

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   JUAN BRAVO-FERNANDEZ AND                   :

4   HECTOR MARTINEZ-MALDONADO,               :

5                   Petitioners               :   No. 15-537

6                   v.                         :

7   UNITED STATES,                             :

8                   Respondent.               :

9   - - - - - x

10                                   Washington, D.C.

11                                   Tuesday, October 4, 2016

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13                   The above-entitled matter came on for oral  
14   argument before the Supreme Court of the United States  
15   at 10:04 a.m.

16   APPEARANCES:

17   LISA S. BLATT, ESQ., Washington, D.C.; on behalf of  
18       Petitioners.

19   ELIZABETH B. PRELOGAR, ESQ., Assistant to the Solicitor  
20       General, Department of Justice, Washington, D.C.; on  
21       behalf of the United States.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case No. 15-537, Bravo-Fernandez  
5 and Martinez-Maldonado v. the United States.

6 Ms. Blatt.

7 ORAL ARGUMENT OF LISA S. BLATT

8 ON BEHALF OF THE PETITIONERS

9 MS. BLATT: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 For three reasons, acquittals should have  
12 full effect under the Double Jeopardy Clause without  
13 regard to invalid vacated convictions.

14 First, vacated convictions are legal  
15 nullities, including under the Double Jeopardy Clause.  
16 Second, vacated convictions are not relevant to what a  
17 jury necessarily decided. And third, the government  
18 should bear the consequences when overlapping charges  
19 produce split verdicts of acquittals and invalid  
20 convictions.

21 JUSTICE KENNEDY: I take it from that you  
22 would agree that there might be cases where, under  
23 Ashe v. Swenson, there's an acquittal on one count,  
24 conviction on the other count, conviction set aside,  
25 government can retry the count that had been set aside,

1 on the ground that under Ashe v. Swenson the verdict on  
2 the other count was just irrelevant.

3 MS. BLATT: That's right. So we -- the  
4 defendant always has to meet the burden of just showing  
5 that the acquittal necessarily decided a fact that the  
6 government wants to prove in a subsequent prosecution.

7 JUSTICE KENNEDY: In this case, could it be  
8 argued -- was the argument before the jury on the  
9 conspiracy in the travel counts closely intertwined with  
10 666 so that it -- you can't say the jury decided most  
11 likely on some issue that's irrelevant to 666?

12 MS. BLATT: Right. The only issue -- the  
13 only issue that was in dispute was whether there was a  
14 bribe. There's no dispute that to get to Las Vegas from  
15 Puerto Rico, you have to travel. There was no dispute  
16 that they agreed to go to a boxing match together. So  
17 the only dispute at all was whether there was a bribe.

18 And so when the jury acquitted on conspiracy  
19 and travel to commit Program Section 666, bribery, they  
20 necessarily decided there was no bribery.

21 Now, the Court of Appeals did not hold that.  
22 It was just Petitioners' argument throughout the case, a  
23 point that the government just never disputed, a point  
24 that the government never disputed in its brief in  
25 opposition, and a point that the government never

1     disputed in its brief on the merits.

2                   JUSTICE GINSBURG:  Ms. Blatt -- but if we're  
3     trying to figure out what this jury found, you know,  
4     we're not what talking about claim preclusion.  Claim  
5     preclusion -- there can never be a new trial on the  
6     travel or the conspiracy.  But we're talking about issue  
7     preclusion.

8                   And this jury, we don't know what it decided  
9     because of the inconsistency.  It said yes to bribery on  
10    one; no to bribery on the other.  And it might have just  
11    decided that conviction of the predicate offense, the  
12    bribery, was enough, and that the government had laid it  
13    on too strong by adding the conspiracy and the travel  
14    count.

15                   How do we know that's not what the jury  
16    decided?

17                   MS. BLATT:  Well, we know, just looking at  
18    the acquittals alone, that we know what they decided.  
19    So the question is -- and it's, I think, under Yeager  
20    and under the Double Jeopardy Clause -- is this Court,  
21    for the first time in the history of its jurisprudence,  
22    going to give any meaning to or relevance to an invalid  
23    conviction?

24                   You have never held an invalid conviction  
25    was relevant to or evidence of anything,

1 Justice Ginsburg, and let me just suggest the last place  
2 you should start is the Double Jeopardy Clause, where  
3 illegal, invalid, vacated convictions always been legal  
4 nullities.

5 JUSTICE KAGAN: Ms. Blatt, it does seem to  
6 me that's what your argument rests on in the end: The  
7 idea that we shouldn't give any weight or any influence  
8 to an invalid conviction. Is that a double jeopardy  
9 principle, or does it come from someplace else?

10 MS. BLATT: Both. So we have our main -- I  
11 would call it our legal argument, is just that vacated  
12 convictions are legal nullities, void ab initio. You  
13 pretend that they just don't exist.

14 JUSTICE KAGAN: Yes. Well, why do we do  
15 that?

16 I mean, I take it you have -- you know,  
17 usually you do pretend that they don't exist. There are  
18 not many instances that we can find where we do look to  
19 vacated convictions for something or other. But in this  
20 case, the vacated conviction surely does tell us  
21 something about what the jury did do or what the jury  
22 didn't do. It's part of the factual picture, and so the  
23 question has to be, well, notwithstanding that, why  
24 shouldn't we look at it? And I guess the -- why?

25 MS. BLATT: Right. Well, so, again, there's

1 the legal argument, which I do want to get back to, but  
2 on the factual argument, in Yeager, it was never  
3 disputed, and it was beyond obvious that a jury that  
4 acquits cannot rationally hang. There is this  
5 historical fact, and the dissent was all up in arms that  
6 the jury decisions were completely inconsistent. And it  
7 was at least relevant under 401 that the jury, if it was  
8 going to acquit, it could not have hung.

9 And the Court said, I think, three things.  
10 But the most -- and I think as a factual matter, you  
11 don't know what a jury decides when there's an illegal  
12 conviction. Just like a hung count, which a jury  
13 doesn't decide anything in a hung count. That's what  
14 the Court said in Yeager.

15 JUSTICE KAGAN: You know, I think you're  
16 contesting the premise of my question. Because the  
17 premise of my question is that this vacated conviction  
18 does tell you something about what the jury did. Now  
19 what it tells you is that the jury did inconsistent  
20 things, because the vacated conviction tells you that,  
21 on the one hand, the valid convictions, the jury said  
22 that there was not bribery. And on the other hand, the  
23 vacated conviction, the jury said there was bribery.

24 And let's assume for the moment that that's  
25 true, that that is exactly what the vacated convictions

1 tell you. They tell you that the jury went in two  
2 inconsistent ways.

3 MS. BLATT: Right.

4 JUSTICE KAGAN: And now you're saying,  
5 notwithstanding that the vacated conviction tells you  
6 something about what the jury did or didn't do about how  
7 the jury reasoned, we shouldn't look at it.

8 And there's something very powerful,  
9 rhetorically, in your statement. But I guess what I'm  
10 trying to figure out: Is it anything more than  
11 rhetoric? Is --

12 MS. BLATT: Yeah, let me --

13 JUSTICE KAGAN: -- there, like, a legal  
14 principle here about why we shouldn't look to vacated  
15 convictions to tell us something about the facts, when  
16 they can tell us something about the facts?

