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PERSPECTIVE

Giving full effect to a jury acquittal

By Jeffrey L. Bornstein and Andrew G. Spore

The U.S. Supreme Court will hear oral arguments Tuesday in an important double jeopardy case that asks "whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the double jeopardy clause to the issue-preclusive effect of an acquittal." Based on Supreme Court precedent, we believe the court is likely to hold that, where a defendant has been found not guilty by a jury, the defendant's double jeopardy rights prohibit a retrial of the same underlying facts in connection with a different charge in a subsequent trial, even where the defendant has consented to severance of the charges.

In *Currier v. Commonwealth of Virginia*, the defendant was charged with breaking and entering, grand larceny and being a felon in possession of a firearm. All three counts arose out of the theft of a large safe that contained cash and guns stolen from the home of a Virginia resident. Currier was alleged to be a participant in the underlying theft and, in the course of that crime, to have come into possession of the firearms in question.

Virginia law provides that "evidence that a defendant has committed crimes other than the offense for which he is being tried is highly prejudicial." But proving a felon-in-possession charge requires proof of a prior felony conviction. Virginia law therefore mandates that, unless both the commonwealth and the defendant agree to a single proceeding, "a trial court *must* sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction" (emphasis added). Accordingly, the trial court ordered severance, and Currier did not oppose. The commonwealth decided that Currier would be tried first as to the charges of breaking and entering and grand larceny. A jury acquitted him of those charges.

To retry a different charge on precisely the same underlying facts with the same witnesses but before a different jury would unfairly give the government a mulligan and would undermine the finality of the first jury's acquittal.

When the commonwealth pressed forward with the felon-in-possession trial, it sought to use the same witnesses and evidence adduced in the first trial. Currier argued that the issue of his involvement in the theft of the safe had been definitively decided by the jury in his first trial, and that the commonwealth could not therefore relitigate that issue to try to prove that Currier possessed the firearms while he possessed the stolen safe. Based on the issue preclusive effect of the acquittal, Currier asked the court to dismiss the felon-in-possession charge without trial, because the commonwealth had proffered no evidence in support of any alternative theory of possession by Currier. The trial court denied these requests, and Currier was convicted at his second trial; the commonwealth presented a substantially improved case and was permitted to present evidence of Currier's prior felony conviction, along with other circumstantial evidence that had been excluded from the first trial on procedural grounds. The Virginia Court of Appeal and its Supreme Court affirmed Currier's conviction, finding that Currier's consent to severed proceedings had waived his right to any issue preclusive effect of the acquittals obtained in the first trial.

The key issue is whether a defendant should be forced to choose between a single trial wherein prejudicial evidence is freely admitted and a severed proceeding wherein a finding of innocence by the jury in the first trial will have no bearing whatsoever on the second. We think that the U.S. Supreme Court will find that, even given Currier's consent to severance, the acquittals in this case preclude a retrial of the fact of Currier's involvement in the underlying robbery.

The rule of issue preclusion was imported from the civil law by Supreme Court Justice Oliver Wendell Holmes Jr., who remarked that this safeguard should be at least as robust in criminal proceedings as it is in civil. In 1970, the Supreme Court confirmed that issue preclusion is an aspect of the Constitution's protection against double jeopardy, holding in *Ashe v. Swenson* that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties." The nature of this right was well described by Judge Henry Friendly in *United States v. Kramer*, a decision relied on by the *Ashe* court. Judge Friendly wrote, "The Government is free, within the limits set by the Fifth Amendment, to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial."

There is little reason to think that the Supreme Court will move away from this approach. As recently as 2009's *Yeager v. United States*, the court has reinforced the *Ashe* holding. In a majority opinion joined by both Chief Justice John Roberts and Justice Anthony Kennedy, the court wrote that "[a] jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it," and found that the defendant's acquittal on certain charges in a mixed verdict could preclude the government from retrying that defendant as to other counts that had resulted in hung jury in the same trial. And the lower federal courts have followed this rule faithfully, as then-Judge Neil Gorsuch observed, writing for the 10th U.S. Circuit Court of Appeals in *United States v.*

Wittig, the double jeopardy clause does not just prohibit subsequent trials for the same offense, but also "restrict[s] the proof the government might seek to use" at the second trial, by virtue of the issue preclusive effect of the first trial.

In Currier's case, the first jury found that he did not participate in the robbery of the safe that contained the firearms. The commonwealth already had its bite of the apple as to this particular set of facts, and it failed to prove Currier's involvement. To retry a different charge on precisely the same underlying facts with the same witnesses but before a different jury would unfairly give the government a mulligan and would undermine the finality of the first jury's acquittal. In the criminal law, an acquittal by jury is singular, sacrosanct, and should possess the same trappings of finality that attach to final judgments in the civil context.

Currier does not dispute that the commonwealth would have the power to try him as a felon-in-possession if it had an alternative theory as to how he came to possess the firearms in question. But the commonwealth sought to prove facts against Currier in his second trial that had necessarily already been decided in Currier's favor by the first jury's acquittal.

There are many reasons why a defendant may seek or consent to severance, and many jurisdictions have rules like Virginia's, which require or strongly favor severance of certain types of charges. For instance, *Turner v. Arkansas*, a decades-old double jeopardy case relied on by Currier, itself involved mandatory severance of murder charges from other charges under Arkansas law. These procedural safeguards are designed for the benefit of the defense, to avoid undue prejudice and ensure a fair trial. Defendants should not have to choose between their right against double jeopardy and the protections against prejudice wisely adopted by many states or imposed by many jurists. As Currier points out, the rights at issue are not incompatible and to honor both presents no great burden on the government or the judiciary, but can make all the difference to a criminal defendant.

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