if your suggestion is
10 that the government is -- is prosecuting in a
11 correct venue, well, then that should be fine,
12 and, you're right, there are sometimes many,
13 many venues under continuing crime statute that
14 -- that Congress has passed that defines crimes
15 as taking place in many venues. So, you're
16 right, the government can pick one of those
17 venues, but those would be proper venues.

18 I take the thrust of your question to
19 be, well, what if the government serially tries
20 to retry someone in the wrong venue? I don't
21 think that's realistic, and I'm going to give
22 you a few answers here, and I understand some
23 may be more satisfactory than others.

24 The first is that we think our rule
25 has been the dominant rule in the circuits and

1 in this country for hundreds of years. I think
2 Petitioner identified at the cert stage, I
3 think, just two cases, neither of which we think
4 actually stand -- adopt his principle. But I
5 don't think we've seen any suggestion that the
6 government has ever engaged in that kind of
7 practice. Petitioner had all the incentive in
8 the world, as amici did, to identify such a
9 case. They haven't been able to.

10 CHIEF JUSTICE ROBERTS: No, but, I
11 mean --

12 MR. JOSHI: Now I understand that --

13 CHIEF JUSTICE ROBERTS: -- you -- you
14 say that they're all going to be correct venues,
15 but often you don't know that until after
16 there's extensive pleading practice and
17 everything else and the government, you know, it
18 is an imposition on the defendant to have to
19 litigate with the government, whether or not
20 his, you know, vacation trip to wherever was
21 enough to establish venue there.

22 MR. JOSHI: Yeah, that's a fair point.
23 Sometimes it's going to be difficult. This is,
24 I think, one of those difficult cases. And I --
25 I -- but I took your question to be asking about

1 bad faith. I think, if it's a difficult case
2 and the government believes sincerely that venue
3 is appropriate, the jury agrees unanimously that
4 venue is appropriate, and the trial court agrees
5 that venue is appropriate, it seems -- I don't
6 think you could call that bad faith, you know,
7 in addition to the fact that --

8 JUSTICE GORSUCH: Why was this brought
9 in the Middle District of Florida, which -- I
10 mean, everyone seemed to -- you were alerted
11 pretty early on that that wasn't the right
12 venue. Are they just not that busy in the
13 Middle District?

14 (Laughter.)

15 MR. JOSHI: So -- so this was brought
16 in the Northern District.

17 JUSTICE GORSUCH: Sorry, the Northern
18 District. It should have been brought in the
19 Middle District or in Alabama.

20 MR. JOSHI: Yeah.

21 JUSTICE GORSUCH: I apologize. I got
22 the wrong district. So apologies to the Middle
23 District of Florida.

24 (Laughter.)

25 JUSTICE GORSUCH: They're obviously

1 very busy. Maybe the Northern District isn't.

2 MR. JOSHI: So I believe -- so I don't
3 know --

4 JUSTICE GORSUCH: We don't know?

5 MR. JOSHI: -- everything that went
6 into the prosecution decision, but I think the
7 Northern District of Florida was the natural
8 home for this because that's where all the harm
9 was felt, that's where the victim was, that's
10 where --

11 JUSTICE GORSUCH: Yeah, but none of
12 the -- none of the "crime" occurred there?

13 MR. JOSHI: I don't think that's
14 right.

15 JUSTICE GORSUCH: All right.

16 MR. JOSHI: We -- we -- we didn't
17 cross-petition for cert on it --

18 JUSTICE GORSUCH: Yeah.

19 MR. JOSHI: -- because it was
20 fact-bound, and remember the --

21 JUSTICE GORSUCH: The Eleventh
22 Circuit's wrong about that too? Go ahead.

23 MR. JOSHI: -- the jury agreed and the
24 appellate court agreed, and Petitioner hasn't
25 sought review of the other finding, which is

1 that the extortion count was proper --

2 JUSTICE GORSUCH: Okay.

3 MR. JOSHI: -- in the Northern
4 District. And so you --

5 JUSTICE GORSUCH: Let me ask you a
6 more fundamental question.

7 MR. JOSHI: Yeah.

8 JUSTICE GORSUCH: I'm sorry. I just
9 wondered if you happened to know, and you don't
10 know why it was brought in the Northern
11 District. That's fair.

12 Your colleague on the other side makes
13 an interesting point about Arundel's Case and
14 the other authorities you cite, that those had
15 -- had to do with challenging the indictment,
16 arresting the indictment, and not after a
17 sufficiency-of-the-evidence determination by the
18 fact-finder.

19 What say you?

20 MR. JOSHI: So I'm -- I'm not sure
21 that's right for a couple of reasons. One is
22 that -- and I admit this is -- I -- I -- I
23 couldn't find the author. It might be Lord
24 Hill, it might be someone else, but it's an
25 annotation to Coke's -- Coke on Littleton. It

1 -- it's in a footnote clearly added by the
2 editor, so at a later time, but in the early
3 1800s or even earlier. It's undated. But it
4 makes the point that arrests of judgment and
5 appeal are essentially treated the same for
6 these purposes. And, on that point, my second
7 point is --

8 JUSTICE GORSUCH: Well, how could that
9 be if there were no -- if there was no appeal?
10 Maybe you can explain that to me.

