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Double Jeopardy & Collateral Estoppel: A Thing Derided

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> "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]"[1]

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution (the Clause) is one of many ways the Bill of Rights reduces government oppression. Although it also protects from multiple punishments in a single trial, this paper focuses on the right to be free from successive trials. It begins with a brief discussion of this core right followed by an in-depth analysis of substantive jeopardy law, including when jeopardy attaches and terminates. The second half of the paper deals with issue preclusion, *i.e.*, the aspect of the Clause that applies when a successive trial is not actually for "the same offence."

I. What is the core right?

The Clause had its origin in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon. "These three pleas prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense."[2] Despite its origins, the application of these pleas through the clause they spawned "has come to abound in often subtle distinctions which cannot by any means all be traced to the original three common-law pleas referred to above."[3]

First, "[a]lthough the constitutional language, 'jeopardy of life or limb,' suggests proceedings in which only the most serious penalties can be imposed, the Clause has long been construed to mean something far broader than its literal language."[4]

Second, and perhaps most important for the people affected, despite its explicit reference to punishment, "[t]he prohibition is not against being twice punished, but against being twice put in jeopardy[.]"[5] The common law at the time of the founding distinguished the freedom from a second trial from the more basic freedom from a second punishment.[6] While freedom from a second trial would prevent a second punishment, that was not the primary purpose of the Clause:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is 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

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[1] U.S. CONST. AMEND. V.

[2] *U.S. v. Scott*, 437 U.S. 82, 87 (1978).

[3] *Id*. The Double Jeopardy Clause of the Texas Constitution, Art. I sec. 14, is interpreted the same. *See Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007) (overruling the only case interpreting it more expansively).

[4] *Breed v. Jones*, 421 U.S. 519, 528 (1975).

[5] *Ball v. U.S.*, 163 U.S. 662, 669 (1896).

[6] *Green v. U.S.*, 355 U.S. 184, 187 (1957). This protection from multiple punishments was later incorporated but is a function of legislative intent rather than pure constitutional prohibition. *Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999). It is not the focus of this paper.

> 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.[7]

The Supreme Court has sometimes viewed the primary purpose of the Clause to be context-specific: after acquittal, it "prevent[s] the State from mounting successive prosecutions and thereby wearing down the defendant[;]"after conviction, it "prevent[s] a defendant from being subjected to multiple punishments for the same offense."[8] However, it has consistently viewed the "controlling constitutional principle" to be the use of successive trials for the same offense as "a potent instrument of oppression"[9] and a second trial for a serious offense "an ordeal not to be viewed lightly," regardless of the ultimate outcome.[10] As it said in its most recent case on the subject, "This guarantee recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek."[11]

Third, and perhaps most noteworthy for practitioners, the Court has added to the list of interests being balanced when applying the Clause. As will be shown below, its conceptualization of what jeopardy is has changed over the years to accommodate new situations and avoid mechanical or formulaic application. It has sometimes viewed the freedom from successive trials positively as the "valued right" to have guilt decided by a single tribunal.[12] Perhaps as a corollary, the Court has recognized the government's interest in obtaining one full and fair opportunity to prove its case.[13] It has also characterized "the preservation of the finality of judgments" as a "vitally important" interest.[14] And, as will be discussed in greater detail in the second part of this paper, the Court has showed a renewed interest in the Clause's reference to "the same offence."[15]

Keeping the Court's formulation of the Double Jeopardy Clause in mind is crucial because, as the Court recently held, "the Clause was not written or originally understood to pose an insuperable obstacle to the administration of justice in cases where there is no semblance of these types of oppressive practices."[16] Most arguments will thus be based more in policy than rule.

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[7] *Green*, 355 U.S. at 187-88.
[8] *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 307 (1984).
[9] *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).
[10] *Price v. Georgia*, 398 U.S. 323, 331 (1970).
[11] *Currier v. Virginia*, 138 S. Ct. 2144, 2149 (2018).
[12] *Ex parte Garrels*, 559 S.W.3d 517, 519 (Tex. Crim. App. 2018) ("A defendant has a constitutional right to have her fate determined 'before the first trier of fact.'"); *Torres v. State*, 614 S.W.2d 436, 441 (Tex. Crim. App. 1981).
[13] *See Wade v. Hunter*, 336 U.S. 684, 689 (1949) ("a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.").
[14] *Yeager v. U.S.*, 557 U.S. 110, 117-18 (2009) (internal quotations and citations omitted).
[15] *Currier*, 138 S. Ct. at 2149.
[16] *Id.* (cleaned up).

II. **When does jeopardy attach?**

Most jeopardy cases turn on whether a previous proceeding ended with a jeopardy-terminating event or, in some cases, whether a termination has preclusive effect. But sometimes the question is whether jeopardy ever attached. This question can be tougher.

A. Trials

In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn.[17] Bench trials are less clear. The Supreme Court says jeopardy attaches in a nonjury trial when the court begins to hear evidence.[18] A plurality of the Court of Criminal Appeals would hold that jeopardy attaches in a bench trial when the defendant pleads to the indictment.[19] Either makes sense because, as "the constitutional prohibition can have no application[] until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge."[20]

Consider a pretrial suppression motion for a traffic offense. The State might offer all the evidence it has on all the elements of the offense, "[b]ut even when a motion to suppress is granted pretrial, the State has the option to simply dismiss the case, and in doing so, prevent the attachment of jeopardy to the first prosecution."[21] The Court of Criminal Appeals was thus overly cautious when it said "[t]his fact *suggests* that suppression issues are simply not the type of issues that implicate double jeopardy in the first place."[22]

B. Pleas

The Supreme Court has not clarified when jeopardy attaches in the plea context,[23] but it has assumed that jeopardy attaches at least when a defendant is sentenced.[24] State and federal courts are split. Some, like the Supreme Court, have not decided.[25] Some find that jeopardy

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[17] *Serfass v. U. S.*, 420 U.S. 377, 388 (1975).
[18] *Id*.
[19] *Ortiz v. State*, 933 S.W.2d 102, 105 (Tex. Crim. App. 1996) (plurality).
[20] *Serfass*, 420 U.S. at 388 (quotation omitted).
[21] *York v. State*, 342 S.W.3d 528, 551 (Tex. Crim. App. 2011).
[22] *Id*. (emphasis added).
[23] George E. Dix & John M. Schmolesky, 41 Texas Practice: Criminal Practice and Procedure 19:3, at 485 (3d ed. 2011).
[24] *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987).
[25] *See United States v. Wampler*, 624 F.3d 1330, 1341 (10th Cir. Okla. 2010) ("jeopardy does not attach at least until the guilty plea is accepted, and perhaps not until even later.").

attaches upon the court's acceptance of a guilty or no contest plea.[26] Some require entry of a judgment and imposition of sentence.[27] Their reasons vary.

