No. 16-___

IN THE

Supreme Court of the United States

MICHAEL N. CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael N. Currier respectfully petitions for a writ of certiorari to review the judgment of the Virginia Supreme Court.

OPINIONS BELOW

The order of the Virginia Supreme Court (Pet. App. 1a) is published at 292 Va. 737. The opinion of the Virginia Court of Appeals (Pet. App. 2a) is published at 779 S.E.2d 834.

JURISDICTION

The Virginia Supreme Court entered its judgment on December 8, 2016. Pet. App. 1a. On February 14, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including Sunday, May 7, 2017, No. 16A810, making it due Monday, May 8, 2017 under S. Ct. Rule 30.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ."

STATEMENT OF THE CASE

This case presents an important question, over which federal courts of appeals and state high courts are openly and intractably divided, concerning the issue preclusion component of the Double Jeopardy Clause.

A. Legal background

The Double Jeopardy Clause of the Fifth Amendment protects a person from being "twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. The Clause embraces the principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Yeager v. United States*, 557 U.S. 110, 117-18 (2009) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)).

This principle carries "particular significance" when an initial trial results in an acquittal. *United States v. Scott*, 437 U.S. 82, 91 (1978). Our criminal justice system is built on the premise that "[a] jury's verdict of acquittal represents the community's collective judgment" that the prosecution has failed to prove its allegations. *Yeager*, 557 U.S. at 122. Accordingly, an acquittal's finality "is unassailable," *id.* at 122-23, and "absolute," *Burks v. United States*, 437 U.S. 1, 16 (1978).

To protect the integrity of acquittals, the Double Jeopardy Clause embodies the doctrine of issue

preclusion, also known as collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970); *see also Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 n.1 (2016) (preferring the term "issue preclusion" to "collateral estoppel"). Issue preclusion dictates that where a jury's acquittal has necessarily decided an issue of ultimate fact in the defendant's favor, the Double Jeopardy Clause bars the prosecution "from trying to convince a different jury of that very same fact in a second trial." *Bravo-Fernandez*, 137 S. Ct. at 359. Particularly now that "prosecutors [can] spin out a startlingly numerous series of offenses from a single alleged criminal transaction," the issue preclusion doctrine ensures that individuals who are acquitted cannot be forced to defend a second time against functionally the same allegations. *Ashe*, 397 U.S. at 445 n.10.

B. Factual and procedural background

1. In March 2012, a large safe containing approximately $71,000 in cash and twenty firearms was stolen from the home of Paul Garrison II in Albemarle County, Virginia. A few days later, police recovered the safe from a nearby river. It had been forcibly opened. All twenty firearms remained in the safe, but most of the cash was gone.

A neighbor reported that she had seen a pickup truck leaving the Garrison residence around the time of the theft. The police linked that truck to Garrison's nephew, Bradley Wood. Executing a warrant to search Wood's truck, the police found metal shavings and insulating material in the truck's bed. These items appeared to match materials collected from the floor of the Garrison residence, near where the safe

had been. The police also collected a cigarette butt from the bed of the truck.

The Commonwealth of Virginia charged Wood with the theft. After initially denying his involvement, he pleaded guilty. Hoping for a more lenient sentence, Wood began cooperating with the police and implicated his cousin as an accomplice. *See* Va. Ct. App. Jt. App. ("Jt. App.") 188, 228-29. The detective, however, believed that Wood was lying and declined to pursue charges against the cousin. Wood then claimed that petitioner had participated in the theft. The two men had met in prison and had sold firewood together after their release. *Id.* 401-02, 414.

2. The Commonwealth indicted petitioner on three charges: (i) breaking and entering, (ii) grand larceny, and (iii) possessing a firearm after being convicted of a felony. Pet. App. 4a. The firearm charge was based on the theory that he had briefly handled the guns inside the safe while removing the cash.