11 MR. JOSHI: Oh. Oh, so there -- there
12 -- there -- there -- there was a limited right
13 of appeal in England long before there was one
14 in -- in the -- in the federal system here. And
15 so that's going to lead me to my second point,
16 which is Rex against Welsh, which we cite in our
17 brief. That's from 1827, so it's post-founding.
18 But there's been no suggestion that that case
19 somehow represented a break in the English law.

20 There, the jury was directed to acquit
21 the defendant in Southwark because it became
22 apparent that the crime took place in London.
23 And then he was reindicted in London and -- at
24 the Old Bailey, and the judges gathered together
25 and they decided unanimously that his plea of

1 autrefois acquit was no good in London because
2 it was -- his acquittal was on venue grounds.

3 So I think that disposes of
4 Petitioner's objection here that there is
5 somehow this big difference between them.

6 I also think our modern case law
7 disposes of that objection. Again, he -- he
8 discusses Burks a lot, but Scott was decided the
9 same day, and both Burks and Scott overruled
10 several of the Court's earlier double jeopardy
11 cases, which they had just begun to have
12 experience with, and -- and -- and they -- they
13 decided -- of course, Burks I take no issue
14 with. What Burks did was overrule Brian. Brian
15 said that, if an appellate court reverses for
16 insufficient evidence, you could have a retrial.
17 And Burks said, no, we're not going to do that
18 because it's a verdict of acquittal, it ought to
19 be final, we don't always know why the jury
20 acquitted someone, and so benefit of the doubt
21 to the defendant.

22 That's not true when an appellate
23 court weighs in or a reviewing court, even if
24 it's the trial court, weighs in on an issue.

25 Now --

1 JUSTICE KAGAN: Can I -- can I take
2 you back to the Chief Justice's question? In
3 your brief at some point, you say, in
4 extraordinary circumstances where appropriate, a
5 court can dismiss with prejudice.

6 So what did you mean there? Is that
7 supposed to respond to the possibility of bad
8 faith? What's appropriate? What are
9 extraordinary circumstances?

10 MR. JOSHI: Yeah, I -- I think that's
11 right. The question presented in this case is
12 whether the Constitution compels a forbidding of
13 retrial. Our answer is no. But we don't think
14 the Constitution forbids that either. Congress,
15 for example, could pass a statute and say the
16 government gets one shot and that's it. That
17 would be perfectly constitutional.

18 And we think that if there is actually
19 an allegation of bad faith conduct on the part
20 of the government, like any litigant engaging in
21 bad faith conduct, courts have inherent powers
22 to discipline the litigants, and if a court
23 thinks that the government is walking in and
24 serially retrying someone just for the purpose
25 of harassing them in bad faith, it can issue a

1 preclusive order like that.

2 And we think that there's nothing in
3 the Constitution that forbids it. There may be
4 some other statutory law or something, but
5 nothing in the Constitution forbids it, and
6 that's what we were trying to say.

7 But, as I -- as I was saying to the
8 Chief Justice, I -- I really don't think this is
9 a likely possibility, and this is not an
10 argument that says, you know, trust us. This is
11 more an argument about trust human nature.
12 Like, prosecutors like convictions, and they
13 don't like reversals of convictions.

14 And so it wouldn't really make sense
15 for a prosecutor to deliberately try a defendant
16 in the wrong venue knowing that there's a risk
17 the jury might acquit, and then that's going to
18 be final, and then, even if the injure convicts,
19 knowing that the appellate court might reverse
20 the conviction --

21 JUSTICE JACKSON: But why does it all
22 have to come down to bad faith? I mean, you can
23 imagine a world in which there are -- there's a
24 nonfrivolous possibility that this crime was
25 committed, it's a complicated fraud crime, and

1 there are nine different places, you know, actus
2 reus is a part of it. And I guess I don't
3 understand why it matters that the government is
4 deliberately trying to do something to the
5 defendants.

6 Isn't there something to your friend
7 on the other side's point that the government
8 should not be allowed to in seriatim try this
9 defendant if it turns out that one after the
10 other after the other, a determination is made
11 that that's the wrong venue?

12 MR. JOSHI: No. I mean, you can
13 imagine a trial in which there's an uncounseled
14 -- uncounseled statement is introduced against
15 him. It gets reversed. Then he goes up, and an
16 un-Mirandized confession gets introduced against
17 him. That's reversed. Then there's -- evidence
18 in violation of the exclusionary rule is
19 introduced. That's reversed. But --

20 JUSTICE JACKSON: Right. But, at the
21 heart of it, I guess, is this question of
22 whether a venue determination is more like the
23 ones that you just articulated or like an
24 insufficiency determination. And your friend on
25 the other side says that when you present it to

1 a jury, as was done here, and when the
2 government, in my view, a little puzzlingly
3 says, we are okay with a jury instruction that
4 says you can acquit if the government hasn't
5 proven by clear and convincing evidence that
6 this is the right venue, why isn't that, like,
7 you know, tantamount to an insufficiency such
8 that if the government -- if the jury gets it
9 wrong, says the appellate court, then it's over,
10 the government doesn't get to come back and
11 marshal new evidence and -- and do it again?