For example, numerous courts hold that accepting and later rejecting a plea (or even dismissing the charges) does not implicate any of the interests protected by the Double Jeopardy Clause, especially finality.[28] "Rather, to end prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws."[29] This rationale has been applied to pleas that were undone due to mistake rather than reconsideration.[30] "Defendant[s] 'should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution,' when the policies behind the clause are not at issue and the ends of justice will be defeated through a mechanical application of the clause."[31]

The Court of Criminal Appeals held in *Ortiz v. State* that jeopardy attaches to a negotiated plea of guilty when the trial court accepts the plea bargain.[32] A plea proceeding, "although a type of bench trial, does not implicate the same constitutional policy considerations for the double jeopardy prohibition present in bench trials or jury trials in which guilt is contested."[33] First, a defendant who has a plea agreement and pleads guilty before the court has no particular interest in a chosen tribunal.[34] Second, no interest in the finality of judgments arises until the agreement is binding, which occurs only when the plea agreement is accepted.[35] Third, a defendant who pleads guilty is not subject to the embarrassment, anxiety, and insecurity of repeated attempts

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[26] *United States v. Jones*, 733 F.3d 574, 580 (5th Cir. La. 2013); *United States v. Patterson*, 381 F.3d 859, 864 (9th Cir. Idaho 2004); *State v. Petty*, 548 N.W.2d 817, 826 (Wis. 1996); *Nardone v. Mullen*, 322 A.2d 27, 29 (R.I. 1974). At least one specifies "unconditional" acceptance. *United States v. Baggett*, 901 F.2d 1546, 1548 (11th Cir. Ala. 1990).

[27] *See*, *e.g.*, *United States v. Santiago Soto*, 825 F.2d 616, 620 (1st Cir. P.R. 1987) ("jeopardy did not attach when the district court accepted the guilty plea to the lesser included offense and then rejected the plea without having imposed sentence and entered judgment."); *Davis v. State*, 845 P.2d 194, 197 (Okla. Crim. App. 1993).

[28] *Santiago Soto*, 825 F.2d at 620 ("mere acceptance of a guilty plea does not carry the same expectation of finality and tranquility that comes with a jury's verdict or with an entry of judgment and sentence as in *Brown* [*v. Ohio*, 432 U.S. 161 (1977)]."); *State v. Thomas*, 995 A.2d 65, 75-76 (Conn. 2010) ("jeopardy does not necessarily attach automatically upon the acceptance of a guilty plea" because acceptance of the plea was conditioned implicitly on the results of the PSI and victim's statement); *State v. Angel*, 51 P.3d 1155, 1159 (N.M. 2002).

[29] *Angel*, 51 P.3d at 1159.

[30] *See State v. Burris*, 40 S.W.3d 520, 526-27 (Tenn. Crim. App. 2000) ("A trial court may set aside a guilty plea, even after the trial court has accepted the plea, and not violate double jeopardy when (1) the trial court's acceptance of the plea is premised on [its] incorrect understanding of the plea's terms, and (2) that misunderstanding is reflected in the record."); *State v. Duval*, 589 A.2d 321, 325 (Vt. 1991) ("acceptance [of a plea] should have no more legal significance than the mistake that led to it").

[31] *Burris*, 40 S.W.3d at 525 (quoting *Ohio v. Johnson*, 467 U.S. 493, 502 (1984)); *see also Duval*, 589 A.2d at 325 (eschewing a "procrustean analysis").

[32] *Ortiz*, 933 S.W.2d at 107 (plurality); *see also Ex parte Dangelo*, 376 S.W.3d 776, 780 (Tex. Crim. App. 2012).

[33] *Ortiz*, 933 S.W.2d at 106.

[34] *Id*.

[35] *Id*.; *see* art. TEX. CODE CRIM. PROC. art. 26.13(a)(2) ("if an agreement exists, the court shall inform the defendant whether it will follow or reject the agreement in open court and before any finding on the plea. Should the court reject the agreement, the defendant shall be permitted to withdraw the defendant's plea of guilty or nolo contendere[.]").

to convict him since he has admitted his guilt, thus avoiding the "harrowing experience" of a contested trial.[36]

Texas is undecided when it comes to open pleas. One court of appeals has applied *Ortiz*'s reasoning and held, "Even in the case of an open plea, the trial court must still accept the plea in order for jeopardy to attach."[37] Importantly, that court drew a distinction between acceptance of a plea and "merely not[ing]" it.[38] This makes sense. One of the *Ortiz* rationales for attachment at acceptance of a plea agreement was that neither the State nor Appellant are bound until the trial court accepts it.[39] Similarly, a defendant may not withdraw his open plea without the trial court's permission once the trial court has entered a finding of guilt and "tak[en] the case under advisement" for punishment.[40] If one equates sentencing consideration with a bench trial on punishment only, entering a plea that cannot be revoked suggests attachment of jeopardy because, as noted above, jeopardy attaches in a bench trial in Texas when the defendant pleads to the indictment.[41]

But there are problems with attachment at acceptance of an open plea. Attachment at that point does not serve the policies underlying double jeopardy any better than would acceptance of a plea of guilty prior to consideration of a negotiated punishment. A defendant who pleads open to a judge has no more interest in a jury than one who pleads with an agreed punishment. And pre-sentence investigations—and attendant delays—are present with both types of plea. As such, the "harassing exposure to the harrowing experience of a criminal trial" is only marginally higher with a sentencing hearing than it is with an agreed sentence.

Most importantly, cases decided since *Ortiz* undercut the parties' expectation in finality following acceptance of a plea. In *State v. Aguilera*, the Court of Criminal Appeals held that a trial court "retains plenary power to modify its sentence if . . . the modification is made on the same day as the assessment of the initial sentence and before the court adjourns for the day."[42] Unlike many of the state cases cited above, this change was not due to mistake or oversight; this was a simple change of mind. More recently, in the context of the State's right to appeal, that court held that an oral ruling is not "an order" that establishes the decision of the trial court because, in part,

[36] *Ortiz*, 933 S.W.2d at 106 (quoting *Crist v. Bretz*, 437 U.S. 28, 38 (1978)).
[37] *Harvey v. State*, 367 S.W.3d 513, 516 (Tex. App.–Texarkana 2012, pet. ref'd).
[38] *Id*.
[39] *Ortiz*, 933 S.W.2d at 106.
[40] *DeVary v. State*, 615 S.W.2d 739, 740 (Tex. Crim. App. 1981) (panel op.), cited with approval in *Murray v. State*, 302 S.W.3d 874, 883 (Tex. Crim. App. 2009).
[41] *Ortiz*, 933 S.W.2d at 105.
[42] 165 S.W.3d 695, 698 (Tex. Crim. App. 2005). In that case, Aguilera entered an open plea of guilty before the trial court, which sentenced him to 25 years' in prison. *Id*. at 696. Later that day, shortly after an off-the-record "victim impact statement" prompted an in-chambers discussion with the attorneys, the trial court reassessed Aguilera's sentence at 15 years. *Id*.

there would be "no evidence of the required finality of a ruling; an oral ruling is subject to change after further discussion or presentation of contrary law or precedent. Only a writing suffices."[43]

Finally, not only does Texas recognize the existence of conditional pleas,[44] it recognizes a distinct type of plea known as a "timely pass for plea," in which a defendant pleads open but has the ability to withdraw his waiver of jury for punishment if he does not like the judge's sentence.[45] These arrangements further diminish a defendant's expectation in finality.

If analogy to *Ortiz* is the starting point, *Ortiz* deserves reconsideration because there is a solid argument that no plea can create jeopardy until it is accepted and reduced to a judgment. The acceptance of an open plea of guilty or no contest, without more, is not even a complete oral judgment[46] and, as noted above, an oral ruling on punishment is subject to change until the trial court adjourns that day.