In Virginia, as elsewhere, "evidence that a defendant has committed crimes other than the offense for which he is being tried is highly prejudicial" and generally "inadmissible." *Hackney v. Commonwealth*, 504 S.E.2d 385, 388 (Va. Ct. App. 1998) (en banc). Therefore, "unless the Commonwealth and defendant agree to joinder, 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." *Id.* at 389; *see also* Pet. App. 9a.

The parties acceded to that procedure here. Trying all three charges simultaneously would have unduly prejudiced petitioner by bringing his prior

convictions to the attention of the jury to which the breaking-and-entering and grand larceny charges would be tried. *See* Pet. App. 9a. Accordingly, the trial court severed the felon-in-possession charge from the other two charges. *Id.* 4a.

3. The Commonwealth elected to first try petitioner for breaking and entering and grand larceny. It offered two primary strands of evidence. First, Wood testified that petitioner broke into the Garrison residence and stole the safe with him. Jt. App. 230. Second, the neighbor testified that she saw petitioner riding as a passenger in the pickup truck as it was leaving the Garrison residence. *Id.* 161-63, 206. The Commonwealth also attempted to introduce evidence that the cigarette butt recovered from the bed of the pickup truck carried petitioner's DNA, but the court excluded this evidence because the prosecution failed to disclose it in time. *See id.* 480-81.

The defense argued that petitioner was not present and played no role in the theft. Consequently, both sides agreed that the sole issue before the jury was whether petitioner was involved in stealing the safe. In his closing remarks to the jury, the prosecutor asked: "What is in dispute? Really only *one issue and one issue alone*. Was the defendant, Michael Currier, one of those people that was involved in the offense?" Jt. App. 256 (emphasis added). The defense attacked the weaknesses in the Commonwealth's evidence and warned the jury that "[u]nreliable testimony is how innocent people go to jail." *Id.* 277-83.

The jury acquitted petitioner of both charges concerning the theft of the safe. Pet. App. 4a.

4. The Commonwealth insisted on pressing ahead with the felon-in-possession prosecution. In response, petitioner asserted that the issue preclusion component of the Double Jeopardy Clause barred the Commonwealth from trying to convince a second jury that he had been involved in the break-in and theft. Pet. App. 5a. In a related motion, petitioner asked to have the felon-in-possession charge dismissed outright, emphasizing that "if he did not steal the firearms[,] he cannot [have] possess[ed] the firearms." Jt. App. 293.

The trial court denied both motions. Pet. App. 5a. It described the issue preclusion doctrine as concerned with "prevent[ing] the Commonwealth from subjecting the accused to the hazards of *vexatious* multiple prosecutions." Jt. App. 306 (emphasis added). Reasoning that the Commonwealth had not sought separate trials for the purpose of harassing petitioner—to the contrary, it had been required to try the charges separately to avoid unduly prejudicing him—the court held that this concern was not implicated. *Id.* 306.

The case then proceeded to trial for a second time. The Commonwealth advanced the same basic theory as in the first trial: that petitioner broke into the Garrison residence and helped steal the safe containing cash and firearms. *See* Jt. App. 449-53.

But given the second opportunity to convince a jury of petitioner's involvement in the break-in and theft, the Commonwealth modified its presentation in two ways. First, the Commonwealth's key witnesses refined their testimony and redelivered it with greater poise. For example, the Garrisons' neighbor had testified at the first trial that she "didn't suspect

anything" when she saw the pickup truck leaving the house. Jt. App. 216. At the second trial, however, she testified that she had seen the safe in the back of the truck as it left the house, and even specified that she "could see the knob" on the safe. *Id.* 386, 393. And at the second trial, Wood anticipated and preemptively denied the defense's suggestion that he had accused petitioner of participating in the theft because they had had a falling out. *Compare id.* 248, *with id.* 414-15. Having already undergone cross-examination once, Wood told petitioner's attorney: "I know where this story is going . . . . [I]t's the same story you used last time." *Id.* 414. Second, the Commonwealth corrected its procedural error from the first trial by successfully introducing into evidence the cigarette butt found in the back of the pickup truck—thereby confirming that petitioner had at some point been in Wood's truck. *See id.* 480-81.