17 MS. BLATT: Sure. Let me prove it to you.  
18 I mean, I'm happy to prove it, that the only reason you  
19 vacate a conviction is because the conviction is a  
20 worthless piece of paper and unreliable. And at looking  
21 how an error inversely affects acquittals and  
22 convictions proves the point. Because whereas errors  
23 render the conviction completely worthless and  
24 unreliable, an error in the face of an acquittal has the  
25 opposite effect of making the acquittal all that more



1 meaningful, reliable, and worthy of respect.

2 JUSTICE ALITO: I'm not sure that really  
3 answers the question. Because the vacated conviction  
4 may be worthless for a reason that is irrelevant to the  
5 point that Justice Kagan was making, which seems to be  
6 the situation here. It's -- it's a wrongful conviction  
7 because an element was missing, but that doesn't  
8 undermine the argument that the two verdicts were  
9 inconsistent.

10 MS. BLATT: So the reason why Yeager -- I  
11 mean, Yeager said -- I don't think any dispute, and this  
12 is the government's whole argument. Yeager, all that  
13 mattered was there was no jury decision. And the only  
14 reason why you care about jury decisions --

15 JUSTICE GINSBURG: But the Yeager case  
16 was -- the jury didn't reach any decision. Here, your  
17 jury did reach a decision. The decision was vacated  
18 because, in the court's view, the charge was erroneous.

19 By the way, that's not -- it's not clear  
20 that the charge was erroneous, is it? There's a split  
21 on that issue.

22 MS. BLATT: It's clear as it comes to this  
23 Court, but I think, you know, I'd have to go back and  
24 read Sun Diamond, which is --

25 JUSTICE GINSBURG: The question is --

1 MS. BLATT: Is whether to quid pro quo.

2 JUSTICE GINSBURG: Is it quid pro quo, or is  
3 it gratuity as well? As I understand it, there's a  
4 circuit split.

5 MS. BLATT: Right. And the government's  
6 position is, if the court had directed a verdict and  
7 said, you must find guilty, and the jury both acquit and  
8 convict, you still have a piece of relevant information  
9 that the jury acted inconsistency -- inconsistently.

10 And what I'm trying to say about a jury  
11 verdict is that it doesn't count in our legal system  
12 unless it's imbued with finality and validity.

13 JUSTICE SOTOMAYOR: But why is that true  
14 when you can have a set-aside of the verdict that's  
15 independent of the jury charge? You can have a  
16 situation, like in the State of Michigan, where the  
17 conviction was set aside because the defendant was  
18 deprived of his right to proceed pro se. There, there's  
19 still a complete inconsistency between the acquittal and  
20 the conviction. The set-aside had nothing to do with  
21 the nature of the charge. Why would you say in that  
22 situation we should be ignoring --

23 MS. BLATT: So I think for errors like  
24 Feretta and Gonzalez-Lopez, right to counsel and a few  
25 other kind of nutty structural errors, where the Court

1 has never said it's prejudicial, but we're going to  
2 treat it as such, because you can't unwind the apple  
3 cart. But for all other errors, including a biased  
4 judge, absences of counsel, you know, a Brady violation,  
5 a directed verdict, a reasonable doubt instruction, they  
6 are prejudicial. And when a --

7 JUSTICE SOTOMAYOR: But what do they have to  
8 do to impeach the inconsistent act of the jury?

9 MS. BLATT: Okay. So what -- exactly what  
10 they had to do in Yeager, because then the other reason  
11 that Yeager held that hung counts were not relevant is  
12 because they were indecipherable. And this part is key.  
13 It is because they are indecipherable the defendant  
14 can't be put to the impossible burden of reconciling  
15 with the acquittal, even though they may be reconcilable  
16 in ways that don't undermine the acquittal.

17 And vacation -- vacated convictions are the  
18 same. Let me explain why. The instructional error,  
19 because of it, no one knows and no one can know why the  
20 jury convicted. And therefore, the defendants should  
21 not be put in the impossible burden of explaining that  
22 the consistency -- that the inconsistency is on a point  
23 that's not relevant to the acquittals.

24 And so here's the example we gave in the  
25 brief, is that all 12 jurors -- and the -- this is

1 the -- this is the point of the -- the error itself  
2 causing the inconsistency. All 12 jurors could have  
3 thought Petitioners were not guilty of a crime, of a  
4 quid pro quo exchange. And the only inconsistency, the  
5 only inconsistency, is they were divided on whether  
6 there was a lawful gratuity.

7 And so in that case, it's completely  
8 possible that the verdicts are consistent on the only  
9 relevant question.

10 JUSTICE KAGAN: I'm sorry. I --

11 CHIEF JUSTICE ROBERTS: Yeah, but we don't  
12 know.

13 MS. BLATT: Exactly.

14 CHIEF JUSTICE ROBERTS: I mean, that's the  
15 whole point. And then it -- well, exactly, except you  
16 have the burden, as I understand it, under the law, of  
17 carrying the burden of indicating that -- a double  
18 jeopardy violation. And if you don't know, you can't  
19 carry that burden.

20 MS. BLATT: So unlike an acquittal, this is  
21 just Yeager all over again. Yeager said we -- because  
22 you can't ask the jury what transpired in the courtroom,  
23 the burden is not on the defendant to reconcile it. You  
24 know when you have a final invalid jury verdict,  
25 Mr. Chief Justice, what the jury found. And that's the

1     only reason that final invalid jury verdicts have  
2     ever -- have ever counted under our system at all.  
3     Without the finality --

4                 JUSTICE KENNEDY: I don't understand why  
5     you're saying we don't know why the jury convicted on  
6     666. It convicted because the evidence was  
7     overwhelming.

8                 MS. BLATT: Well, it convicted on 666 --

9                 JUSTICE KENNEDY: That's why it convicted.

10                MS. BLATT: -- on a charge that allowed it  
11     to convict based on completely lawful conduct. So if  
12     the jury -- the evidence could have been overwhelming.

13                JUSTICE KENNEDY: I understand there was an  
14     instructional error. But we know why the jury  
15     convicted.

16                MS. BLATT: No. The jury could have --

17                JUSTICE KENNEDY: Because under the --  
18     because under the erroneous instruction, they clearly  
19     found the facts of a violation. All of the factual  
20     elements the government asserted were found to be true.

21                MS. BLATT: Under the wrong -- under  
22     something that's not a crime. If they had charged the  
23     jury that if the defendant were wearing glasses, they  
24     committed a crime, and the jury returns a guilty  
25     verdict, you shouldn't care. You can't just say, well,

1 it's a guilty verdict.

2 JUSTICE GINSBURG: Well, the jury was  
3 operating under the same charge with respect to the  
4 compound crimes. So in order to convict, it would have  
5 had to find there was neither quid pro quo nor gratuity.  
6 That's what it would have had to find, which would be  
7 inconsistent with finding --

8 MS. BLATT: So it's actually inverse. To  
9 convict, all the jury had to do was find one out of two  
10 possibilities. The jury could have convicted either if  
11 they found a lawful gratuity or an unlawful bribe. But  
12 to acquit, Justice Ginsburg, the jury had to reject and  
13 consider all of the government's theories of criminal  
14 liability. So you know the acquittals, there's no way  
15 to -- there's no way to read them other than the jury  
16 acquitted Petitioners of a crime.