At the very least, no state or federal court requires less than acceptance of the plea, which includes a finding of guilt. As one justice of the Florida Supreme Court put it, no prevailing theory "lend[s] credence to the suggestion that a defendant can force a premature attachment of jeopardy simply by tendering a 'no contest' plea to the trial judge."[47]

C. Jurisdiction

One important catch is that jeopardy cannot attach if the trial court has no jurisdiction, regardless of whether a jury is sworn and evidence presented.[48] Put another way, if a conviction could be declared a nullity based on lack of jurisdiction, it is not a bar to prosecution. This played out in *Ex parte Macias*.[49] Macias filed a successful motion to suppress but the State won on appeal. On remand, trial commenced before the mandate issued. After the charge on guilt was read to the jury, an appellate prosecutor notified the trial court, which dismissed the case because it did not have the authority to declare a mistrial under the circumstances. The Court of Criminal Appeals agreed, and held that retrial was not barred.

It is important to contrast this concept of legal nullity with the much more common occurrence of a conviction that is merely voidable due to a defect the defendant/appellant could have raised on appeal. In *Ball v. U.S.*, for example, Ball and two co-defendants were indicted on a charging

[43] *State v. Sanavongxay*, 407 S.W.3d 252, 258 (Tex. Crim. App. 2012).
[44] *Moore v. State*, 295 S.W.3d 329, 332 (Tex. Crim. App. 2009) ("A trial court may conditionally agree to follow a plea-bargain agreement, but only by delaying the unconditional acceptance or rejection of the agreement until after the condition of acceptance has been fulfilled.").
[45] *Ex parte Delaney*, 207 S.W.3d 794, 796 (Tex. Crim. App. 2006).
[46] *See* TEX. CODE CRIM. PROC. art. 42.01 § 1 (judgment is a written declaration showing, *inter alia*, conviction and term of sentence).
[47] *Vinson v. State*, 345 So. 2d 711, 717 (Fla. 1977) (England, J., concurring).
[48] *Serfass v. U. S.*, 420 U.S. 377, 391-92 (1975).
[49] *Ex parte Macias*, 541 S.W.3d 782 (Tex. Crim. App. 2017), *reh'g denied* (Dec. 13, 2017), *cert. denied sub nom. Macias v. Texas*, 138 S. Ct. 1562 (2018)

instrument containing reversible—but not jurisdictional—error.[50] Ball was acquitted; the other two were convicted and successfully appealed. The Supreme Court held that Ball's judgment was "not void, but only voidable" and so good unless attacked by him and reversed.[51]

III. **When does it terminate?**

A. Final conviction

Jeopardy is complete for a conviction when the mandate issues.[52] Thus, it has been "quite clear" for over 120 years "that a defendant who procures a judgment against him . . . to be set aside may be tried anew . . . for the same offense of which he had been convicted."[53] In other words, defendants cannot rely on convictions that were reversed "upon a writ of error sued out by themselves."[54]

It is worth noting that the official explanation for why a second trial under these circumstances is not a second "jeopardy" has been a source of contention. While often explained in terms of "continuing jeopardy," the ability to retry successful appellants has also been described as a function of waiver or estoppel.

In 1904, Justice Holmes's inability to conceive of a waiver of an express right to face only one trial forced him to create the concept of "continuing jeopardy." [55] He would have permitted repeated trials, and repeated attempts at conviction, so long as they occurred within a single case. Seventy years later, a unanimous Court contrasted Justice Holmes "concept" of continuing jeopardy from the "conclusion" the Court had occasionally used to explain its practice.[56] By then, however, it had already recognized that the availability of retrial following appeal could be justified by viewing it as an implicit waiver of his plea of former jeopardy or by viewing the second trial as "continuing the same jeopardy" because the original jeopardy does not end until there is an acquittal or a "final" conviction.[57]

The Court had also held that "continuing jeopardy" "appears to rest on an amalgam of interests—*e.g.*, fairness to society, lack of finality, and limited waiver, among others[,]"[58] and likened a new trial due to appeal to a new trial following a defense request for mistrial because "in both situations, the policy behind the Double Jeopardy Clause does not require prohibition of the second trial."[59] But in *U.S. v. Scott*, the Court specifically rejected adoption of a "wavier" theory

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[50] *Ball v. U.S.*, 163 U.S. 662 (1896).
[51] *Id.* at 670.
[52] *Ex parte McAfee*, 761 S.W.2d 771, 773 (Tex. Crim. App. 1988) (jeopardy not concluded until conviction is final); *Jones v. State*, 711 S.W.2d 634, 636 (Tex. Crim. App. 1986) (conviction is final when mandate issues).
[53] *Ball*, 163 U.S. at 672.
[54] *Id*.
[55] *Kepner v. U.S.*, 195 U.S. 100, 134-35 (1904) (Holmes, J., dissenting).
[56] *Breed*, 421 U.S. at 534.
[57] *Green*, 355 U.S. at 189.
[58] *Price*, 398 U.S. at 329 n.4.
[59] *Jeffers v. U. S.*, 432 U.S. 137, 152 (1977).

of jeopardy when it said a requested mid-trial dismissal for pretrial delay did not bar retrial. Instead, it based its holding on a form of estoppel: "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice."[60]

The Court in 2016 reapproved the "continuing jeopardy" rule, which "neither gives effect to the vacated judgment nor offends double jeopardy principles."[61] "[B]y permitting a new trial post vacatur, the continuing-jeopardy rule serves both society's and criminal defendants' interests in the fair administration of justice[;] losing the ability to punish the guilty would be too high a price to pay for trial errors, and appellate courts might be less protective of a defendant's rights if they knew reversal meant immunity.[62]

As with other jeopardy issues, then, the resolution in a given case will come down to policy even when that policy is called a rule.

B. Acquittal

Although a second trial is offensive regardless of the final verdict it follows, a second bite at the guilt apple is worse than a second bite at the punishment apple. "Acquittals, unlike convictions, [immediately] terminate the initial jeopardy"[63] because they cannot be appealed. But what is an acquittal? When is an acquittal not an acquittal? There continues to be a lot of litigation on this issue.

i. *Appellate acquittals*

A defendant who is convicted may obtain an acquittal on appeal, but it does not mean anything until a mandate issues. In other words, the government can appeal the appellate reversal and resurrect the conviction without offending the Clause.[64]

ii. *Jury acquittals*

It is easy enough when the jury finds a defendant not guilty. It can even be done implicitly. In *Green v. U.S.*,[65] the jury was charged on first- and second-degree murder and convicted Green of the latter. After that conviction was reversed on appeal, the government retried Green for first-degree murder. The Court held that, having been forced to run the gantlet once and the jury refusing to convict him, he received an "implicit acquittal" at the first trial.[66] Texas has a statute that embodies this principle[67] but, constitutionally, the order is unimportant: "Whatever the

[60] *Scott*, 437 U.S. at 99.
[61] *Bravo-Fernandez v. U.S.*, 137 S. Ct. 352, 363 (2016).
[62] *Id*.
[63] *Lydon*, 466 U.S. at 308.
[64] *Martin Linen*, 430 U.S. at 569-70 (appeal of this type presents no threat of successive prosecution).
[65] *Green v. U.S.*, 355 U.S. 184 (1957).
[66] *Id*. at 190-91.
[67] TEX. CODE CRIM. PROC. art. 37.14.

sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."[68] Two exceptions to the constitutional rule are 1) when all the events necessary to the greater crime have not taken place at the time the prosecution for the lesser is begun, and 2) when the facts necessary to the greater were not discovered before the first trial despite the exercise of due diligence.[69]