This time, the jury found petitioner guilty and sentenced him to five years in prison. Pet. App. 5a.

Petitioner moved to set aside the verdict on double jeopardy grounds. Pet. App. 5a. The trial court acknowledged that the jury in the first trial had necessarily rejected the theory the Commonwealth renewed in the second trial: "If they didn't find him guilty of [stealing] the safe, they didn't find him guilty of [possessing] the guns" inside it. Jt. App. 488. The court, however, denied petitioner's motion. It reasoned that issue preclusion did not apply because the severance had not been "an attempt by the government to infringe upon [petitioner's] Fifth Amendment protection against double jeopardy, but rather to protect [petitioner]" from undue prejudice. *Id.* 489.

5. The Virginia Court of Appeals affirmed. Pet. App. 2a. It recognized that "[c]ourts are divided" over whether issue preclusion applies "when the defendant has obtained severance of the charges against him and the first trial results in an acquittal." *Id.* 10a n.2 (citing several decisions on each side of the conflict). And it acknowledged that "[o]ne of the purposes of the [Double Jeopardy Clause] is to protect final judgments." *Id.* 6a. Nevertheless, the court held that issue preclusion did not apply because the Clause's other purpose—preventing prosecutorial "overreaching through successive trials"—was not implicated. *Id.* 5a-6a. It saw no "overreaching" in this case because the separate trials occurred "with the defendant's consent and for his benefit." *Id.* 10a.

6. The Virginia Supreme Court granted discretionary review and affirmed. Pet. App. 1a. In lieu of writing an opinion, the court issued a published order adopting as its own "the reason[ing] stated in the opinion of the Court of Appeals." *Id.*

REASONS FOR GRANTING THE WRIT

Federal courts of appeals and state courts of last resort are divided four-to-four over whether a defendant who consents to sequential trials retains his right under the Double Jeopardy Clause to the issue-preclusive effect of an acquittal.

This Court should grant certiorari to resolve this conflict. Issue preclusion is "an extremely important principle in our adversary system of justice." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). And the question whether that constitutional protection applies in the situation here affects choices ranging from charging

decisions to plea bargaining to trial strategy. Finally, the Virginia Supreme Court's holding here is incorrect. Criminal defendants do not waive the right to issue preclusion simply by consenting to severance. Nor does the absence of prosecutorial overreaching in producing sequential trials obviate the Double Jeopardy Clause's command to afford absolute finality to an acquittal.

I. Federal and state courts are intractably divided over the question presented.

As the Virginia Court of Appeals recognized—and multiple other courts have acknowledged—there is a deep and mature conflict over whether the issue preclusion component of the Double Jeopardy Clause applies when a defendant consents to sequential trials and is acquitted at the first trial. *See* Pet. App. 10a n.2 ("[c]ourts are divided"); *Joya v. United States*, 53 A.3d 309, 318-19, 319 n.20 (D.C. 2012) ("[c]ourts have not been uniform"); *State v. Butler*, 505 N.W.2d 806, 809-10 (Iowa 1993) ("courts have split"). This conflict stems from confusion over the reach of this Court's decisions in *Jeffers v. United States*, 432 U.S. 137 (1977), and *Ohio v. Johnson*, 467 U.S. 493 (1984).

1. Two state courts of last resort—including the Virginia Supreme Court—and two federal courts of appeals have held that defendants lose their right to the preclusive effect of an acquittal by consenting to sequential trials. *See* Pet. App. 1a; *United States v. Blyden*, 964 F.2d 1375, 1379 (3d Cir. 1992); *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 227 (4th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989); *State v. Chenique-Puey*, 678 A.2d 694, 698-99 (N.J. 1996). Two state intermediate courts have reached the same conclusion. *See People v. Cohen*,

No. 191062, 1998 WL 1987006, at *1 (Mich. Ct. App. Dec. 29, 1998), *appeal denied*, 601 N.W.2d 388 (Mich. 1999); *State v. Alston*, 346 S.E.2d 184, 187-88 (N.C. Ct. App. 1986), *aff'd on other grounds*, 374 S.E.2d 247, 248 (N.C. 1988).