17 JUSTICE GINSBURG: What about the question I  
18 asked you before? If we're trying to find out what this  
19 jury did, isn't it a reasonable assumption that they  
20 convicted on the bribery for which there was much  
21 evidence? They thought that having the compound crimes,  
22 the conspiracy and the travel, was just laying it on too  
23 thick, so they weren't going to convict on those. Why  
24 couldn't that have been?

25 MS. BLATT: Yeah. I think -- I mean, it's

1 the same case in Yeager where the Court said, look,  
2 there's an apparent inconsistency. No one questioned  
3 that the verdicts were irreconcilable, and that who --  
4 who knows?

5 JUSTICE GINSBURG: I thought that in Yeager,  
6 the Court said there was no -- there was no conflict  
7 because there was no decision. A hung jury doesn't  
8 decide anything.

9 MS. BLATT: Right.

10 JUSTICE GINSBURG: This jury, we know, did  
11 decide something.

12 MS. BLATT: We know the jury decided  
13 something that is completely irrelevant. We know the  
14 jury decided something that the law finds anathema. We  
15 know the jury found that Petitioners may have committed  
16 lawful conduct. There is a reason why this Court has  
17 never, ever, ever treated an invalid conviction of  
18 evidence or -- or relevant to anything. If the Court  
19 had directed a verdict of guilty, I would just be  
20 astonished if you were saying, well, we know they  
21 convicted; we know they found him guilty.

22 JUSTICE KENNEDY: Under your argument, the  
23 trial court could instruct the jury: If you find guilt  
24 on 666 and if you find that there was travel, you must  
25 find that there was guilt under the travel section as

1 well. That's what you're saying.

2 MS. BLATT: I'm actually -- that one, I'm  
3 lost on what you're asking. Sorry.

4 JUSTICE KENNEDY: Well, you're saying in  
5 answer to Justice Ginsburg's question that the jury  
6 can't make different decisions with multiple counts. So  
7 based on your theory, the trial court can instruct the  
8 jury: If you find guilt on 666, you must find guilt on  
9 the others, if you find there was travel.

10 MS. BLATT: Right. And our position works  
11 no matter what kind of error you have. When you have an  
12 acquittal --

13 JUSTICE KENNEDY: But I think that's an  
14 improper instruction.

15 MS. BLATT: It is an improper instruction.  
16 And the question is, is if the instruction is  
17 prejudicial in a way that renders the decision not  
18 final, invalid, it can't be any more relevant evidence  
19 than the jury's just refusal to find anything.

20 And it's kind of like -- I'll give you an  
21 example. If I say I need a car and you give me one  
22 without any brakes or steering wheel, it's not that  
23 helpful. And here you just have something on its face  
24 that's invalid. On its face, it's a worthless piece of  
25 paper. It's never been recognized of anything. And I



1 do think I'll get back to legal argument because the  
2 factual argument doesn't seem to be moving you.

3 On the legal argument is -- the only reason  
4 I'm even here -- the only reason we're here and that  
5 these vacated convictions don't themselves bar retrial  
6 under the Double Jeopardy Clause is because this Court  
7 has, over and over and over, called them complete  
8 nullities.

9 JUSTICE KAGAN: Maybe one way I can figure  
10 out the scope of your argument is just to ask, do you  
11 think that the government is always unable to use a  
12 vacated conviction, that is for any purpose, or do you  
13 think that the government is unable to use a vacated  
14 conviction only for double jeopardy purposes?

15 MS. BLATT: This Court has never used a  
16 vacated conviction for any purpose, period. Yes.

17 JUSTICE KAGAN: So you have the history on  
18 your side, most of it. Do you think that that's because  
19 the government, you know, cannot use a vacated  
20 conviction for any purpose?

21 MS. BLATT: Yes. I mean, since Blackstone,  
22 I don't know, in the 1600s is it -- when it's -- when  
23 it's void ab initio, it disappears.

24 JUSTICE KAGAN: This isn't a double jeopardy  
25 argument. This is a something else argument.

1 MS. BLATT: True.

2 JUSTICE KAGAN: But what is it? What is the  
3 something else? Why can't the government use a vacated  
4 conviction for any purpose?

5 MS. BLATT: Well, I mean, we have -- we have  
6 it's void ab initio and then it's void ab initio under  
7 the Double Jeopardy Clause. Well, why --

8 JUSTICE KAGAN: Look at the label. It's  
9 void ab initio, but I mean, it's void in the sense that  
10 you can't be punished for a vacated conviction. But the  
11 question is, can we use what the vacated conviction  
12 tells us about a historical fact, or can we use it for  
13 some other purpose that, you know, that I'm not thinking  
14 about right now?

15 MS. BLATT: But -- but that's --

16 JUSTICE KAGAN: But -- but, you know,  
17 what's -- what part of the Constitution are we looking  
18 to to tell us this?

19 MS. BLATT: Just because I'm not going to  
20 let Yeager go like this, I mean, there's historical fact  
21 of the hung jury, and the entire government brief and  
22 the entire dissent is they're not reconcilable. It's --  
23 you just can't ignore reality. That's why Justice --

24 JUSTICE KAGAN: That's not the question I'm  
25 asking.

1 MS. BLATT: Well, except that I a.m. saying  
2 Yeager does defeat what you're saying. But on the void  
3 ab initio, there's a reason that invalid convictions are  
4 void ab initio -- and I don't want to leave the Double  
5 Jeopardy Clause -- is if their -- the government wants  
6 its cake and eat it -- eat it too. It wants to say that  
7 they're complete nullities under United States versus  
8 Ball, otherwise we wouldn't be here.

9 JUSTICE SOTOMAYOR: But they are not  
10 complete nullities. I'm sorry.

11 CHIEF JUSTICE ROBERTS: Justice Alito.

12 JUSTICE ALITO: They lack legal effect, but  
13 it is a historical fact that it occurs. So surely they  
14 can be used to prove a historical fact. For example,  
15 suppose there's a case in which the -- in which the  
16 question is whether a witness who testified for the  
17 prosecution was bribed. Surely the -- the conviction  
18 could be used in that situation, right?

19 MS. BLATT: I guarantee you if that  
20 testimony was struck from the record, it's gone. It  
21 disappeared. And here that's what we're talking about.  
22 No, it didn't --

23 JUSTICE SOTOMAYOR: I'm sorry. You're  
24 suggesting that if there's a retrial in a vacated  
25 conviction that you can't use the testimony that was

1 elicited during that conviction?

2 MS. BLATT: That was bribed, and the court  
3 struck from the record. And they say -- the government  
4 wants to introduce bribe testimony. I don't know of a  
5 case that says you can do that.

6 JUSTICE KENNEDY: That -- that wasn't  
7 Justice --

8 MS. BLATT: Well, maybe I misunderstood the  
9 question.

10 JUSTICE KENNEDY: -- Alito's hypothetical,  
11 as I understand it. His hypothetical is the juror  
12 lied -- pardon me -- the witness lies. Conviction set  
13 aside for instructional error.