12 MR. JOSHI: Because I think this Court
13 has rejected that principle, and I'll explain
14 why, but I just want to observe at the outset
15 that just because, you know, two things are
16 alike in one sense doesn't mean they're alike in
17 all senses. And I don't think -- just because
18 venue might go to the jury and the jury might
19 decide a question of venue doesn't make it like
20 an element or like an affirmative defense. You
21 know, juries decide statute of limitations as
22 well. Like, that's got nothing to do with --
23 with acquittal, but --

24 JUSTICE KAGAN: What do you think
25 would happen -- did I interrupt you? Sorry.

1 MR. JOSHI: If I -- if I could just
2 fully answer. I'm sorry, Justice Kagan.

3 Just the -- the -- I said this Court
4 has rejected that principle, and what I was
5 going to say there is illustrated by Evans
6 against Michigan on the one hand and Musacchio
7 against United States on the other.

8 In both cases, the courts were under
9 the misimpression that there was an extra
10 element of the crime that wasn't actually there.
11 In Evans, the defendant was acquitted for
12 insufficiency of the evidence with respect to
13 that element that wasn't actually an element.
14 And this Court said, sorry, acquittal is final.
15 That -- you know, that's the end of the story
16 because it goes to criminal culpability.

17 But, in Musacchio, exactly the same
18 thing happened. The jury was instructed to find
19 an extra element that wasn't actually an element
20 of the crime. The jury nevertheless convicted.

21 And on appeal, the defendant said,
22 hey, insufficient evidence for this element
23 that's not actually an element, and this Court
24 said, we don't care, it's not actually an
25 element. You're on appeal now. And, as a legal

1 ground, like, because it's not actually an
2 element, you're not going to get your conviction
3 overruled.

4 JUSTICE SOTOMAYOR: You're missing the
5 point there. If the jury convicts and convicts
6 wrong, you can get a new trial. But, if it
7 acquits, that's the whole purpose of the Double
8 Jeopardy Clause, and we did repeatedly, in Burks
9 and other cases, we have said the Double
10 Jeopardy Clause forbids a second trial for the
11 purpose of affording the prosecution another
12 opportunity to supply evidence which it failed
13 to muster in the first proceeding.

14 MR. JOSHI: Agree --

15 JUSTICE SOTOMAYOR: If a jury acquits,
16 it's saying you failed to muster.

17 MR. JOSHI: Yes.

18 JUSTICE SOTOMAYOR: If it convicts, it
19 says you did muster the evidence. But why
20 should we permit you the opportunity to retry
21 the case again for insufficient evidence?

22 MR. JOSHI: Because Scott tells us
23 that when a jury convicts and then a court
24 decides that the conviction was obtained on the
25 basis of some constitutional error, a retrial is

1 permissible if that error does not relate to
2 factual guilt or innocence.

3 Burks and Scott were decided the same
4 day. Every Justice in the majority in Scott was
5 in the majority in Burks, other than one who was
6 recused, I think, or didn't participate. I
7 don't -- I'm guessing he was recused.

8 So Burks and Scott, you have to read
9 them together, and the dividing line is whether
10 the legal basis for setting aside the conviction
11 goes to factual guilt or innocence. Venue does
12 not go to factual guilt --

13 JUSTICE KAGAN: What would --

14 MR. JOSHI: -- or innocence.

15 JUSTICE KAGAN: -- happen if -- if
16 there were a special verdict form and the jury
17 said, we're finding this defendant not guilty
18 and the reason we're doing it is because there
19 was no venue here? Could you retry?

20 MR. JOSHI: I think we could, and let
21 me -- let me just break it down. I mean, just
22 to be super-analytic about it, suppose there are
23 two questions. One, did the government prove
24 guilt beyond a reasonable doubt on all the
25 elements of the crime? Question two, did the

1 government prove venue by a preponderance or
2 whatever the standard of proof might be?

3 And in that case, I think, you know,
4 if -- if the jury answers yes and yes, that's
5 this case, we think retrial is permissible.

6 JUSTICE KAGAN: That wasn't my
7 question.

8 MR. JOSHI: Yeah, no, but I just want
9 to make sure we're on the same page. If the
10 jury answers yes and no, which I think was your
11 question, we -- we do think that -- we do think
12 that you could be retried in that -- in that
13 circumstance.

14 And just to round out the four
15 permutations, if the jury answers no and yes, so
16 guilty -- not guilty but right venue, obviously,
17 that's just like a regular old acquittal.

18 And if the jury answers no and no,
19 that's actually a tough question because venue
20 was wrong, so maybe they shouldn't have opined
21 on anything. But we think, under Ash against
22 Swanson and Yeager and that line of cases, we
23 could not retry a defendant in that scenario.
24 So that's my complete answer to -- to the
25 special verdict.

1 JUSTICE SOTOMAYOR: Does that apply --

2 JUSTICE KAGAN: That's all the boxes
3 in the matrix checked off.

4 MR. JOSHI: That's right. And -- and,
5 you know, speaking of special verdicts, you
6 know, Petitioner mentioned them when -- or, I'm
7 sorry, my friend mentioned them when he was up
8 here that, you know, special verdicts were never
9 used.

10 That's actually not correct. One of
11 the very cases he cites had a special verdict.
12 So this is Wright that he cites in his brief.
13 And in Wright, there was a special verdict, and
14 the jury, you know, found facts and said, well,
15 look, like, here are the facts we found, and,
16 you know, if -- if it -- if the Court determines
17 then, you know, that these facts took place in I
18 think it was Washington, D.C., then --

19 JUSTICE GORSUCH: Your -- your answer
20 to Justice Kagan, though --

21 MR. JOSHI: Yeah?

22 JUSTICE GORSUCH: -- seems to suggest
23 guilt on -- on elements, going to guilt or
24 innocence, but wrong venue, special verdict,
25 retrial permissible, I believe, is your answer.