These courts invoke two related rationales. First, they reason that defendants who consent to severance waive their right to the preclusive effect of an acquittal. In reaching this conclusion, these courts rely on *Jeffers*, where the plurality concluded that defendants who object to trying multiple charges together at a joint trial "waive[]" their double jeopardy right against successive prosecutions for greater and lesser-included offenses. 432 U.S. at 142, 153 n.21, 154. According to courts on this side of the split, defendants who agree to sequential trials not only waive the right against successive prosecutions but also are "precluded from then asserting . . . collateral estoppel." *See Chenique-Puey*, 678 A.2d at 698; *see also* Pet. App. 10a (stressing petitioner's "consent" to sequential trials); *Ashley Transfer*, 858 F.2d at 227 (emphasizing "defendants' choice" to have sequential prosecutions).

Second, these courts rely on *Johnson*, where the Court explained that the Double Jeopardy Clause's protection against successive prosecutions for the same offense does not apply where there "has been none of the governmental overreaching that double jeopardy is supposed to prevent." 467 U.S. at 502. These courts reason that issue preclusion similarly does not apply unless sequential trials are caused by "prosecutorial overreaching." Pet. App. 9a (quoting *Johnson*, 467 U.S. at 501); *see also Ashley Transfer*, 858 F.2d at 227.

2. In contrast, three state courts of last resort and one federal court of appeals have held that there is "no reason to conclude" that defendants who consent to sequential trials lose their issue preclusion rights. *State v. Butler*, 505 N.W.2d 806, 810 (Iowa 1993); *see also United States v. Aguilar-Aranceta*, 957 F.2d 18, 22-23 (1st Cir. 1992), *cert. denied*, 506 U.S. 834 (1992); *Joya v. United States*, 53 A.3d 309, 319 (D.C. 2012); *Gragg v. State*, 429 So. 2d 1204, 1208 (Fla. 1983), *cert. denied*, 464 U.S. 820 (1983). The Pennsylvania Superior Court (the state's intermediate court) has issued a thorough opinion taking the same position, *Commonwealth v. Wallace*, 602 A.2d 345, 349 (Pa. Super. Ct. 1992), which the Pennsylvania Supreme Court has cited with approval, *see Commonwealth v. States*, 938 A.2d 1016, 1023 & n.8 (Pa. 2007).[1]

These courts reason that *Jeffers* "turned on application of the . . . protection against successive prosecutions," *Joya*, 53 A.3d at 316, whereas issue preclusion "is an entirely separate claim that mandates a separate analysis," *Butler*, 505 N.W.2d at 808-09. Conducting that analysis, these courts conclude that a defendant's consent to sequential trials does not waive his right to the preclusive effect of an acquittal. *See Joya*, 53 A.3d at 319; *Gragg*, 429 So. 2d at 1208; *Butler*, 505 N.W.2d at 810.

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[1] The Louisiana Supreme Court has also applied issue preclusion in a case where a felon-in-possession charge was severed from another charge and the defendant was acquitted at the first trial. *State v. Blache*, 480 So. 2d 304, 306 (La. 1985). The court did not expressly state, or otherwise deem it material, whether the defendant consented to the severance.

These courts also reject the notion that issue preclusion applies only when sequential trials are caused by prosecutorial overreaching. These courts reason that issue preclusion—in contrast to the general prohibition against multiple prosecutions involved in *Johnson*—applies regardless of the reason for having multiple trials. This is because the Double Jeopardy Clause's issue preclusion component is grounded in the need to respect the integrity of acquittals, not the interest in preventing prosecutorial overreaching. *See, e.g.*, *Joya*, 53 A.3d at 315-17.

II. The question presented is important.

The question whether the Double Jeopardy Clause's issue preclusion component applies in the circumstances presented here is a frequently recurring issue that has significant implications for the criminal justice system.