14 MS. BLATT: All right.

15 JUSTICE KENNEDY: Can that witness be  
16 prosecuted for perjury?

17 MS. BLATT: Oh, yeah. Sorry. Yes.  
18 Absolutely. Our question is --

19 JUSTICE KENNEDY: So then -- and then his  
20 point could follow this; the conviction can be used for  
21 some things.

22 MS. BLATT: You're not using the conviction.  
23 You're using the witness's testimony. You can use  
24 evidence that's introduced in an invalid conviction for  
25 other purposes. The question is are you -- the only

1     thing we're talking about is the verdict on its face  
2     that's invalid. The same way if you had said you can  
3     convict on preponderance of the evidence. It's just the  
4     piece of paper that the government's relying on in  
5     saying the jury necessarily found guilt. It's not guilt  
6     in the way the law recognizes.

7                     But I do think there's something quite  
8     unseemly about when the Court in Yeager said if you have  
9     the continuing -- if hung counts are void and a nonevent  
10    under the continuing jeopardy principle, they're also  
11    void and nonevents under Ashe. And here the government  
12    has it -- well, they got to count -- they at least count  
13    for something when it helps us, in it's not only  
14    rendering the clause incoherent but kind of perverse.

15                    CHIEF JUSTICE ROBERTS: Well, but the basic  
16    point that was made in Yeager made over and over again  
17    is that when the jury is hung, the jury hasn't done  
18    anything. So the defendant in that case was able to  
19    carry the burden that the jury hasn't done anything. So  
20    we're right back to the typical Ashe case.

21                    But this is very different. Now what you're  
22    saying -- and the way you phrase things, I think, is  
23    significant. You said, well, what do we know? We know  
24    the jury might have done this. Well, that means you  
25    don't know what the jury did. And again, it seems to me

1     that, I guess, everybody agrees it's the defendant's  
2     burden, and it's different than a hung jury. The hung  
3     jury, the jury hasn't done anything. When there's a  
4     conviction, the jury has done something. They may have  
5     done something under erroneous understanding of the law  
6     or they may have done something under the correct  
7     understanding of the law. But either way, I don't know  
8     that you can put that much reliance on Yeager.

9                 MS. BLATT: I think -- I mean, what our  
10    argument does depend on is that the reason why the Court  
11    cares about jury verdicts is they come with a stamp of  
12    finality and validity. And let me look at -- let's look  
13    at Powell. Powell is a case where you had a valid  
14    conviction and a valid acquittal. It was basically  
15    apples and apples. And this case is apples and rotten  
16    apples. And if you can't use even a valid verdict to  
17    impeach another verdict, you sure shouldn't be able to  
18    use an invalid verdict either.

19                It's just -- that is what Yeager said, that  
20    Powell means acquittals can't be undermined by hung  
21    counts. Well, they shouldn't be able to be undermined  
22    by invalid verdicts either.

23                JUSTICE GINSBURG: When the acquittal isn't  
24    undermined in that it has claim preclusive effect, those  
25    acquittals are final. They are done. These people can

1 never be prosecuted for the travel offense or the  
2 conspiracy offense. So it's not -- I think you're not  
3 right to say the acquittals don't count under the  
4 government -- I mean, yes, they do count.

5 MS. BLATT: And that was the very argument  
6 made by, you know, the government in Yeager, is who  
7 cares about the acquittals, because they are going to  
8 count. But the Court said, no, to really count, you  
9 have to have the full effect with Ashe --

10 JUSTICE GINSBURG: Because there was nothing  
11 on the other side in Yeager. If you say a hung jury, a  
12 hung -- the jury says we can't decide.

13 MS. BLATT: Right. And I think a rotten  
14 apple is worse than, you know, the orange in Yeager.  
15 You basically had an apple and an orange. Here you have  
16 something infected with reversible error. And just the  
17 irony that it has never been counted by this Court --

18 JUSTICE GINSBURG: The error had nothing to  
19 do with the inconsistency.

20 MS. BLATT: Yes, it -- well, it could have.  
21 It definitely could have. It could have caused the  
22 inconsistency, but it was precisely because we can't  
23 know, the defendant could never meet the burden of  
24 reconciling the acquittals with the hung counts.

25 And that was what Yeager was saying, is,

1     sure, the defendant has the burden, but we're not going  
2     to give them the impossible burden of explaining, well,  
3     if the jury acquitted, what were they doing hanging? No  
4     one could ever reconcile that imponderable. It was a  
5     complete inconsistency. And the Court said, yeah, it  
6     looks kind of inconsistent, but we just -- we're not  
7     really sure what a hung count is. You can't really tell  
8     what they did. It could have been an exhaustion; who  
9     knows? And here --

10                   JUSTICE GINSBURG: It didn't say we're not  
11     really sure. It said a hung count is equivalent to no  
12     decision at all.

13                   MS. BLATT: And I think an invalid verdict  
14     on a legally relevant question is worse than no decision  
15     at all. Again, the government's position is the jury  
16     convicted. Sure, it was a coerced confession that  
17     withheld the crucial confession of the real killer.  
18     They didn't have a lawyer. But it's a piece of paper.  
19     They unanimously found him guilty. Oh, and there was a  
20     preponderance of the evidence instruction too.

21                   But it sure says, well, it has a lot of  
22     meaning to us, because it's evidence of inconsistency.  
23     And it should -- and the jury acquits. And you say, oh,  
24     well, that's just an acquittal. Okay. Well, they can't  
25     retry him.



1                   Acquittals -- I mean, the acquittal has to  
2   mean something under Ashe more than just, you know, the  
3   jury -- you have to assume that the jury necessarily  
4   found him not guilty of the elements. That is the  
5   supposition of this case.

6                   JUSTICE KENNEDY: You're -- you're saying it  
7   is highly doubtful if the government had charged just  
8   counts 2 and 3 and got an acquittal, and that they could  
9   then have had a second trial under 666. You're saying  
10   that just couldn't happen under Ashe v. Swenson.

11                  MS. BLATT: That's exactly right. Yes.  
12   Yes. Yes. Yes, yes, yes.

13                  And the point I'm making about once you have  
14   the acquittal is that -- and I do think this was going  
15   on in Yeager, because the whole point of the  
16   government's brief is we get one complete opportunity.  
17   Yeah, I know it's a nullity, but let's pretend it's not  
18   really a nullity here. But at least we need one  
19   complete opportunity.

20                  And there were a lot of questions about why  
21   should the principles of Ashe outweigh? And the answer  
22   was because of sort of the -- the special status  
23   acquittals have. They're sacrosanct. The Court has  
24   said their unassailability is the most fundamental rule  
25   in the history of double jeopardy law, and the primary

1 purpose of the clause is to protect their integrity.

2 And the Court said the fact you've already  
3 got an acquittal after running the gauntlet and staring  
4 down the barrel of the government's gun -- and here it  
5 was really a firing squad -- that should count for  
6 something. It should count for barring retrial instead  
7 of permitting it. And because acquittals are so  
8 special, our position is the government should give you  
9 something pretty good if they're going to impeach it.

10 And if the hung count nondecisions weren't  
11 good enough in Yeager, it's hard to see how the rotten,  
12 infected apple with a worm should be good enough here.

13 Can I reserve the rest?

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Ms. Prelogar.