1 What's left of the notion that the
2 wrong venue leads to an acquittal? I would
3 think that the government would have every
4 incentive in the world to have special verdict
5 forms with respect to venue in every case or at
6 least try very hard to get them.

7 MR. JOSHI: You know, I would have
8 thought the same thing, and somehow that doesn't
9 play out in practice.

10 JUSTICE GORSUCH: Well, it hasn't yet.

11 MR. JOSHI: Yeah.

12 JUSTICE GORSUCH: But, after today,
13 why wouldn't it?

14 MR. JOSHI: Maybe I think courts -- my
15 understanding from those who -- who practice in
16 the courts is that district courts are hesitant
17 to give --

18 JUSTICE GORSUCH: Oh, they won't do
19 it. They won't do it. Okay. I -- I -- I got
20 the practical argument. But, if we take
21 seriously the founding evidence that does
22 suggest that a jury's verdict on -- of acquittal
23 on venue means something, then why would it be
24 different if it comes in the form of a special
25 verdict rather than a general one?

1 MR. JOSHI: Oh, I think -- I think I
2 was making maybe the opposite point. I think
3 Rex against Welsh shows that a jury's verdict of
4 acquittal when we can definitively say it is on
5 venue grounds but not --

6 JUSTICE GORSUCH: You've got that one
7 case, I've got that. Okay. All right.

8 MR. JOSHI: It's -- it's cited -- I
9 mean, look like --

10 JUSTICE GORSUCH: It's a good case.

11 MR. JOSHI: It's a good case, and I --
12 I will also point out --

13 JUSTICE KAVANAUGH: It's an English
14 case after the founding. I'm not sure --

15 MR. JOSHI: That -- that's true.

16 JUSTICE KAVANAUGH: Yeah.

17 MR. JOSHI: That's true. But there's
18 no suggestion --

19 JUSTICE KAVANAUGH: I'm not sure why
20 we rely on that.

21 MR. JOSHI: There is no suggestion
22 that it represented a break from the law, and we
23 know that later additions of Coke and Hale and
24 Hawkins' treatises all cite Welsh as being in
25 line with all the other cases, including

1 Arundel's Case.

2 And I guess my point here is that the
3 framers were familiar with all of these sources,
4 and I admit they're sparse. I know you can poke
5 holes and say, well, it's not quite exactly the
6 same. But here's the thing: A hundred percent
7 of them support our rule. Not a single one
8 supports Petitioner.

9 JUSTICE GORSUCH: But a hundred
10 percent of them also support the rule that a
11 jury's verdict of acquittal on venue meant
12 something and that was enough and that was the
13 end of the case.

14 MR. JOSHI: No, that --

15 JUSTICE GORSUCH: And there's a lot --
16 we've got a lot of evidence on that too.

17 MR. JOSHI: No, no, Justice --

18 JUSTICE GORSUCH: At least within a
19 general verdict, you -- you would -- a general
20 verdict, good to go.

21 MR. JOSHI: Yes.

22 JUSTICE GORSUCH: A special verdict,
23 the rule somehow flips.

24 MR. JOSHI: Yes, that's right.

25 JUSTICE GORSUCH: What's -- yeah.

1 What's left of the general rule?

2 MR. JOSHI: Because the -- well, I --

3 JUSTICE GORSUCH: Other than district
4 courts won't let you do it.

5 MR. JOSHI: -- I -- I think -- I think
6 you've got the general rule wrong.

7 JUSTICE GORSUCH: Okay.

8 MR. JOSHI: We think the general rule
9 was that an acquittal, if it was on venue
10 grounds, as in Welsh, did not preclude retrial.
11 But a general verdict of acquittal categorically
12 precludes retrial under the Double Jeopardy
13 Clause.

14 This Court in Scott, I think it's
15 Footnote 5, it might be Footnote 4, I can't
16 remember, specifically said that that is an
17 American rule that postdates the founding and is
18 a deviation from the original meaning of the
19 Constitution, but well settled and we'll just
20 keep it.

21 So that rule is very
22 defendant-protective. It's the rule that was
23 announced in Ball. But it's strange that
24 Petitioner relies on Ball, because Ball actually
25 involved three defendants. One was acquitted

1 initially. The other two were convicted. It
2 comes up to this Court in 1891, when appeal is
3 allowed finally, and this Court says venue was
4 bad. It wasn't adequately alleged. Reverses
5 the convictions.

6 It goes back down. Venue is now
7 adequately alleged, proved to be in the same
8 venue, so not quite the issue here. All three
9 are convicted again, as -- as Petitioner notes.

10 It comes back up to this Court, and
11 this Court says, all right, the defendant who
12 was originally acquitted, his is bad. You can't
13 retry him. Once he was acquitted, that was it,
14 that's the end of the story. But the other two
15 whose convictions we reversed because of failure
16 to prove venue, those new convictions can stand.

17 So I don't think Ball helps him all
18 that much. All Ball does is establish the rule
19 I just mentioned, the rule I mentioned in my
20 introduction, which is that a general verdict of
21 acquittal, yes, preclusive, final. It's
22 different when the jury convicts and then a
23 reviewing court is determining that the
24 conviction was obtained by constitutional error.