1. Prosecutors often bring multiple charges together in circumstances where evidence admissible on one charge would cause undue prejudice to the defendant on another charge. Cases in which the prosecution brings a felon-in-possession charge alongside other charges illustrate this point.[2] Courts

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[2] Every state and the federal government restrict possession of firearms by felons. *See, e.g.*, 18 U.S.C. § 922(g); D.C. Code § 22-4503; Va. Code Ann. § 18.2-308.2. At the federal level alone, 4984 people (7% of offenders) were convicted of violating Section 922(g) in fiscal year 2015. U.S. Sentencing Comm'n, Quick Facts: Felon in Possession of a Firearm 1 (July 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_FY15.pdf.

"have long recognized that where a felon-in-possession charge is joined with other counts, the defendant may be unduly prejudiced with respect to the other counts by the introduction of prior crimes evidence that would otherwise be inadmissible." *United States v. Myles*, 96 F.3d 491, 495 (D.C. Cir. 1996); *see also* 1A Charles Alan Wright & Andrew D. Leipold, Federal Practice and Procedure § 222, at 582-83 (4th ed. 2008) (calling the risk of undue prejudice "especially acute" where a felon-in-possession charge is joined with other charges).

Criminal defendants therefore regularly seek severance, triggering the question presented if they are acquitted at the first trial. Again, cases including felon-in-possession charges are illustrative. The prosecution often alleges that a defendant must have possessed a firearm because he committed another offense, such as a shooting, involving a gun. If a jury in such a case determines that the defendant was not the one who committed the other offense, and the prosecution seeks to relitigate that issue at the felon-in-possession trial, then the question presented arises. *See, e.g.*, *Jackson v. State*, 183 So. 3d 1211, 1212 (Fla. Dist. Ct. App. 2016); *State v. Butler*, 162 So. 3d 455, 458-59 (La. Ct. App. 2015). Other combinations of charges also give rise to the question presented. *See, e.g.*, *Joya v. United States*, 53 A.3d 309, 312 (D.C. 2012) (charges severed because gang evidence admissible on one charge would be unduly prejudicial with regard to other charges); *State v. Chenique-Puey*, 678 A.2d 694, 698-99 (N.J. 1996) (charges severed because proving charge predicated on a domestic violence restraining order would be unduly prejudicial with regard to the other charge).

2. Even when the double jeopardy issue here is not directly litigated, it looms over virtually every criminal case in which severance is a possibility. When—as is almost always the case—a single episode implicates numerous criminal statutes, defendants need to know whether issue preclusion applies so they can make informed decisions about whether to consent to severance. If consenting to severance means waiving issue preclusion, a defendant might prefer a joint trial. Or, faced with the prospect of two prosecutorial bites at the apple, he might simply take a plea deal.

Prosecutors, for their part, need to know the answer to the question presented to make informed decisions. If a defendant's consent to severance waives issue preclusion, a prosecutor can add charges that present the defendant with a choice between severing the charges to avoid undue prejudice and preserving his right to issue preclusion. If, on the other hand, issue preclusion remains available to defendants who consent to severance, the prosecution may wish to object to severance. And if the court nonetheless severs the charges, the prosecution may wish to try the severed charges in an order that minimizes the chance that issue preclusion will come into play.

III. This case presents an ideal vehicle for resolving the conflict.

1. This case comes to the Court in the best posture for resolving the question presented. Petitioner raised his double jeopardy argument at every stage of the state court proceedings, and each court squarely addressed it. *See* Pet App. 1a, 5a-10a. Further, this case comes to the Court on direct

review, enabling the Court to reach the question without any of the complications that sometimes attend habeas cases.

2. The answer to the question presented determines the outcome of petitioner's case.

If issue preclusion applies, petitioner's conviction must be reversed. The preclusive effect of an acquittal turns on what a jury necessarily decided, "taking into account the pleadings, evidence, charge, and other relevant matter." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (citation omitted); *see also Yeager v. United States*, 557 U.S. 110, 119-20 (2009). At petitioner's first trial, the jury was presented with "only one issue": whether petitioner was "one of those people that was involved" in the break-in and theft of the gun-filled safe. Jt. App. 256; *see also supra* at 5. In acquitting him, the jury necessarily decided that he was not. Therefore, if issue preclusion applies, the Commonwealth should have been precluded from relitigating that issue in any subsequent trial.