16 ORAL ARGUMENT OF ELIZABETH S. PRELOGAR

17 ON BEHALF OF THE UNITED STATES

18 MS. PRELOGAR: Mr. Chief Justice, and may it  
19 please the Court:

20 The most essential prerequisite for applying  
21 collateral estoppel is that the jury must have actually  
22 decided an issue in the defendant's favor, and that  
23 prerequisite isn't satisfied here.

24 Petitioner's jury returned inconsistent  
25 verdicts, convicting them of the standalone bribery

1 offense that they're seeking to preclude relitigation of  
2 now, but also acquitting them of offenses involving  
3 bribery as a predicate. And it's undisputed that those  
4 verdicts cannot be reconciled. They are indisputably  
5 inconsistent. Because of that, we know that error  
6 occurred, and that the jurors must have neglected to  
7 follow the instructions with respect to that count.

8           Because of that, this case falls within  
9 Powell's recognition that when a jury issues  
10 inconsistent verdicts, a defendant can't point to the  
11 acquittal and say that that acquittal necessarily  
12 resolved any facts in the defendant's favor.

13           JUSTICE KENNEDY: But suppose the  
14 hypothetical were -- just conspiracy and travel are  
15 charged, and there's an acquittal. Could you then try  
16 on 666?

17           MS. PRELOGAR: No, because in that  
18 situation, there would be nothing in the record to  
19 indicate that the jury had done anything other than  
20 follow their instructions, apply a lot of facts, and  
21 make factual findings in the defendant's favor. But the  
22 situation is different when the jury returns  
23 inconsistent verdicts, because there, we have conclusive  
24 evidence that something went wrong; the jury erred, it  
25 wasn't following its instructions. And so when the

1 charges are brought at the same time, as they were here,  
2 and the jury acts inconsistently, we lack that  
3 confidence that the acquittal is actually a reflection  
4 of findings in the defendant's favor.

5 CHIEF JUSTICE ROBERTS: Do you agree with  
6 Ms. Blatt's statement that the government has never  
7 before sought to gain a benefit from a vacated  
8 conviction?

9 MS. PRELOGAR: Well, I think that it's  
10 important to separate out the use of the vacated  
11 conviction. It's certainly the case that a vacated  
12 conviction can't be used to establish the defendant's  
13 guilt of that charge. The -- the fact that the  
14 conviction is vacated forecloses reliance on the  
15 conviction for that purpose.

16 But we're not relying on the conviction for  
17 that purpose here. We're looking at it to establish  
18 only the jury's inconsistency. That's a historical  
19 fact. It's -- it's a matter on this historical record  
20 that actually occurred.

21 JUSTICE KAGAN: What other purpose could you  
22 use a vacated conviction for? Is there anything else  
23 that the government can use a vacated conviction for, or  
24 is this the only thing?

25 MS. PRELOGAR: I think it can use it to

1 establish any kind of historical fact when -- when  
 2 that's the purpose to which the conviction is being put.  
 3 And we cite a number of lower court cases that look at  
 4 vacated convictions to establish things like motive for  
 5 a -- for a subsequent crime, which would establish the  
 6 defendant's plan or intent.

7 So there are situations where it's really  
 8 the existence of the conviction that tells us something  
 9 about what actually happened with facts on the ground,  
 10 that I think the conviction is relevant for.

11 JUSTICE KAGAN: Who -- who's not --

12 JUSTICE KENNEDY: Could you use it in a  
 13 civil case? Could a -- could a -- a party use it in a  
 14 civil case to impose civil liability? Say, well, you  
 15 know, the jury obviously found that you did this; there  
 16 was an instruction on the criminal aspect but didn't --  
 17 but you did this act, and that's collateral estoppel, or  
 18 it's issue preclusion, in a civil case for damages.

19 MS. PRELOGAR: No. It wouldn't be  
 20 appropriate to rely on it there, because as a Federal --

21 JUSTICE KENNEDY: Why not?

22 MS. PRELOGAR: -- civil collateral estoppel  
 23 principle, the verdict has to be final, and it would  
 24 lack finality if the conviction had been reversed. But  
 25 I think that actually points up Petitioner's primary

1 argument here, which is to focus on what the conviction  
2 necessarily established, and that's not actually the  
3 correct focal point of this inquiry, because we're not  
4 the ones trying to rely on the conviction to  
5 collaterally estop Petitioners from doing anything.

6           Rather, they're the ones invoking collateral  
7 estoppel, and they're relying on the acquittal to do so.  
8 So the proper focal point of the inquiry here is what  
9 did that acquittal actually decide? And in light of the  
10 inconsistency, we can't know that it resolved any issues  
11 in the defendant's favor.

12           CHIEF JUSTICE ROBERTS: But you don't know  
13 based on the conviction. You don't know that the  
14 verdicts are inconsistent. What you know -- it's the  
15 same problem I was raising with your friend on the other  
16 side. What you know is they might be. And so it seems  
17 to me that what we're being asked to decide, if the  
18 possibility that they might be is enough to allow the  
19 government to relitigate the substantive -- the  
20 substantive count. And it does seem to me that's a  
21 little bit of a -- an extension of what our precedents  
22 have said.

23           MS. PRELOGAR: We do know, though, that  
24 these verdicts definitely were inconsistent. It's not  
25 just a possibility, because the jury was instructed on

1 the same theories of liability for all of the counts  
2 involving Section 666.

3 The First Circuit considered this issue --

4 CHIEF JUSTICE ROBERTS: Well, but if the  
5 jury -- if the jury relied on the part of the  
6 instruction that was legally invalid, then you don't  
7 know that they reached a -- a verdict inconsistent with  
8 what was the acquittal in the prior case.

9 MS. PRELOGAR: We can't rely --

10 CHIEF JUSTICE ROBERTS: A valid conviction.

11 MS. PRELOGAR: That's true we can't rule out  
12 that possibility, but it's equally possible that the  
13 jury validly convicted on a quid pro quo bribery theory  
14 and decided to acquit on the other offenses out of  
15 lenity or mistake or confusion.

16 And when we're in this world where we just  
17 don't know, and Petitioners concede that we can't be  
18 certain what other verdict rested on, then in that  
19 situation the -- the general collateral estoppel  
20 principle is that they cannot preclude that issue from  
21 further litigation. Because it's not just whether  
22 there's a possibility that the jury resolved issues in  
23 their favor. There has to be a certainty that the jury  
24 did that.

25 And I think it's actually something notable

1     that it's not at all unusual for acquittals to lack  
2     preclusive effect when there's some ambiguity about what  
3     the jury had actually decided.

4                 JUSTICE KAGAN:  Ms. Blatt suggested that  
5     there's something -- I think she used the word  
6     "unseemly" -- about using a vacated conviction for this,  
7     or indeed for any other purpose, given the traditions of  
8     our legal system where it's just very hard to find  
9     instances in which we have done so.

10                So, you know, I'm not sure I understand  
11     where the unseemliness prohibition comes from, but it  
12     does seem, you now, quite out of kilter with the  
13     traditions of our legal system to use vacated  
14     convictions in a manner that affects individuals'  
15     constitutional rights.  So, I guess, tell me why we  
16     shouldn't be concerned about that?