25 JUSTICE SOTOMAYOR: Counsel --

1 MR. JOSHI: In that case --

2 JUSTICE SOTOMAYOR: -- I had the same
3 thought that Justice Gorsuch did and you did. I
4 did a little research. We have a case that
5 dissuades district court justices from --
6 judges from doing special interrogatories,
7 because I too as a district court judge never
8 had someone ask me and I wondered why.

9 So there is a Supreme Court case that
10 discourages special interrogatories in criminal
11 cases, and I think that's the reason why.

12 But you're now going much further,
13 because you're suggesting to me that a whole
14 bunch of special issues, like a dispute about
15 the date a crime occurred and whether it's in
16 the statute of limitations, you're suggesting
17 that if a reviewing court found the government
18 failed to supply sufficient evidence to negate a
19 statute of limitations defense, that the
20 government could try that case again and collect
21 more evidence.

22 Why not?

23 MR. JOSHI: I -- I'm not --

24 JUSTICE SOTOMAYOR: Because you're
25 saying there's now a conviction, the court --

1 reviewing court says no, this didn't happen
2 within the statute of limitations, that you
3 could collect more evidence and have another go
4 at it because that wasn't a decision on the
5 sufficiency of the evidence.

6 It's an affirmative defense, just like
7 you're saying, treat it like venue, it goes --
8 doesn't go to the culpability. The guy did
9 commit the crime, just on a different date. And
10 you're suggesting that you can, after a
11 conviction, retry.

12 MR. JOSHI: No, that wouldn't work for
13 a different reason, which is that it would be
14 preclusive that the crime is outside the statute
15 of limitations. I don't think the government
16 could then under law-of-the-case principles
17 prove that it actually, in fact, is in the
18 statute of limitations.

19 Venue is different because venue --

20 JUSTICE SOTOMAYOR: Why?

21 MR. JOSHI: -- you go and -- because
22 --

23 JUSTICE SOTOMAYOR: You got -- you got
24 new evidence.

25 MR. JOSHI: Because you'd be going to

1 a different venue, which is -- which would not
2 be precluded under the -- the -- the -- the
3 findings that have been made in the earlier --

4 JUSTICE SOTOMAYOR: Isn't the -- isn't
5 the issue, though, always why are we giving the
6 government another chance at an apple it already
7 took a bite at? And isn't that the center of
8 our entire double jeopardy ruling? If the jury
9 is going to determine whether you have
10 sufficient evidence or not to prove either an
11 element, a defense, a material I don't know
12 what, because our case law is very confusing as
13 to what "venue" is, we seem all to -- to agree
14 or people assume it's not an element of the
15 crime, yet we submit it to the jury, and yet we
16 do put the government to a burden of proof, and
17 yet we don't want to call it an element. It's a
18 little bit like that platypus, this mixed-up
19 animal, isn't it?

20 MR. JOSHI: It -- it is a little mixed
21 up. And I -- I admit, reading the historical
22 sources, I'm not entirely sure why it gets
23 submitted to the jury. All I can rest on here
24 is this Court's trilogy of double jeopardy cases
25 decided on the same day, including --

1 JUSTICE SOTOMAYOR: Well --

2 MR. JOSHI: -- Burks and Scott.

3 JUSTICE SOTOMAYOR: -- that's my
4 problem with the historical record, because the
5 historical record thought about it as a court
6 who tried a person without venue had no
7 jurisdiction, and -- and we have destroyed that
8 concept here because we say the district court
9 has jurisdiction; it's just not this particular
10 venue.

11 MR. JOSHI: Look, this -- this Court,
12 until -- all of its early cases addressing venue
13 did treat it as jurisdictional. You're
14 absolutely right. It's only in the middle of
15 the 20th Century that it moved away from that
16 understanding of it.

17 So, if you want the original
18 understanding, then -- of -- of what the framers
19 would have expected to be the result of a
20 violation of the venue or vicinage clauses, I
21 think that's pretty straightforward.

22 But, if you're having trouble with the
23 historical sources, I guess I would say just
24 look at Burks and Scott together, look at those
25 double jeopardy principles, and the -- the

1 bright line, the one that was then applied in
2 Evans, one that was applied in Smith against
3 Massachusetts has been, does it go to factual
4 guilt or innocence? Does it go to criminal
5 culpability?

6 JUSTICE JACKSON: Can I --

7 JUSTICE KAGAN: Does Mr. Smith have a
8 live double jeopardy claim?

9 MR. JOSHI: What do you -- oh, are you
10 asking whether the Eleventh Circuit's decision
11 forecloses it? No, I don't think so. I think,
12 if we attempted to re prosecute him, he would be
13 entitled to raise a double jeopardy defense if
14 he want -- you know, if that came to pass.

15 JUSTICE KAGAN: But there would have
16 to be some steps taken to -- by -- by the
17 government?

18 MR. JOSHI: Yeah, that's right.

19 JUSTICE KAGAN: I mean --

20 MR. JOSHI: That's right. Yeah, we
21 would have to actually reindict him. It would
22 actually have to be within the statute of
23 limitations. His -- his offense conduct, I
24 believe, took place in, like, May and June of
25 2018, so we're coming up on five years. So it's

1 not at all clear that that would be -- that
2 would be possible.

3 I do want to address --

4 JUSTICE JACKSON: Can I -- I'm sorry.
5 Before we leave too far Justice Sotomayor's
6 point, so you've been saying that the test is
7 does it go to factual guilt or innocence as to
8 whether or not a person can be retried, but then
9 you also admitted, I thought, in response to her
10 that a jury finding related to the timing of the
11 crime vis-à-vis a defendant claiming outside the
12 statute of limitations would be preclusive.