Indeed, applying the Double Jeopardy Clause's issue preclusion component here would almost certainly result in an outright dismissal of the felon-in-possession charge. The Commonwealth cannot reasonably argue that petitioner possessed the stolen firearms without relitigating his involvement in the break-in and theft. That is, petitioner could not have possessed the firearms unless he participated in the theft. The trial court acknowledged as much when considering petitioner's double jeopardy argument, observing that if the first jury "didn't find him guilty of [stealing] the safe, they didn't find him guilty of [possessing] the guns." Jt. App. 488.

IV. The Virginia Supreme Court's decision is incorrect.

This case implicates the core concerns animating the Double Jeopardy Clause's issue preclusion doctrine. Contrary to the Virginia Supreme Court's conclusion, the facts that severance occurred "with the defendant's consent and for his benefit," Pet. App. 10a, provide no basis for suspending the protection that doctrine affords to an acquittal.

A. The Commonwealth's attempt to relitigate petitioner's alleged involvement in the break-in and theft violates the double jeopardy protection established in *Ashe v. Swenson*, 397 U.S. 436 (1970), and reaffirmed in cases up through *Yeager v. United States*, 557 U.S. 110 (2009). *Ashe* involved the simultaneous robbery of several people at a poker game. "[A]fter a jury determined by its verdict that the petitioner was not one of the robbers," the question arose whether "the State could constitutionally hale him before a new jury to litigate that issue again." *Ashe*, 397 U.S. at 446. This Court held that it could not, explaining that the prosecution's attempt to relitigate the question of identity in the second trial was "constitutionally no different" from attempting to try Ashe again for the exact same charge. *Id.* Giving the prosecution an opportunity to refine its case after an acquittal is "precisely what the constitutional guarantee forbids." *Id.* at 447; *see also Burks v. United States*, 437 U.S. 1, 11 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.").

This case is just like *Ashe* in every way that matters. The first jury acquitted petitioner of the breaking-and-entering and larceny charges, necessarily deciding that he had not participated in the theft of the safe and its contents. The prosecution then haled petitioner before a new jury and seized the opportunity to refine its case. At the second trial, the prosecution's witnesses refined their testimony and redelivered it with greater confidence. The prosecution also introduced evidence (the cigarette butt) that had been excluded from the first trial due to its own error. *Compare Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam) (applying issue preclusion to bar a second trial in which the prosecution sought to admit evidence that had been excluded from the first trial). And in the end, the Commonwealth secured a conviction by persuading a second jury of the very thing it tried and failed to prove at the first trial: that petitioner stole a safe full of guns.

B. The Virginia Supreme Court gave two reasons for refusing to apply issue preclusion here: (1) petitioner, unlike the defendant in *Ashe*, consented to sequential trials; and (2) the sequential trials were not the product of "prosecutorial overreaching." Pet. App. 9a-10a. Neither of these arguments withstands scrutiny.

1. Petitioner did not waive issue preclusion by consenting to severance of the charges against him.

a. This Court has held that defendants can waive constitutional rights when they take actions flatly inconsistent with the exercise of those rights. For example, a defendant waives his constitutional right to be present in the courtroom during trial by electing

to be absent, *Taylor v. United States*, 414 U.S. 17, 19-20 (1973) (per curiam), or by "insist[ing] on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom," *Illinois v. Allen*, 397 U.S. 337, 343 (1970). Similarly, a defendant forfeits his constitutional right to have an adverse witness testify in his presence if he causes "the absence of [that] witness by wrongdoing." *Davis v. Washington*, 547 U.S. 813, 833 (2006).