17                MS. PRELOGAR:  You shouldn't be concerned  
18     about it because the tradition is limited to looking at  
19     convictions to stand in for the defendant's guilt.  And  
20     we acknowledged here that we are -- we can't rely on the  
21     convictions to establish that.

22                JUSTICE KAGAN:  I think the tradition goes  
23     further.  I mean, you have a tough time in your brief  
24     coming up with any instances, and the only times you do  
25     are -- are some -- a couple of scattered lower court



1 decisions. But you have, other than that, a really  
2 tough time coming up with any instances in which courts  
3 have used vacated convictions for any purpose.

4 MS. PRELOGAR: Those lower court examples,  
5 though, I think are particularly relevant, because what  
6 a number of them are doing are using the vacated  
7 conviction to answer precisely the question that we have  
8 at issue here, which is to try to ascertain the basis  
9 for a jury's other verdict.

10 And when the whole question is what did the  
11 jury actually necessarily decide. The jury's verdicts  
12 are quite obvious relevance in answering that question.  
13 And in fact, it's -- it's also the case that the  
14 conviction can be relevant to help the defendant, not  
15 just harm the defendant, by actually clarifying the  
16 basis of an accompanying verdict that might otherwise be  
17 ambiguous.

18 We cite a case that does this, the Velasquez  
19 case from the Third Circuit. The way that that  
20 situation works is that if a defendant, for example, has  
21 defended on multiple theories, let's say it's a  
22 conspiracy case and he said there was no agreement and  
23 no overt act, he won't be able to establish, in  
24 acquittal, which basis the jury accepted in returning  
25 that verdict.

1                   But if there's a separate conviction in the  
2 case, maybe overlapping with the overt act, even if that  
3 conviction is set aside, the defendant could point to it  
4 and say this shows that the jury must have resolved the  
5 agreement issue in my favor on that separate verdict of  
6 acquittal.

7                   So this isn't an argument that -- that  
8 convictions are relevant only when they benefit the  
9 government, or that we're able to use them to the  
10 defendant's disadvantage. It's an argument about the  
11 nature of the inquiry. And I think that when you're  
12 looking at the question of -- of what that jury  
13 necessarily decided, its verdicts are quite salient  
14 relevance in answering that question.

15                  Petitioners' primary argument is based on  
16 Yeager. Petitioners contend that because there, the  
17 court didn't consider the hung count, the same result  
18 has to obtain here. But Yeager is fundamentally  
19 different because there, there wasn't a jury decision at  
20 all through the hung count, and so there wasn't anything  
21 that could actually create a true inconsistency with the  
22 one verdict in that case that the jurors had returned,  
23 the verdict of acquittal.

24                  I think Yeager is a manifestation of this  
25 Court's long-standing presumption that jurors follow

1     their instructions, they're presumed to act rationally.  
2     And Yeager ultimately concluded that the hung count was  
3     just too thin of a reed to attribute irrationality to  
4     the jury as a whole. Because by definition, the jury as  
5     a whole in that hung count hadn't done anything. They  
6     hadn't agreed on anything.

7                 The verdicts are differently situated as  
8     Yeager itself recognized. Yeager distinguished Powell  
9     and said that when you have inconsistent verdicts, there  
10    the jury has spoken through its verdicts. And if it  
11    reached contradictory results, then what we know is that  
12    that inconsistency exists as a matter of the record of  
13    the case, and Powell says that in a situation presenting  
14    that kind of inconsistency, it wouldn't be appropriate  
15    to assume that the verdict of acquittal is the proper  
16    verdict, the one that the jury really meant.

17                In fact, Powell said that the most obvious  
18    explanation for that kind of inconsistency is that  
19    jurors were convinced of guilt and decided to acquit out  
20    of lenity.

21                And it would be particularly inappropriate,  
22    I think, to accord preclusive effect to that kind of  
23    verdict based on lenity, because it would essentially  
24    magnify the effects of the jury's nullification and  
25    extend it far beyond the compromise the jury itself

1 struck and affect other counts beyond what the jury ever  
2 intended.

3 And so I think Powell rightly recognized  
4 that when we're in a situation where we can't know that  
5 the jury was following its instructions and applying a  
6 lot of fact in a rational manner, then the defendant's  
7 not able to carry the burden to show that the acquittal  
8 is the verdict that -- that the jury truly meant and  
9 intended to resolve the factual disputes in the case.

10 I think that we cite a number of examples as  
11 well where it's clear that there are a number of  
12 examples where there will be ambiguity in what an  
13 acquittal resolved, even separate and apart from  
14 inconsistent verdict. And so petitioners' suggestion  
15 that this fails to accord respect to verdicts I think is  
16 out of sync with how general preclusion principles  
17 operate.

18 Imagine again my conspiracy example where  
19 the defendant offers two defenses and says there was no  
20 agreement and no overt act. In that situation, if the  
21 jury acquits and we have a general verdict of acquittal,  
22 we won't be able to ascertain the exact argument that  
23 the jury adopted. In that situation we know they must  
24 have decided something in his favor, but the inability  
25 to identify which issue was resolved in the defendant's

1 favor provides a basis to avoid collateral estoppel.

2 And I think this is just a recognition that  
3 collateral estoppel is something of an extraordinary  
4 remedy here, and yet we need to be satisfied that its  
5 most fundamental prerequisite is satisfied, that  
6 something was actually resolved in the defendant's  
7 favor.

8 JUSTICE GINSBURG: Do you agree with  
9 Petitioner that if you have a jury finding, jury makes a  
10 finding, but that finding is infected by race  
11 discrimination, you can't use that for anything even  
12 though it's a jury finding?

13 MS. PRELOGAR: Certainly you can't use it to  
14 establish that the jury found the defendant guilty,  
15 because in that situation, that kind of error would  
16 establish that the jury wasn't basing that conviction on  
17 any relevant circumstance. And to the extent that that  
18 error itself results in apparent inconsistency in  
19 verdicts and establishes that the -- what seems to be an  
20 inconsistency was actually based on the error itself,  
21 then, of course, collateral estoppel wouldn't apply  
22 because that would restore our presumption that the jury  
23 did act rationally and find facts in reaching its  
24 verdict of acquittal.

25 But to the extent that the error doesn't

1 explain the inconsistency, doesn't resolve the verdicts,  
2 then we'd still be in a world where, as Powell  
3 recognized, we simply can't see that through the verdict  
4 of acquittal the jury necessarily resolved facts in the  
5 defendant's favor.

6 JUSTICE ALITO: Well, does that position  
7 extend to anything that affects the evidence in the  
8 case, so that if any prosecution evidence is improperly  
9 admitted or any defense evidence is improperly excluded,  
10 the same would follow?

11 MS. PRELOGAR: So long as it creates  
12 reversible error, then, of course, the conviction would  
13 have to be set aside based on that evidence. But  
14 assuming that the evidence applied across the board --

15 JUSTICE ALITO: I thought your answer to  
16 Justice Ginsburg was that if there was a particular kind  
17 of error that resulted in the reversal, then the  
18 conviction could not be used to show inconsistency in  
19 the verdicts.