13 Did you say that? Did you say that if
14 a jury were to find based on evidence presented
15 that this crime took place on X date and that
16 date is outside the statute of limitations, then
17 the government could not retry the person?

18 MR. JOSHI: Correct, because the jury
19 would have found it's outside the statute of
20 limitations.

21 JUSTICE JACKSON: So you couldn't go
22 to another jury to -- to have that fact --

23 MR. JOSHI: Correct.

24 JUSTICE JACKSON: -- redone. So what
25 -- what about a scenario in which there's a

1 special verdict form that asks the jury to
2 determine where this crime took place? So
3 similar to her what -- you know, when did it
4 happen. Now the question is where. And the
5 jury has a line, and they write Los Angeles or
6 Detroit or wherever. If they pick the wrong
7 place, sufficiency of the evidence, is that
8 going to be a problem in terms of the government
9 venue issue?

10 MR. JOSHI: So, if -- if I understand
11 the question correctly, the jury picks a place
12 and that place is the correct venue?

13 JUSTICE JACKSON: No, incorrect --

14 MR. JOSHI: Oh.

15 JUSTICE JACKSON: -- venue.

16 MR. JOSHI: It's incorrect venue.

17 JUSTICE JACKSON: The jury picks a
18 place --

19 MR. JOSHI: Oh. Well, then -- then
20 that finding is preclusive, right?

21 JUSTICE JACKSON: Well, that's --

22 MR. JOSHI: Like, the jury has found
23 that it took place in a particular location.

24 JUSTICE JACKSON: Right.

25 MR. JOSHI: Then that's the finding of

1 the jury. I -- I think our -- our submission
2 here --

3 JUSTICE JACKSON: But wait, why
4 doesn't that totally undermine the government's
5 position in this case?

6 MR. JOSHI: Oh, no. Perhaps I
7 misunderstood the question. Our -- our
8 submission here is that where the jury finds
9 venue is appropriate and then a reviewing court
10 determines that, in fact, as a matter of law,
11 venue is inappropriate, in those circumstances,
12 a retrial is permissible just --

13 JUSTICE JACKSON: So it's not really a
14 special verdict versus a general verdict issue?
15 I was sort of responding to Justice Gorsuch's
16 point too.

17 MR. JOSHI: The -- the --

18 JUSTICE JACKSON: If we have a special
19 verdict where it's clear that the jury is
20 picking a place that is -- turns out on appeal
21 is the wrong venue, what result?

22 MR. JOSHI: Oh. So, again, I just
23 want to make sure --

24 JUSTICE JACKSON: Yes.

25 MR. JOSHI: -- I understand your

1 question.

2 JUSTICE JACKSON: Yes. Yes.

3 MR. JOSHI: So the jury, on a special
4 verdict, says we find all the elements of the
5 crime --

6 JUSTICE JACKSON: Yes.

7 MR. JOSHI: -- have been proved beyond
8 a reasonable doubt, and we find that this crime
9 takes place in -- every single element of this
10 crime took place in Washington, D.C., and all of
11 these things happened in Washington, D.C., but
12 trial is in the District of Maryland.

13 JUSTICE JACKSON: Correct.

14 MR. JOSHI: What then?

15 JUSTICE JACKSON: Correct.

16 MR. JOSHI: Then, in that case,
17 retrial would be permissible.

18 JUSTICE JACKSON: Would be?

19 MR. JOSHI: Would be. Would be, yeah.
20 That's our -- that's the natural result of our
21 position.

22 JUSTICE JACKSON: All right.

23 MR. JOSHI: Right. Now, again, this
24 basically never happens, and venue errors are
25 also, you know, quite rare, but -- but I do want

1 to address the point that -- that --

2 JUSTICE KAVANAUGH: Why should venue
3 go to the jury?

4 MR. JOSHI: I'm not entirely sure. I
5 think Petitioner is right that as a matter of
6 historical practice, it often did go to the
7 jury. Of course --

8 JUSTICE KAVANAUGH: But just today.

9 MR. JOSHI: Today? I'm not sure it
10 has to, except for this Court's decision in
11 Jackalow, which is from 1862. That -- that
12 decision said that there were -- it came up to
13 the Court, not on appeal, because there was no
14 appeal; it was on a division of the circuit
15 judges this Court could review discrete issues
16 of law in the pre-appeal era. And it came up to
17 the Court because the circuit judges disagreed
18 on whether a particular crime took place within
19 the boundary of New York or not, or outside of
20 New York, in which case the defendant could be
21 tried in New Jersey.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas?

25 Justice Alito?

1 JUSTICE ALITO: I had two questions I
2 hope are quick questions. The first is I'm not
3 quite sure I understand what you're saying about
4 the double -- double jeopardy question, because
5 the Eleventh Circuit said, 15a of the petition
6 to the -- the appendix to the cert petition,
7 "The Double Jeopardy Clause is not implicated by
8 a retrial in a" -- "in a proper venue after we
9 vacate a conviction for improper venue."

10 So didn't the Eleventh Circuit decide
11 that question, and having held against
12 Petitioner on that question, would not an
13 affirmance by this Court preclude the assertion
14 later of a double jeopardy claim?