For any of this to matter, however, you must have an actual verdict of acquittal. In *Blueford v. Arkansas*, the jury informed the trial court that it was unanimous against guilt on charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide.[70] But the jury could not reach a formal verdict after two *Allen* charges and was discharged after a mistrial was declared. The Supreme Court held that retrial on capital and first-degree murder was permitted. Because of the possibility that the jury could have revisited the primary charges at any time before a verdict was rendered, "the foreperson's report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses, quite apart from any requirement that a formal verdict be returned or judgment entered."[71]

The Court of Criminal Appeals recently reached the same conclusion with a jury note expressing a similar impasse.[72] It noted, however, that a second trial was permitted because the jury had not shown its intent to have "finally resolved" to acquit the defendant of the primary charge.[73] The Court cited cases interpreting Article 37.10(a), which covers "informal verdicts," in support of its suggestion (or at least openness to the idea) that a jury could somehow express a definitive verdict on greater counts without completing its deliberations on all the lessers. It is not clear that a statutory procedure for putting verdicts into proper form and even correcting omissions[74] authorizes trial courts to accept partial verdicts. And even if a defendant could waive his right to a single tribunal by accepting acquittal on the greater offenses, it is doubtful the State could be made to accept it. As it stands, however, whether the reasoning of *Blueford* would prevent this scenario from making a partial verdict "final" is an open question in Texas.

iii. *Judicial acquittals*

As confusing as it can be when the jury at least appears to have reached a decision on an accusation, it is worse when the judge does it. First, saying so is not enough. "The word ['acquittal'] itself has no talismanic quality for purposes of the Double Jeopardy Clause."[75] Second, "what constitutes an 'acquittal' is not to be controlled by the form of the judge's

[68] *Brown v. Ohio*, 432 U.S. 161, 169 (1977);
[69] *Jeffers*, 432 U.S. at 151.
[70] *Blueford v. Arkansas*, 566 U.S. 599 (2012).
[71] *Id*. at 608.
[72] *Traylor v. State*, __S.W.3d__, PD-0967-17, 2018 WL 5810859 (Tex. Crim. App. Nov. 7, 2018), reh'g denied (Mar. 20, 2019).
[73] *Id.* at *4-5.
[74] *See generally Nixon v. State*, 483 S.W.3d 562 (Tex. Crim. App. 2016) (discussing cases).
[75] *Serfass*, 420 U.S. at 392.

action."[76] It is the substance, not the label, of the order that controls.[77] "[W]hen a trial ends, after jeopardy has attached, with a judgment of acquittal, 'whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict,' any further prosecution, including an appeal, is prohibited by the Double Jeopardy Clause."[78] A reviewing court "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, *correct or not*, of some or all of the factual elements of the offense charged."[79]

The italicized portion of the above quote from *Martin Linen* has proved the most irksome. "Even where an acquittal is based on an 'egregiously erroneous foundation,' such as erroneous exclusion of evidence or erroneous weighing of evidence, the acquittal bars appellate review of the ultimate disposition as well as the underlying foundation."[80] This rule has—and has always had—its detractors. Chief Justice Burger dissented to *Martin Linen*; he said of an "acquittal" by the trial judge in a jury trial:

> The District Judge's ruling is thus plainly one of law, not of fact; it could only exonerate, not convict, the defendant. No legitimate interest of the defendant requires that this ruling be insulated from appellate review. On the other hand, barring the appeal jeopardizes the Government's substantial interest in presenting a legally sufficient case to the jury.[81]

But it is—and will remain—the law.

For the same reason, appellate courts may not remand for additional fact-finding on an element. In *Burks v. U.S.*,[82] Burks was tried for bank robbery and pled insanity. The court of appeals held that the government did not carry its burden of proving sanity but remanded to the district court to choose an equitable remedy following the presentation of additional evidence by the government. The Supreme Court concluded that the only just outcome for Burks was an acquittal. "By deciding that the Government had failed to come forward with sufficient proof of petitioner's capacity to be responsible for criminal acts, that court was clearly saying that Burks' criminal culpability had not been established."[83] If the Clause is to protect an individual from repeated trials (and convictions) and especially the government's abuse of successive trials, an acquittal—even a mistaken acquittal—must bar further prosecution.[84] A reviewing court's conclusion that a rational jury would have acquitted the defendant is entitled to no less

[76] *Martin Linen*, 430 U.S. at 571.
[77] *State v. Moreno*, 294 S.W.3d 594, 598 (Tex. Crim. App. 2009).
[78] *Id*. (citation omitted).
[79] *Martin Linen*, 430 U.S. at 571 (emphasis added).
[80] *State v. Blackshere*, 344 S.W.3d 400, 406 (Tex. Crim. App. 2011) (citations omitted).
[81] *Martin Linen*, 430 U.S. at 583 (Burger, C.J., dissenting).
[82] *Burks v. U.S.*, 437 U.S. 1 (1978).
[83] *Id*. at 10.
[84] *Id*. at 11.

preclusive effect.[85] Thus an unreversed appellate determination that the evidence was legally insufficient will terminate the initial jeopardy.[86]

It also does not matter that the proceeding that generated the acquittal *could have been* challenged based on some error that makes it merely voidable. In *Ball v. U.S.*,[87] for example, Ball was acquitted but his two co-defendants were convicted. The other two successfully appealed on the basis that the indictment charging all of them should have been quashed, and the government tried to re-indict all three. The Supreme Court held that Ball could not be retried. "Ball's acquittal by the verdict of the jury could not be deprived of its legitimate effect by the subsequent reversal by this court of the judgment against the other defendants upon the writ of error sued out by them only."[88] In other words, Ball was happy not to complain about the errors leading to his acquittal and that made it binding.

The good news (for the State) is that courts scrutinize "acquittals" to see if they comply with the above standard. "[I]f the judgment reflects that an accused was acquitted, and it is later made to appear that he was not acquitted in fact, the judgment may be reformed accordingly."[89] Again, it is the substance of the order or ruling, not its title.

In *U.S. v. Scott*,[90] for example, the trial court waited until after the close of all evidence to dismiss the charges based on prejudice for pretrial delay. The Court rejected the idea that appeal (and possible retrial) were barred by jeopardy. "This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact."[91] "It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt."[92] The Court contrasted legal bars to conviction extrinsic of the facts to be proved at trial, like a defective charging instrument.[93] The Court held that Scott suffered no injury by the government's appeal of the dismissal. "He has not been 'deprived' of

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[85] *Id*.
[86] *Lydon*, 466 U.S. at 308-09. The requirement that the event be a final determination of the *legal* sufficiency of the evidence against the State is why the "very limited" actions of the "thirteenth juror" in factual-sufficiency review had no jeopardy consequences. *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006).
[87] 163 U.S. 662 (1896).
[88] *Id*. at 670.
[89] *Ex parte George*, 913 S.W.2d 523, 526 (Tex. Crim. App. 1995).
[90] *Scott*, 437 U.S. at 84.
[91] *Id*. at 96.
[92] *Id*. at 96.
[93] *See*, *e.g.*, *Lee v. U. S.*, 432 U.S. 23, 30 (1977) (District Court granted a motion to dismiss carried through trial but "stressed that the only obstacle to a conviction was that the fact that the information had been drawn improperly.").

his valued right to go to the first jury; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws."[94]