20 Did I misunderstand your answer?

21 MS. PRELOGAR: No, I apologize. Let me try  
22 to clarify.

23 I was trying to distinguish between those  
24 errors that are actually confined to the count of  
25 conviction and those errors that would apply across the

1 board to all counts. So if there's a particular error  
2 in the case, say an instructional error that only  
3 affects the count of conviction, then that might  
4 actually resolve the apparent inconsistency, because if  
5 the jury received two different instructions on the  
6 overlapping charges, then we might think by looking at  
7 the instructions that we can actually clear up the  
8 inconsistency that would otherwise exist. So to that  
9 extent, that type of error could resolve the  
10 inconsistency and provide that the predicate for  
11 collateral estoppel is satisfied.

12 But putting aside that class of errors, and  
13 we're not in that world here, then I don't think the  
14 type of error at all affects the analysis, because so  
15 long as it's disconnected from the inconsistency itself,  
16 then it doesn't do anything to clarify what that jury,  
17 that we know must have disregarded its instructions,  
18 what that jury was doing.

19 And I think that there's actually -- the  
20 sole reason that Petitioners say that the Court should  
21 disregard the inconsistency here is because of the legal  
22 error in this case.

23 But it bears emphasis that they have a  
24 remedy for that legal error. The remedy is a new trial.  
25 It's the ordinary remedy in this circumstance, and,

1 Justice Ginsburg, in your hypothetical, there too, the  
2 defendant would be entitled to a new trial.

3 But what petitioners are attempting to do in  
4 this case is actually gain complete immunity from  
5 further prosecution on these charges. They want to  
6 extend the effects of the acquittal on those independent  
7 counts to this situation and prevent retrial of the very  
8 count that the jury itself convicted them on. And they  
9 are not entitled to that much greater remedy unless they  
10 can satisfy the prerequisites for collateral estoppel.

11 JUSTICE KAGAN: But that is the greater  
12 remedy that Yeager gave, and I understand your  
13 distinction between Yeager and this case, but it does  
14 leave you with a fundamental anomaly, which is, in a  
15 case in which there's an acquittal and a hung count, the  
16 acquittal is the only thing that matters. And in a case  
17 where there's an acquittal and a vacated conviction, you  
18 know, where a court has said this has got to be -- this  
19 has got to be reversed and it no longer exists, in that  
20 case the person comes up with a far less good situation.

21 MS. PRELOGAR: But that result makes sense  
22 in light of the way Yeager reasoned through the issue in  
23 the case, because in Yeager you could look to the  
24 acquittal and identify that it must have made factual  
25 finding --



1 JUSTICE KAGAN: It makes sense in terms of  
2 parts of Yeager's reasoning, but not in terms of other  
3 parts of Yeager's reasoning.

4 Another part of Yeager's reasoning just said  
5 hung counts have never been accorded respect as a matter  
6 of law or history. And similarly, one could say vacated  
7 convictions have never been accorded respect as a matter  
8 of law or history. They are vacated. They are  
9 nullities. You don't get respect for that.

10 MS. PRELOGAR: I understand that portion of  
11 Yeager, though to just simply confirm what the Court had  
12 already said, which is that hung counts are evidence of  
13 nothing because they don't represent jury decisions at  
14 all. A jury doesn't speak through its -- a jury speaks  
15 only through its verdict. And so something that signals  
16 just disagreement or a failure to agree or even  
17 extraneous --

18 JUSTICE KAGAN: Well, I guess I see -- when  
19 I read Yeager, I see two different rationales, and on  
20 one you're exactly right. There's a real distinction  
21 with this case.

22 On the other, seems you're exactly wrong.  
23 There's no distinction in this case at all because both  
24 have never been accorded respect as a matter of law or  
25 history.

1                   MS. PRELOGAR: But I think that Yeager  
2   itself signaled that the issue on which the case turned  
3   is that we didn't have the kind of true inconsistency  
4   that existed in a case like Powell, and the finality of  
5   the conviction, its validity doesn't erase the  
6   inconsistency that existed in Powell or provide any  
7   greater clue about what that jury was actually thinking  
8   and what it actually decided through its verdicts.

9                   And so I think Yeager itself emphasized that  
10 although we do have these finality concerns, a verdict  
11 of acquittal is final only with those issues that it  
12 actually decided, and Yeager was able to conclude that  
13 the jury in that case, through the acquittal, did decide  
14 issues in the defendant's favor as opposed to, for  
15 example, deciding to acquit out of compassion, exercise  
16 lenity, or neglect to follow instructions through the  
17 count of acquittal.

18                  That's not the case here where we have  
19 conclusive evidence. We know for sure this jury didn't  
20 follow its instructions, and that brings the case in  
21 line with Powell, notwithstanding the fact that the  
22 convictions had to be vacated for unrelated reasons.

23                  I think it's -- it's important to emphasize  
24 too the weighty interests that land on the side of  
25 retrial in this circumstance. Thus, the ordinary remedy

1 here and it's for good reason, because when there's a  
2 legal error in a trial, that doesn't signal that the  
3 government necessarily failed to prove its case and  
4 there's still a strong societal interest in ensuring  
5 that the government has an opportunity to enforce the  
6 criminal laws against that person, and if it can prove  
7 its case under proper instructions, obtain a guilty  
8 verdict to punish the criminal misconduct.

9 JUSTICE ALITO: The question on which we  
10 granted review refers to a vacated unconstitutional  
11 conviction.

12 But is that what we have here? Is this an  
13 unconstitutional conviction?

14 MS. PRELOGAR: I think that we -- that the  
15 conviction, if it were based on proper theory, would not  
16 be unconstitutional, and so we don't necessarily know.  
17 That was the reason why the conviction had to be  
18 vacated, was because it wasn't clear what basis the jury  
19 had resolved the verdict on.

20 JUSTICE ALITO: Well, it was an erroneous  
21 instruction, so it was instructional error. Is that a  
22 constitutional error?

23 MS. PRELOGAR: It's a -- I think it rises to  
24 the level of a constitutional error insofar as the First  
25 Circuit held that the defendants -- that the

1 instructional error would have permitted criminal  
2 conviction based on conduct that doesn't constitute a  
3 crime, putting, of course, to one side, as Justice  
4 Ginsburg noted, the circuit split on that issue. It's  
5 by no means an issue that's been fully resolved. And  
6 the majority of circuits have found that the gratuity  
7 theory that the jury was instructed on here is a proper  
8 interpretation of Section 666.

9 JUSTICE ALITO: Sorry. Is every  
10 instructional error a constitutional error?

11 MS. PRELOGAR: I don't think that all of  
12 them would necessarily rise to the level of a  
13 constitutional error. I guess any error that ultimately  
14 is prejudicial and where we can't know for certain  
15 whether the defendant was properly convicted based on  
16 that charge, I think at the very least would of course  
17 warrant setting aside the conviction and vacating it.

18 JUSTICE ALITO: So if there were a harmless  
19 error issue in this case, what would the standard be?

20 MS. PRELOGAR: If there were a harmless  
21 error --

22 JUSTICE ALITO: It would have to be harmless  
23 beyond a reasonable doubt because it's a constitutional  
24 error?

25 MS. PRELOGAR: I'm not sure whether the

1 lower court applied a Chapman standard here, and I think  
2 ultimately the potential difference in standards  
3 wouldn't have affected the analysis, because the court  
4 concluded that there was -- that there was sufficient  
5 evidence on the proper quid pro quo theory, also  
6 evidence that would have supported a bribery theory.  
7 And so the court just couldn't tell either way on what  
8 ground the jury would have possibly grounded this  
9 verdict.