15 MR. JOSHI: I don't think so, and
16 maybe --

17 JUSTICE ALITO: Why? Why?

18 MR. JOSHI: Yeah.

19 JUSTICE ALITO: Why?

20 MR. JOSHI: Maybe -- maybe I'm slicing
21 the baloney a little thin here, but I viewed
22 Petitioner's claim as being that he wanted a
23 judgment of acquittal that would be preclusive,
24 and the court denied him that relief.

25 The reason it denied him the relief

1 was because it thought that double jeopardy
2 didn't compel it to give him that relief. But I
3 don't think that would preclude a bona fide
4 double jeopardy challenge if there were actually
5 to be another prosecution. All that he would
6 have is a nonpreclusive judgment from the
7 Northern District of Florida by virtue of the
8 Eleventh Circuit's judgment.

9 But even though the reason for it was
10 double jeopardy, I don't think that alone would
11 be preclusive. That's just the reasoning of the
12 court. The court could have just denied him
13 that relief for any reason.

14 JUSTICE ALITO: Okay. Second
15 question. Do you think that Burks or Brian is
16 more consistent with the original understanding
17 of the meaning of the Double Jeopardy Clause?

18 MR. JOSHI: So we -- we take Burks as
19 it comes. Scott suggested that Brian might have
20 been more consistent with the original meaning,
21 but we don't take an issue on that. I think
22 even Scott accepted that the times have moved on
23 and that a general verdict of acquittal, just
24 full stop, is -- is always preclusive.

25 JUSTICE ALITO: So, if that's

1 correct -- I guess I'm going to add a third
2 question. If that is -- if that is correct,
3 would we not have to extend our double jeopardy
4 precedents even further beyond the original
5 meaning of the Double Jeopardy Clause in order
6 to find that double jeopardy precludes retrial
7 in a case like this where, on appeal, it is
8 decided that the -- that venue was improper?

9 MR. JOSHI: You would. You would have
10 to stray further and create an exception to
11 Scott's otherwise quite categorical rule.

12 CHIEF JUSTICE ROBERTS: Anything
13 further, Justice Sotomayor? No?

14 Justice Kagan?

15 JUSTICE KAVANAUGH: Can you just
16 finish your answer to my question --

17 MR. JOSHI: Yes.

18 JUSTICE KAVANAUGH: -- about -- about
19 why venue should go to the jury? You were in
20 1860, I think.

21 (Laughter.)

22 MR. JOSHI: Yes. So -- so Jack -- so
23 Jack -- so Jackalow was a division of -- of
24 authority on whether -- like, all the facts were
25 found by the jury, like it took place on this

1 ship which was docked here, it was an assault,
2 but the question was whether it was within
3 New York's territorial waters or without.

4 And this Court, on reviewing it, said,
5 well, we actually don't know because we need to
6 know where New York's boundary is in waters, and
7 that's going to require some maps and facts that
8 we don't have, so send it back for a new trial
9 so that the jury can, like, get those facts in
10 evidence.

11 But Jackalow was very clear that the
12 ultimate determination of venue was for the
13 court, not the jury. So, given Jackalow, it's
14 puzzling to me why we -- we continue to just
15 send it to the jury, but, like, that's what we
16 do. That's what prosecutors do. That's what we
17 all do.

18 Certainly, nothing forbids sending it
19 to a jury. And just like the extra element
20 thing, we can send all sorts of things to the
21 jury.

22 JUSTICE KAVANAUGH: And nothing
23 forbids not sending it to a jury. You're just
24 saying --

25 MR. JOSHI: Right.

1 JUSTICE KAVANAUGH: -- it's just the
2 way it's developed.

3 MR. JOSHI: It's the way it's
4 developed.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 Justice Jackson?

9 JUSTICE JACKSON: So I did not
10 understand this to be a double jeopardy case,
11 and I'm trying to understand, could we enter a
12 judgment on the QP in this case on these facts
13 that does not speak to this defendant's double
14 jeopardy rights?

15 MR. JOSHI: I -- it's a difficult
16 question because, at the petition stage, I
17 think, as you observed in -- in talking to my
18 friend, his argument was all about double
19 jeopardy. He claimed that venue was an element
20 of the crime and, therefore, forbidden by double
21 jeopardy.

22 On the merits, he's totally abandoned
23 that argument, and so I -- I'm not entirely
24 sure.

25 JUSTICE JACKSON: What if -- what

1 if -- would the government object to looking at
2 this as homing in on the particular request that
3 he is making?

4 So you said it in response to Justice
5 Alito, which is he's requesting per the vicinage
6 and venue clauses of the Constitution a judgment
7 preclusive of the government's ability to --
8 to -- to retry him, and I guess one could say
9 that the Constitution, those clauses don't give
10 rise to that remedy without speaking to, if the
11 government were to eventually or in the future
12 seek to retry him, what the Double Jeopardy
13 Clause would say about it.

14 MR. JOSHI: Yeah, I think that would
15 be fine. So you could write a -- an opinion
16 that says -- I mean, this would be possible.
17 You could write an opinion that says, look, the
18 framers codified the venue and vicinage rights
19 in the Constitution, they tweaked them a little
20 bit, you know, they changed county to state and
21 vicinage to district, but they didn't touch the
22 remedial principles that accompany that right,
23 that old soil remains intact.