In *State v. Stanley*,[95] the trial court waited until after the State's case-in-chief to grant the defendant's motion to dismiss for vagueness and overbreadth. The order recited that "all charges against the Defendant . . . are in all things dismissed, and the Defendant and her sureties are in all things discharged from further liability."[96] But it was not an order of acquittal, despite the use of language that would be appropriate to such an order. "[N]owhere does the order recite that the appellees have been found not guilty, that the State's evidence did not meet the standard of proof beyond a reasonable doubt, or that the State's proof as to any specific factual element necessary to conviction was lacking."[97] In context, it was a response to a constitutional ground clearly and consistently urged by the defendant, not a "rul[ing] on the ultimate issue of their guilt or innocence."[98] In other words, it was not an erroneous finding; it was "*no* finding."[99]

C. <u>But what if the trial does not end with any verdict?</u>

Trial sometimes ends without a verdict. In a jury trial, the most common example is a hung jury. In a bench or jury trial, mistrial can be the result of some trial event. The circumstances dictate the analysis.

i. *Hung juries*

In 1824, *U.S. v. Perez*[100] coined the term "manifest necessity" in the first case to hold that retrial was not barred by a mistrial due to a hung jury. The Court framed the issue as one of a jury being discharged without reaching a verdict "without the consent of the prisoner."[101] The question was whether he could be retried. The short answer was "yes": "The prisoner has not been convicted or acquitted, and may again be put upon his defence."[102] The long answer explained that it was not so simple:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

[94] *Scott*, 437 U.S. at 100 (quotations and citation omitted).
[95] *State v. Stanley*, 201 S.W.3d 754, 756 (Tex. Crim. App. 2006).
[96] *Id*. at 756.
[97] *Id*. at 760.
[98] *Id*.
[99] *Id*. (emphasis in original).
[100] *U.S. v. Perez*, 22 U.S. 579, 580 (1824).
[101] *Id*. at 579.
[102] *Id*. at 580.

> They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere.[103]

By 1949, the Court had repeatedly affirmed the view that a defendant is put in jeopardy even when his trial does not end with a verdict.[104] Proceeding from the more modern view, it said that the Double Jeopardy Clause does not require that a defendant go free any time that happens.[105] "Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed."[106] When "unforeseeable circumstances" make a trial's completion "impossible," the protection of society from the guilty would be frustrated for no good reason.[107] In other words, "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments."[108] After quoting *Perez*, the Court said there is no rigid formula. Instead, courts must "take all circumstances into account and thereby [avoid] the mechanical application of an abstract formula."[109]

Eight years later, the Court reiterated that discharge without the defendant's consent bars retrial regardless of whether a verdict was returned, but reaffirmed the "manifest necessity" or "unforeseeable circumstances" exception from *Perez* and *Wade*.[110] It held that the Clause protected the defendant in that case from retrial for first-degree murder following the jury's decision to convict him of second-degree murder instead. It did so, in part, because the jury was given a full and fair opportunity to convict on the greater offense and no extraordinary circumstances appear to have prevented it from doing so.[111]

Justice Frankfurter, in dissent, pointed out that a "wooden interpretation" of the Clause that prevents any second trial for any reason—even at the defendant's request—makes the analysis harder than it has to be.[112] A defendant should not be guaranteed "the right of being hung, to protect him from the danger of a second trial."[113] And by 1984, the Court stated simply that, "The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree."[114] And in *Blueford*, the Court reiterated that, unlike other declarations of mistrial, a trial

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[103] *Id*.
[104] *Wade*, 336 U.S. at 688.
[105] *Id*.
[106] *Id*. at 688-89.
[107] *Id*. at 689.
[108] *Id*.
[109] *Id*. at 691 (internal quotation omitted).
[110] *Green*, 355 U.S. at 188.
[111] *Id*. at 191.
[112] *Id*. at 204 (Frankfurter, J., dissenting).
[113] *Id*. (citation omitted).
[114] *Richardson v. U.S.*, 468 U.S. 317, 326 (1984).

court need not "consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict."[115]

ii. *Other mistrials*

a. Without consent

"The premature termination of a criminal prosecution by the declaration of a mistrial, if it is against the defendant's wishes, will ordinarily bar further prosecution for the same offense."[116] The State faces a "heavy burden" to justify retrial in such circumstances; it must show a "manifest necessity."[117]

But review is not for the existence of manifest necessity; it is of the propriety of the ruling saying there was. Using an abuse-of-discretion standard, appellate review focuses on whether the trial court considered and reasonably discounted less drastic alternatives, assuming they exist.[118] There is no abuse of discretion when there were "extraordinary circumstances" that 1) rendered it impossible to arrive at a fair verdict before the initial tribunal, 2) made it "simply impossible to continue with trial," or 3) made it such that any verdict would automatically be subject to reversal on appeal.[119] The trial court need not expressly articulate its rationale, but manifest necessity must be apparent from the record.[120] The decision to order a mistrial over objection will be afforded "great deference," as it "turn[s] on the trial judge's unique ability to evaluate whether the complained of action biased the jury and, if so, to determine if that bias can be remedied by an instruction to disregard."[121]

Although most non-consensual mistrials are *sua sponte*, some come at the State's request yet do not bar retrial. In *Pierson v. State*, an indecency and aggravated-sexual-assault-of-a-child case, the first question asked of the victim on cross-examination was whether she had claimed Pierson "did these same things to his own daughter[.]"[122] The State objected before it was answered and immediately requested a mistrial, which the trial court was inclined to grant and, following a hearing, did. The Court of Criminal Appeals held that the ruling was not an abuse of discretion on that record. The defense, as the proponent of the evidence bore the burden of admissibility and, at the time of the ruling, neither the parties nor trial court were sure what the factual basis of the question was. "[W]ithout knowing the content of the victim's allegation, it appears that defense counsel hoped, more than intended, that the answer elicited would lead to admissible evidence."[123] "Under these circumstances, the trial court was free to conclude that Appellant

[115] *Blueford*, 566 U.S. at 609.
[116] *Ex parte Garza*, 337 S.W.3d 903, 909 (Tex. Crim. App. 2011).
[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] *Id*. at 909-10.
[121] *Pierson v. State*, 426 S.W.3d 763, 773 (Tex. Crim. App. 2014).
[122] 426 S.W.3d 763 (Tex. Crim. App. 2014).
[123] *Id*. at 771.

failed to carry his burden, as proponent of the evidence, to show that the question was anything more than a prelude to impeachment on a collateral matter and an impermissible attempt to attack the complaining witness's general credibility with evidence of specific instances of conduct."[124] The Court could also tell from the trial court's comments that its ruling was "deliberate" rather than "precipitous."[125]

b. With consent or at the defendant's request

If a defendant consents to a mistrial, double jeopardy will not prevent his re-prosecution.[126] "The distinction between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause."[127] This is so even when a judicial error or prosecutorial (mis)conduct precipitates the request. In such circumstances, a defendant may wish "to go to the first jury and, perhaps, end the dispute then and there with an acquittal."[128] Or he might "reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution."[129] In such a case, his request for a mistrial serves similar objectives to the Clause itself: the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions. A defendant's choice, if respected, has the consequence of making a second trial possible.