10           Ultimately, though, I think in light of that  
11 error, the appropriate result is the ordinary remedy  
12 here, a retrial. Petitioners are only entitled to avoid  
13 that remedy if they can carry their burden, and it's a  
14 stringent one, of showing that the jury actually  
15 resolved issues in their favor in this litigation.

16           They haven't carried that burden here. They  
17 seek to be excused from it based on the legal error.  
18 But they haven't actually carried the error -- carried  
19 the burden of showing that that jury that returned those  
20 inconsistent verdicts necessarily thought they were not  
21 guilty of committing quid pro quo bribery.

22           Unless the court has further questions, we'd  
23 respectfully ask that you affirm the judgment of the  
24 First Circuit.

25           CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Ms. Blatt, you have five minutes remaining.

2 REBUTTAL ARGUMENT OF LISA S. BLATT

3 ON BEHALF OF THE PETITIONERS

4 MS. BLATT: Thanks. Thank you, Mr. Chief  
5 Justice.

6 Justice Alito, any instructional error that  
7 allows a jury to convict on something that's not a crime  
8 violates the due process clause, but not all  
9 instructional errors violate the due process clause. I  
10 wouldn't want to be convicted for something that wasn't  
11 a crime. So I don't -- that doesn't surprise me.

12 I'm going to start sort of backwards.  
13 Justice Ginsburg, on your question about an all-white  
14 jury where blacks are excluded, I'd go back and look at  
15 the transcript, because she said, oh, well, that  
16 might -- that might resolve the inconsistency.

17 And there's a real discomfort that she had  
18 there, because she didn't want to say, well, they  
19 acquitted him of murder, but because they also convicted  
20 him of murder, maybe it was because they were -- they  
21 were all white.

22 It's -- it's the same argument here, is --  
23 she's saying, well, maybe that did cause the  
24 inconsistency.

25 And it's our same argument too. Nobody

1 knows if the inconsistency is because they were  
2 irreconcilably divided on whether he was not guilty of a  
3 crime, or maybe it was purely a result of the  
4 instructional error.

5 And it's because Yeager said it's  
6 impossible, we could never meet that burden, and neither  
7 could that -- the poor African American in her example,  
8 he could never show that burden either, which is why the  
9 burden shouldn't be on us.

10 Justice Kagan, your bit about unseemliness,  
11 I'll take unseemliness. Every single government brief  
12 on don't you dare reverse a conviction; convictions are  
13 final, they bring closure to our community unless --  
14 unless the error is so foul that it makes our country  
15 not have fairness and integrity in our criminal justice  
16 system.

17 You just -- we can't -- we can't have any  
18 confidence in the verdict. That is the whole  
19 supposition behind the prejudicial-error doctrine, is we  
20 take a jury's decision as sacrosanct unless it just --  
21 it's that bad. And that's the -- that's the premise of  
22 your structural-error doctrine. So unseemliness is  
23 written into your structural error, your prejudicial  
24 error, your plain error. It's written into all of your  
25 case law on the criminal law.

1           On the third point about civil, I think it's  
2   fascinating. There are no cases. The government  
3   doesn't cite any. The 2009 brief in Yeager is identical  
4   to this brief. There are no civil cases saying you have  
5   two inconsistent verdicts, but one is invalidated and  
6   then somehow that cancels it out.

7           There's no settled common law of if you have  
8   something invalid, you still get to look at it. In  
9   fact, the law -- and of course we're going to defer to  
10   Justice Ginsburg, but the law has always been an invalid  
11   conviction just disappears for collateral estoppel.

12          The other point I want to make, there was a  
13   lot of talking about, well, juries are just lean --  
14   lenity, and they're just being nice. But we know since  
15   Powell that overlapping charges skyrockets the  
16   conviction rate. With each additional charge, a  
17   conviction rate starts out at 68 percent and it jumps to  
18   88 percent. So the opposite is true, in reality, is the  
19   more charges the government brings, the more likely that  
20   there is a --

21          JUSTICE GINSBURG: The jury might have taken  
22   care of that in this case. The jury might have reacted  
23   to the overcharging by saying we're not -- we will  
24   convict on the predicate offense, but we're not going to  
25   convict on these compound offenses.



1 MS. BLATT: Right. But I just -- that's not  
2 a basis to dismiss the otherwise collateral estoppel  
3 effect under Ashe. I mean, the question is, is are we  
4 going to count illegal invalid verdicts as relevant  
5 evidence of inconsistency. And almost the entirety of  
6 the government's argument, at least the last ten  
7 minutes, were just complete verbatim recounts of the  
8 oral argument in Yeager and the brief in Yeager, is that  
9 we have to have one free chance. The defendant didn't  
10 meet her burden. After all, collateral estoppel, you  
11 got to meet your burden. There was no way he could  
12 reconcile the verdicts. The jury obviously didn't  
13 follow the law, and you should presume they followed the  
14 law. If they followed the law, they had to acquit.

15 It just -- this is definitely a broken  
16 record. And yes, they have a formalistic distinction  
17 that there is no jury decision. But it's worse when  
18 what you have is a jury decision that on its face is  
19 offensive to our legal system.

20 On the historical record, the only thing  
21 they came up with -- I don't know how many -- 30,000  
22 volumes was the two cases in the lower courts. But the  
23 majority, the cases they were talking about are more,  
24 like, for civil. You can't get civil damages if there  
25 was an illegal conviction. It disputes probable cause,

1 and the courts are split.

2 But this Court -- and this court has been  
3 around for a while, and I think it counts more than the  
4 two lower court decisions they have, has said it is  
5 impeached, full stop. It's void ab initio. It's a  
6 legal fiction for a reason. It's not something that  
7 prosecutors get to dig up from the grave and visit from  
8 time to time even though it was invalid. It's cremated.  
9 Its gone.

10 And again, it is something astonishing to  
11 say, well, we're going to treat it, even though it's  
12 unconstitutional under the due process clause, it's a  
13 legal nullity under the double jeopardy clause. And  
14 even though we're not letting the government use it to  
15 prove our conviction, I mean, our guilt or innocence,  
16 it's just that if we otherwise had a double jeopardy  
17 right because we were found not guilty, they can negate  
18 it and take it away.

19 JUSTICE ALITO: Are you really arguing that  
20 it can't be used to prove a historical fact, that it's  
21 not a -- it cannot be a relevant historical fact?

22 MS. BLATT: In the same way that Yeager --  
23 the relevant historical fact is a finding of guilt.  
24 That's why they couldn't get through their brief without  
25 finishing up with historical fact on what the jury

1 thought about the defendant's guilt.

2 And I noticed she didn't once say "legal  
3 conviction." If she had to give her argument saying the  
4 jury legally convicted, it was an invalid verdict, it  
5 was an unconstitutional verdict, her argument doesn't  
6 sound so attractive.

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

9 (Whereupon, at 10:55 a.m., the case in the  
10 above-entitled matter was submitted.)

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