Jeffers v. United States, 432 U.S. 137 (1977), applies this logical incompatibility principle in the context of double jeopardy. In *Jeffers*, the defendant was convicted of a charge and then sought to bar the prosecution from convicting him of a greater offense in a second trial. A plurality of this Court concluded that "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding," there was no violation of the Double Jeopardy Clause because the defendant had "elect[ed]" at the outset of the prosecution to have the two offenses tried separately. *Id.* at 152. In other words, when a defendant seeks to have multiple offenses tried separately, he "waive[s]" his mutually exclusive right against being subjected to more than one trial. *Id.* at 153 n.21.

A defendant's double jeopardy right to the preclusive effect of an acquittal, however, is "separate" from his right not to be subjected to more than one trial. *See United States v. Scott*, 437 U.S. 82, 92 (1978); *see also Yeager*, 557 U.S. at 117-19. A defendant who invokes issue preclusion is not objecting to the fact of a second trial as such, but rather is seeking to enforce the absolute finality of a

prior acquittal. *See Yeager*, 557 U.S. at 118-19. Indeed, issue preclusion does not necessarily preclude a second trial at all; the prosecution is free to press ahead with any theory the jury in the first trial did not reject. *See Bravo-Fernandez v. United States*, 137 S. Ct. 352, 357-58 (2016); *Joya v. United States*, 53 A.3d 309, 321-23 (D.C. 2012). That being so, nothing about consenting to separate trials is inconsistent with insisting upon the preclusive effect of an acquittal.

This Court's cases already recognize as much. The Court has rejected the "paradoxical contention" that a defendant waives the preclusive effect of an acquittal on one charge simply by seeking a new trial on a separate charge. *Green v. United States*, 355 U.S. 184, 191-92 (1957). And the year after deciding *Jeffers*, this Court relied on the same reasoning to hold that a defendant who asks an appellate court to grant him a new trial does not thereby waive his right to the preclusive effect of an acquittal issued by that appellate court (in the form of a holding that the evidence was legally insufficient to support a conviction). *Burks*, 437 U.S. at 17.[3]

The principle that defendants who consent to multiple trials do not waive their right to the

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[3] Several of this Court's Justices (including the author of *Jeffers*) similarly recognized in a case involving a different issue that "[t]here is no doubt that had the defendant in *Jeffers* been acquitted at the first trial, the collateral-estoppel provisions embodied in the Double Jeopardy Clause would have barred a second trial on the greater offense." *Green v. Ohio*, 455 U.S. 976, 980 (1982) (White, J., joined by Blackmun & Powell, JJ., dissenting from the denial of certiorari).

preclusive effect of an acquittal controls here. The mere fact that a defendant consents to severance has no bearing on whether the usual rules of issue preclusion apply at a second trial.

b. Instead of considering whether consenting to severance is logically inconsistent with insisting upon the preclusive effect of an acquittal, the Virginia Supreme Court appeared to view the waiver question as a general equitable inquiry. Even if such an inquiry were appropriate, the equities dictate that a defendant does not waive his right to issue preclusion by consenting to severance.

First, a defendant should not be saddled with a finding of waiver where the risk of undue prejudice left him with no legitimate choice but to consent to severance. In *Jeffers*, the plurality stressed that the charges against the defendant could have been tried together "without undue prejudice to [the defendant's] Sixth Amendment right to a fair trial." 432 U.S. at 153. Had the charges been severed to "ensure that prejudicial evidence . . . would not have been introduced," the outcome "might [have been] different." *Id.* at 153 n.21. And in *Green*, the outcome *was* different for similar reasons. This Court explained there that the law "does not[] place the defendant in such an incredible dilemma" that, to appeal a questionable conviction, he must "forego" the preclusive effect of an acquittal on another charge. *Green*, 355 U.S. at 192-93. A defendant in that position "has no meaningful choice" but to appeal the conviction. *Id.* at 192.

Here, petitioner could not have agreed to a joint trial on all three charges without suffering undue prejudice to his defense on the breaking-and-entering

and larceny charges. Severance was necessary to "avoid[] the undue prejudice that would occur upon mention of [petitioner's] felonious past to a jury." Pet. App. 9a; *see also Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (introducing evidence of past convictions against a defendant when that evidence is irrelevant to a charge "den[ies] him a fair opportunity to defend" against the charge).