24 When the framers wanted to address
25 retrial, they did so in the specific clause of

1 double jeopardy, so we're not going to go
2 hunting for a retrial remedy in the silence of
3 the venue and vicinage clauses, and Petitioner
4 doesn't claim --you know, doesn't raise or has
5 abandoned his double jeopardy argument. Full
6 stop. Affirm.

7 JUSTICE JACKSON: And, really, that
8 argument isn't ripe because the government
9 hasn't sought to retry him, or has it at this
10 point?

11 MR. JOSHI: No, we -- we have not.
12 And, you're right, we think the argument wasn't
13 ripe, but we made that point in our brief in
14 opposition, obviously, unconvincingly, and so --

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Rebuttal, Mr. Deger-Sen?

19 REBUTTAL ARGUMENT OF SAMIR DEGER-SEN

20 ON BEHALF OF THE PETITIONER

21 MR. DEGER-SEN: Thank you, Mr. Chief
22 Justice. Four quick points.

23 On the historical evidence, I -- I
24 think it was telling just how remarkably thin it
25 was, the -- the -- the -- the -- the

1 government's answer was on that. They cited a
2 treatise that I don't know what they're
3 referring to and I've never heard of. If the
4 Court wants supplementary briefing on that
5 treatise, we're happy to do it, but I don't know
6 what they're referring to.

7 And then *Rex v. Welsh*, a post-founding
8 English case, and that case was the indictment
9 was in the general Quarter Sessions in
10 Southwark, which was a court of limited
11 jurisdiction, and the ruling was very much about
12 the fact that because of its jurisdictional
13 limitations, it was not a court of general
14 jurisdiction, that the judgment there wouldn't
15 be preclusive.

16 But that has no implications here.
17 The government agrees it's not jurisdictional.
18 The framers clearly didn't incorporate the
19 jurisdictional principles of English common law,
20 certainly not jurisdictional principles of later
21 English common law into the Constitution.

22 So I just -- if that's the best
23 historical evidence, I think it underscores that
24 the dominant practice here was the venue was
25 respected and treated just the same as anything

1 else that went to a general verdict of
2 acquittal.

3 On the case law, I don't -- again, you
4 know, they cite Musacchio. That's an
5 instructional error case. And Scott was a
6 dismissal for preindictment delay.

7 Now it happened after jeopardy
8 attached, but it was not a sufficiency-of-the-
9 evidence case. The sufficiency-of-the-evidence
10 case is Burks, and in Burks, this Court said an
11 -- an appellate sufficiency ruling is the same
12 thing as a jury sufficiency ruling.

13 Those other cases the government cites
14 did not involve sufficiency evidence. And the
15 same thing was true for the people who were
16 convicted in Ball. Those -- those individuals
17 didn't have a sufficiency-of-the-evidence
18 ruling. The government never took its evidence
19 to venue and failed. And that's what happened
20 here. The appellate -- the Eleventh Circuit
21 said the government's evidence failed. That
22 leads to acquittal under this Court's settled
23 precedent.

24 On the idea of no risk -- further, on
25 the idea of no risk for zero prosecution, the

1 government's answer is just trust us. And I
2 think Justice Story's statement here is very
3 telling. He said, there is little danger indeed
4 that Congress would ever exert their power in
5 such an oppressive and unjustifiable manner, but
6 upon a subject so vital to the security of the
7 citizen, it was fit to leave as little as
8 possible to mere discretion.

9 If that's true, how could it possibly
10 be the case the framers would have contemplated
11 a remedy that did allow just at the government's
12 discretion being shipped to London and then to
13 Manchester or maybe even being retried in London
14 multiple times. The government doesn't even
15 disclaim the Ninth Circuit's rule, where you can
16 just keep being prosecuted in the same
17 jurisdiction.

18 And then -- and I -- I think, Justice
19 Gorsuch, you're absolutely right to say the
20 government is going to request special verdicts
21 in every case, and you can't imagine a rule
22 that's more antithetical to the rule at the
23 founding when not only were special verdicts not
24 used in situations like this, a court couldn't
25 even require a jury to come back with special

1 verdicts and they'll be required in every case.
2 That is completely contrary to the original
3 intent here.

4 And, finally, on the question of
5 remedy, I mean, as Justice Alito said, the --
6 the -- the double jeopardy question was
7 adjudicated against us in what under any
8 ordinary principle is not dicta, it's something
9 that would be preclusive as exactly the kind of
10 judgment people challenge all the time, and the
11 Court then said the remedy for improper venue is
12 vacatur of the conviction, not acquittal or
13 dismissal with prejudice.

14 So, I mean, I think that's absolutely
15 -- you know, we -- we have the opposite of what
16 we're asking for. Our question presented asked
17 for an acquittal barring reprosecution of the
18 offense. What we have is a judgment that says
19 you absolutely do not get that. You have the
20 opposite of it. And it absolutely would bar us
21 from -- from raising a double jeopardy case in
22 another instance.

23 And to Justice Jackson's question
24 about ripeness, this -- this is exactly the same
25 procedural posture as *Burks*, which was a double

1 jeopardy case.

2 In Burks, you had an order from the
3 court of appeals basically saying the
4 government's case fails on insufficiency of the
5 evidence, but a retrial is permissible. That's
6 exactly what the Eleventh Circuit did here.
7 This Court reviewed that on certiorari and
8 reviewed -- and reversed on double jeopardy
9 grounds. That is on all fours with what we have
10 in this case.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. The case is submitted.

13 (Whereupon, at 11:25 a.m., the case
14 was submitted.)

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