This does not mean that any mistrial requested by the defense invites retrial. What if the State forces a request for mistrial to avoid an acquittal? In *Ex parte Lewis*,[130] the Court of Criminal Appeals adopted the federal standard for this analysis that was set forth in *Oregon v. Kennedy*.[131] When the prosecutor's actions giving rise to a defense motion for mistrial were done in order to "goad" the defendant into making it, permitting a second trial would make the defendant's valued right to complete his trial before the first jury "a hollow shell."[132] But that Court discounted a standard based on generalized "bad faith conduct" or "overreaching."[133] Instead, it held that "a standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply."[134] It requires a finding of fact based on the familiar practice of inference from circumstances, and is readily reviewable on appeal.[135] When an error that could justify a mistrial occurs, even when it is the result of

[124] *Id*. at 772.
[125] *Id*. at 775.
[126] *Ex parte Garrels*, 559 S.W.3d 517, 519 (Tex. Crim. App. 2018).
[127] *U.S. v. Dinitz*, 424 U.S. 600, 608 (1976).
[128] *Id*. (internal quotation and citation omitted).
[129] *Id*.
[130] *Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007).
[131] *Oregon v. Kennedy*, 456 U.S. 667 (1982).
[132] *Id*. at 673.
[133] *Id*. at 674.
[134] *Id*. at 675.
[135] *Id*.

overreaching or gamesmanship, a retrial is not barred so long as the defendant retains "primary control over the course to be followed."[136]

c. Implied consent

Consent may be implied from the circumstances but it must be supported by record evidence.[137] It will be the State's burden before the second trial to show that the defendant acquiesced.[138] Although this does not require demonstrating a "knowing, intelligent, and voluntary" waiver, it will require more than showing that a mistrial was mentioned and the defendant failed to object despite having the opportunity.[139] The defense may have a strategic reason for not agreeing, at least on the record. The State will have to show through circumstantial evidence—the defense objection that precipitated the *sua sponte* motion, his tacit acceptance of the need, or his repeated previous requests for mistrial, perhaps—that the defendant exercised his "primary control" to relinquish his right to a single arbiter.

D. Other considerations

i. *The Clause does not (currently) prevent convictions for the same offense by different sovereigns.*

When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences" as that concept was understood at the time of the Founding.[140] But the test is not control over the prosecution; "[t]he degree to which an entity exercises self-governance—whether autonomously managing its own affairs or continually submitting to outside direction—plays no role in the analysis."[141] Instead, whether two entities are separate sovereigns turns on whether the two entities draw their authority to punish the offender from distinct sources of power.[142]

For example, "the States are separate sovereigns with respect to the Federal Government because each State's power to prosecute is derived from its own 'inherent sovereignty,' not from the Federal Government."[143] The same is true of Indian Territories.[144] But other federal territories, such as Puerto Rico, are not separate sovereigns because the "ultimate source" of

[136] *Id*. at 676.
[137] *Ex parte Garrels*, 559 S.W.3d at 525 (refusing to presume implied waiver on a silent record).
[138] *Id*. at 524, 526.
[139] *Id*. at 523.
[140] *Heath v. Alabama*, 474 U.S. 82, 88 (1985).
[141] *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016).
[142] *Heath*, 474 U.S. at 88.
[143] *Id*. at 89.
[144] *Sanchez Valle*, 136 S. Ct. at 1872.

prosecutorial authority flows from the federal government in both cases.[145] For the same reason, municipal subdivisions of a state are not separate sovereigns from that state.[146]

The current, long-held understanding of the separate sovereigns doctrine is currently under review in *Gamble v. U.S.*[147]

ii. *The Clause does not prevent inconsistent verdicts in a single trial.*

The Court held in 1932 that a defendant has no right to consistent verdicts in a single trial.[148] Dunn was tried for three counts related to liquor possession or sales: 1) keeping for sale at a specified place intoxicating liquor ("maintaining a common nuisance"), 2) unlawful possession of intoxicating liquor, and 3) unlawful sale of such liquor.[149] The evidence was the same for all three counts but he was convicted on the first count and acquitted on the other two. Dunn had presented an alibi defense, and argued that the acquittals on the second and third counts entitled him to an acquittal on the first. The Court disagreed. "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment."[150] "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters."[151]

Fifty years later, in *U.S. V. Powell*, the Court explained that *Dunn* also applied when the inconsistent verdicts consist of an offense and the facilitation of that offense.[152] Powell and her family dealt drugs. She was indicted, *inter alia*, on one count of conspiracy to possess cocaine with intent to distribute (Count 1), one count of possession with intent to distribute (Count 9), and four counts of using a telephone to facilitate those offenses (Counts 3-6). Powell was convicted of counts 3 through 5 but acquitted on the underlying felonies. She argued that the Clause required that she be acquitted in full.

The Court summarized the problem with basing a demand for acquittal on an inconsistent verdict thus: "it is unclear whose ox has been gored."[153] Regardless of whether the inconsistency is on a predicate offense, it cannot be determined what the jury "really meant."[154] "The problem is

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[145] *Id*. at 1874-75.
[146] *Waller v. Florida*, 397 U.S. 387, 392-95 (1970). Discussion to the contrary in cases like *Ex parte Doan*, 369 S.W.3d 205 (Tex. Crim. App. 2012), can be attributed to their context, *i.e.*, whether preclusion applied as between different agencies/counties *and* different proceedings. The two conversations were intertwined, and *State v. Waters*, 560 S.W.3d 651 (Tex. Crim. App. 2018), discussed below, puts the value of those conversations in doubt.
[147] Case No. 17-646.
[148] *Dunn v. U.S.*, 284 U.S. 390 (1932). This applies to inconsistent verdicts between co-defendants, too. *Standefer v. U.S.*, 447 U.S. 10, 25 (1980) ("the simple, if discomforting, reality [is] that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.") (quotation and citation omitted).
[149] *Dunn*, 284 U.S. at 390.
[150] *Id*. at 393.
[151] *Id*. at 394.
[152] *U.S. v. Powell*, 469 U.S. 57 (1984).
[153] *Id*. at 65.
[154] *Id*. at 68.

that the same jury reached inconsistent results; once that is established[,] principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful."[155] "The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable."[156] Acquittal under such circumstances would be "hardly satisfactory," and nothing in the Constitution requires it.[157] And it would be "imprudent and unworkable" to allow defendants to argue that their inconsistent verdict was the result of error rather than lenity.[158] "Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake."[159] All in all, "it is neither irrational nor illogical to require [a defendant who accepts the benefit of an acquittal] to accept the burden of conviction on the counts on which the jury convicted."[160]

Ultimately, a jury's inexplicably inconsistent verdicts can be taken as a sign that the State piled on. It is the jury's "overriding responsibility," after all, "to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction."[161] As a result, we should perhaps be less annoyed when it happens.

IV. Collateral estoppel

One adjunct of double jeopardy law that has gotten a lot of attention recently is collateral estoppel, or issue preclusion. Discussed more fully below, issue preclusion prevents a party from relitigating a question of fact that was litigated, determined by, and essential to a valid and final judgment. It has its origins in civil practice and was applied in federal criminal law before it was constitutionalized in 1970. But the rationale for incorporating it into the Fifth Amendment is dubious and its application complicated, both of which leave its future uncertain.

A. History

The story of the Supreme Court's adoption of collateral estoppel begins in 1958 with *Hoag v. N.J.*[162] Hoag was charged in three counts with robbing three individuals at a restaurant: Cascio, Capezzuto, and Galiardo. Those victims, plus two unnamed victims, Dottino and Yager, testified at trial but only Yager was able to identify Hoag at trial. Hoag testified to an alibi, and was acquitted on all three indictments. The State then indicted Hoag for the robbery of Yager. Yager was the only witness called by the State. The defense called Cascio, Capezzuto, Galiardo, and

[155] *Id*.
[156] *Id*. at 66.
[157] *Id*. at 65.
[158] *Id*. at 66.
[159] *Id*.
[160] *Id*. at 69.
[161] *Martin Linen*, 430 U.S. at 573.
[162] 356 U.S. 464 (1958).