Indeed, a failure to sever the charges here may well have "result[ed] in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986). Courts have recognized that where a trial on multiple charges allows the prosecution to introduce otherwise inadmissible evidence of the defendant's other crimes, failing to sever the charges may violate the constitutional "right to a fair trial." *See, e.g.*, *Panzavecchia v. Wainwright*, 658 F.2d 337, 338, 342 (5th Cir. 1981). Surely a defendant in petitioner's situation cannot be forced "to waive one constitutional right in order to assert another." *Gragg v. State*, 429 So. 2d 1204, 1208 (Fla. 1983).

Second, petitioner's consent to severance did not deprive the Commonwealth of "its right to one full and fair opportunity to convict those who have violated its laws." *Ohio v. Johnson*, 467 U.S. 493, 502 (1984). In *Johnson*, the defendant was charged with murder and aggravated robbery as well as with the lesser-included offenses of involuntary manslaughter and grand theft. *Id.* at 494. Over the state's objection, the defendant pleaded guilty to the two lesser-included offenses. *Id.* He then convinced the trial court to dismiss the two greater charges on double jeopardy grounds. *Id.* This Court reversed, rejecting

the notion that the defendant could "use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution of the remaining charges." *Id.* at 502.

Unlike the bar on successive prosecutions the defendant tried to assert in *Johnson*, issue preclusion does not function as a sword preventing the prosecution from pursuing all of its allegations. Rather, issue preclusion springs into effect only to shield a defendant from being forced to relitigate an allegation a jury has already rejected. *State v. Butler*, 505 N.W.2d 806, 810 (Iowa 1993). And when issue preclusion applies, the prosecution remains free to pursue the remaining charges on any theory it has not already litigated and lost. *See, e.g.*, *Joya*, 53 A.3d at 321-23.

2. The Virginia Supreme Court was also incorrect in refusing to find a double jeopardy violation on the ground that the sequential trials were not the product of "prosecutorial overreaching."

This Court has long held that the Double Jeopardy Clause's bar against relitigating issues decided against the prosecution applies "irrespective of the good faith of the State in bringing successive prosecutions." *Harris*, 404 U.S. at 56-57. Just two years after *Ashe*, this Court held that an acquittal on one charge triggered issue preclusion for a second charge even though "under state law, [the two charges] could not be joined in one indictment." *Turner v. Arkansas*, 407 U.S. 366, 367, 370 (1972) (per curiam). Issue preclusion applies in that context because it is designed to protect the sanctity of acquittals, not simply to guard against sequential trials. *See Yeager*, 557 U.S. at 118-19.

Courts that have nevertheless held that the issue preclusion doctrine is suspended when multiple trials occur for the defendant's benefit have pointed to a footnote in *Johnson* that they acknowledge is "dictum" but that they believe counsels a contrary result. *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 227 (4th Cir. 1988). In that footnote, this Court stated that "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Johnson*, 467 U.S. at 500 n.9.

But this Court's subsequent decision in *Yeager* squelches any doubt that the preclusive effect of an acquittal attaches regardless of whether the prosecution sought successive trials. In *Yeager*, the government tried the defendant on several charges. 557 U.S. at 113. The jury acquitted on some but hung on others. *Id.* at 115. The defendant then asserted that the acquittals prevented the government from retrying him on hung charges that would require relitigating allegations the jury had rejected. *Id.* The government—and this Court's dissenters—countered that issue preclusion did not apply because the government had "made no effort to prosecute the charges seriatim." *Id.* at 131 (Scalia, J., dissenting) (quoting *Johnson*, 467 U.S. at 500 n.9). But this Court sided with the defendant, holding that *Ashe* applied because the finality of an acquittal is itself sufficient to trigger issue preclusion. *See id.* at 112, 117-20.

The bottom line is that "[a] jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments

presented to it." *Yeager*, 557 U.S. at 122. Preserving the finality of an acquittal is therefore vitally important to the integrity and proper functioning of the criminal justice system, regardless of any prosecutorial overreaching in creating sequential trials.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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