Dottino, who each testified "once again" either that petitioner was not one of the robbers or that a positive identification was not possible. Hoag again testified to an alibi but was convicted.

Hoag argued to the Supreme Court that the second prosecution violated the Double Jeopardy Clause, which he said was "implicit in the concept of ordered liberty" and as such applied to the States through the Fourteenth Amendment. He said the retrial "amounted to trying him again on the same charges."[163] The Clause was not made fully applicable to the states until *Benton v. Maryland* over a decade later,[164] but the Court addressed his bare claim that the Due Process Clause prevented his subsequent trial.

The Court had no trouble stating "[a]t the outset" that Hoag "ha[d] not been twice put in jeopardy for the same crime."[165] According to New Jersey law—and traditional jeopardy analysis—each of the robberies was a separate offense though taking place on the same occasion.[166] "Certainly nothing in the Due Process Clause prevented the State from making that construction."[167]

The problem was not the number of prosecutions but their successive nature. "[E]ven if it was constitutionally permissible for New Jersey to punish petitioner for each of the four robberies as separate offenses, it does not necessarily follow that the State was free to prosecute him for each robbery at a different trial."[168] This is because successive trials on related but distinct offenses could be used to wear the accused down, which is one of the evils the prohibition against double jeopardy seeks to prevent.[169] That would also lead to "fundamental unfairness" under the Due Process Clause.[170] The Court recognized the "preferable practice" to try several offenses in a single trial under these circumstances but refused to decide the issue for the states or provide an "overall formula."[171] "We do not think that the Fourteenth Amendment always forbids States to prosecute different offenses at consecutive trials even though they arise out of the same occurrence."[172] The analysis would be a case-by-case inquiry into whether the State tried to game the system by pursuing successive trials.

Turning to the facts of Hoag's case, the Court made "a fair inference from the record" that the State initiated the second prosecution because of the unexpected failure of four of the State's witnesses to identify petitioner after two of these witnesses had previously identified him to police.[173] It could not say "that, after such an unexpected turn of events, the State's decision to

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[163] *Id*. at 466.
[164] 395 U.S. 784, 794 (1969).
[165] 356 U.S. 466.
[166] *Id*. at 467.
[167] *Id*.
[168] *Id*.
[169] *Hoag v. State of N.J.*, 356 U.S. 464, 467 (1958).
[170] *Id*.
[171] *Id*. at 467-68.
[172] *Id*. at 467.
[173] *Id*. at 469. "Indeed, after the second of the two witnesses failed to identify petitioner, the State pleaded surprise and attempted to impeach his testimony." *Id*.

try petitioner for the Yager robbery was so arbitrary or lacking in justification that it amounted to a denial of those concepts constituting the very essence of a scheme of ordered justice, which is due process."[174] "Thus, whatever limits may confine the right of a State to institute separate trials for concededly different criminal offenses, it is plain to us that these limits have not been transgressed in this case."[175]

Hoag also challenged his conviction on collateral estoppel grounds. He argued that the sole disputed issue in the first trial was identity, which was necessarily decided in his favor.[176] The Court recognized that, despite its civil origins, the doctrine "has been widely employed in criminal cases in both state and federal courts[,]" but it "entertain[ed] grave doubts whether collateral estoppel can be regarded as a constitutional requirement."[177] It did not decide the question, however, as the New Jersey court concluded there was no way of knowing if the acquittal turned on identity as opposed to some other element.[178]

Chief Justice Warren dissented. "The issue is whether or not this determination of guilt, based as it is on the successive litigation of a single issue that had previously been resolved by a jury in petitioner's favor, is contrary to the requirements of fair procedure guaranteed by the Due Process Clause of the Fourteenth Amendment."[179] "[T]he issue of guilt, which turned solely on the issue of identity, went to the [first] jury. . . . To convict petitioner by litigating this issue again before 12 different jurors is to employ a procedure that fails to meet the standard required by the Fourteenth Amendment."[180] Justice Douglas, joined by Justice Black, added:

> The resolution of this crucial alibi issue in favor of the prosecution was as essential to conviction in the second trial as its resolution in favor of the accused was essential to his acquittal in the first trial. Since petitioner was placed in jeopardy once and found not to have been present or a participant, he should be protected from further prosecution for a crime growing out of the identical facts and occurring at the same time.[181]

Twelve years later, and one year after incorporation, the Supreme Court changed its framework but perhaps not its intent in *Ashe v. Swenson*.[182] Ashe was one of three or four men who robbed six men, including Knight and Roberts, at a poker game. He was first tried for the robbery of Knight. The State called Knight and three of the other victims. [183]Each testified that an armed robbery by three or four men occurred but two witnesses could not identify Ashe and the two

[174] *Id*. at 470 (internal quotation and citation omitted).
[175] *Id*.
[176] *Id*.
[177] *Id*. at 470-71.
[178] *Id*. at 471.
[179] *Id*. at 474 (Warren, C.J., dissenting).
[180] *Id*. at 477.
[181] *Id*. at 479 (Douglas, J., dissenting).
[182] 397 U.S. 436 (1970).
[183] *Id*. at 438.

witnesses who could did so by voice similarity or "size and height, and [Ashe']s actions." Despite being told not to elaborate on its verdict, the jury found Ashe "not guilty due to insufficient evidence."

The State tried Ashe six weeks later for the robbery of Roberts. Most of the same witnesses testified but their identification testimony was stronger in the second trial: the two witnesses who had been wholly unable to identify Ashe now testified that his features, size, and mannerisms matched those of one of their assailants; the witness who had identified Ashe by his size and actions now also remembered him by the unusual sound of his voice. The State also declined to call a witness whose identification testimony at the first trial had been "conspicuously negative." Ashe was convicted.

The Court viewed the issues differently than in *Hoag*—which had "virtually identical" "operative facts" to *Ashe*—because *Benton v. Maryland* had been decided in the interim.[184] "The question is no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy."[185] Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[186] The Court noted that the doctrine had been applied in federal criminal law for at least 50 years at that point, the lesson being that it be applied "with realism and rationality" rather than "the hypertechnical and archaic approach of a 19th century pleading book."[187] The test was phrased thus:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.[188]

"Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal."[189] It added, in a footnote, "If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the

[184] *Id*. at 441-42.
[185] *Id*. at 442.
[186] *Id*. at 443.
[187] *Id*. at 443-44.
[188] *Id*. at 444 (citations and quotation omitted).
[189] *Id*.

prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering."[190]

The Court had no problem finding that Ashe's second trial violated the law applied in federal prosecutions. Because the record was "utterly devoid" of any indication that a rational jury could have acquitted Ashe in the first trial because of insufficient evidence that a robbery occurred or that Knight was a victim, "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers."[191] Its general verdict was necessarily its finding that he was not (or at least that he was entitled to an acquittal).[192]

"The ultimate question to be determined, then, in the light of *Benton v. Maryland*, *supra*, is whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy."[193] The Court "did not hesitate to hold that it is[,]" as it saw no difference between the successive trial in Ashe's case and successive trials for the same victim's robbery.[194] It summarized its holding and distinguished the claim from related aspects of charging and punishment:

> The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again.[195]

B. <u>There were problems from the beginning.</u>

Justice Burger dissented. "Nothing in the language or gloss previously placed on this provision of the Fifth Amendment remotely justifies the treatment that the Court today accords to the collateral-estoppel doctrine."[196] He called it "truly a case of expanding a sound basic principle beyond the bounds—or needs—of its rational and legitimate objectives to preclude harassment of an accused."[197] In his view, the Court turned its "firm constitutional commitment against repeated trials for 'the same offence'" into "a 'same evidence' test."[198] Under the *Blockburger* test, Ashe's convictions in the first and second trials would have been permitted because each

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[190] *Id*. at 444 n.9 (citation and quotation omitted). The fact-finder's ability to rationally disregard some or all of uncontested testimony is, of course, a tenet of sufficiency review. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).
[191] *Id*. at 445.
[192] *Id*.
[193] *Id*.
[194] *Id*. at 445-46.
[195] *Id*. at 446.
[196] *Id*. at 460 (Burger, J., dissenting).
[197] *Id*. at 460-61.
[198] *Id*. at 463.

contained an element the other did not—a different victim.[199] By suddenly "superimpos[ing]" a "new and novel collateral-estoppel gloss" based on the Court's application of collateral estoppel to federal prosecutions as a matter of its supervisory power over the federal court system, the Court found a double jeopardy "ingredient that eluded judges and justices for nearly two centuries."[200]

Justice Burger had practical complaints as well. He pointed out that the doctrine's rationale and application in civil proceedings made its form in Ashe's case "a strange mutant."[201] In civil cases, collateral estoppel is justified as conserving judicial and party resources and providing finality, and it applies to parties on each side who are identical to or have the same interest in the initial litigation.[202] Here, the complainant's are different, the State's interest in conserving resources is trumped by its interest in multiple convictions (to which the majority did not dispute), and the State cannot rely on collateral estoppel to stop a defendant from asserting his innocence.[203]

C. <u>The dissent's complaints have been well taken.</u>

Practically, the Court has repeatedly and consistently noted the poor fit of collateral estoppel to criminal law. Just 10 years later, for example, the Court explained the problems that arise due to the government's inability to obtain "the kind of full and fair opportunity to litigate that is a prerequisite of estoppel":[204]

- the prosecution's discovery rights in criminal cases are limited by rule and constitutional privileges
- it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt
- it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence
- it cannot secure appellate review where a defendant has been acquitted

The Court was not saying these are bad rules—they just undercut the rationale for estoppel because they prevent the government from demonstrating that an acquittal was born of compassion or compromise.[205] "Under contemporary principles of collateral estoppel, this factor strongly militates against giving an acquittal preclusive effect."[206] Although the Court was careful to avoid suggesting that the availability of appellate review is "always an essential

[199] *Id*. at 464.
[200] *Id*.
[201] *Id*.
[202] *Id*.
[203] *Id*. at 464-65.
[204] *Standefer*, 447 U.S. at 22 (internal quotations omitted).
[205] *Id*. at 22.
[206] *Id*. at 23.

predicate of estoppel[,]" it did say that 1) the confidence that the result of the litigation was substantially correct is the premise underlying estoppel, and 2) such confidence is "often unwarranted" in the absence of appellate review or similar procedures.[207]

And in 2016, the majority again reminded us that the preclusion doctrine is premised "[i]n significant part" on "an underlying confidence that the result achieved in the initial litigation was substantially correct."[208] In civil litigation, "the availability of appellate review is a key factor" to establishing this confidence, and "inability to obtain review is exceptional."[209] "In criminal cases, however, only one side (the defendant) has recourse to an appeal from an adverse judgment on the merits."[210] A jury's verdict of acquittal is unassailable. As a result, any application of the preclusion doctrine must be "guarded," and any indication that the acquittal resulted from compromise, compassion, or misunderstanding should "strongly militate[] against" giving it preclusive effect.[211] The Court also reminded us that the burden is on the defendant to show that the issue to be relitigated was "actually decided" by the prior verdict of acquittal.[212]

Numerous justices have cautioned against its use. Justice Alito, joined by Justices Scalia and Thomas, said in his dissent to *Yeager* that it is "imperative that the doctrine of issue preclusion be applied with the rigor prescribed in *Ashe*[; l]oose application of the doctrine will lead to exceedingly complicated and protracted litigation, both in the trial court and on appeal, and may produce unjust results."[213] Justice Kennedy agreed that it was unclear whether Yeager met the "demanding standard" of proving it would have been irrational for the jury to acquit without finding a given fact in his favor.[214]

The result is that, regardless of whether issue preclusion persists as a branch of jeopardy law, success with it should be difficult. In effect, the Court has effectively limited its application while attempting to retain its applicability. An interesting test of its applicability is currently pending before the Court of Criminal Appeals. In *Ex parte Adams*, that Court is considering the preclusive effect of defenses.[215] Adams was acquitted of aggravated assault, having claimed defense of a third person. The question is whether that is an ultimate fact that precludes trial for stabbing someone not directly involved in the altercation.

There are other signs that the doctrine is not as reliable as it perhaps once was. Beyond the renewed insistence on the rigor of the test, the Supreme Court has also chosen not to cast the "ultimate question" as *Ashe* did, *e.g.*, as whether an established rule (collateral estoppel) is

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[207] *Id*. at 23 n. 18. The Court added that the outcomes of trials of co-defendants are complicated by the fact that some evidence is admissible as to one but not the other. *Id*. at 23-24.
[208] *Bravo-Fernandez*, 137 S. Ct. at 358 (citations and internal quotations omitted).
[209] *Id*.
[210] *Id*.
[211] *Id*. (citation omitted).
[212] *Id*. at 359.
[213] *Yeager*, 557 U.S. at 133 (2009) (Alito, J., dissenting).
[214] *Id*. at 127 (Kennedy, J., concurring).
[215] PD-0711-18, submitted 2/13/19.

"embodied" in the Clause. Instead, the Court returned (ironically) to Hoag's argument and the text of the Clause by requiring a showing that a defendant was effectively if not technically being tried a second time for the "same offense." In *Yeager v. U.S.*, for example, it framed "[t]he proper question, under the Clause's text," as "whether it is appropriate to treat the insider trading charges as the 'same offence' as the fraud charges."[216]

The way in which the majority in *Currier v. Virginia*,[217] decided last year, framed the analysis was interesting. Although it discussed *Ashe* at length, the majority never used the terms "issue preclusion," "collateral estoppel," or any derivations thereof. Nor did it mention that *Ashe* applied a common-law concept as part of its supervisory power over federal prosecution. Instead, the majority recast *Ashe* as holding that, under the circumstances presented therein, relitigation of Ashe's participation in the robbery "would be tantamount to the forbidden relitigation of the *same offense* resolved at the first trial."[218] It continued: "*Ashe*'s suggestion that the relitigation of an issue can sometimes amount to the impermissible relitigation of an offense represented a significant innovation in our jurisprudence."[219] "To say that the second trial is tantamount to a trial of the same offense as the first and thus forbidden by the Double Jeopardy Clause, we must be able to say that 'it would have been *irrational* for the jury' in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second."[220]

D. Four members of the Court would overrule *Ashe*.

Of course, this led four members of the Court to the conclusion that *Ashe* should be overruled. Unlike the Seventh Amendment's Reexamination Clause, the plurality said, "the [Double Jeopardy] Clause speaks not about prohibiting the relitigation of issues or evidence but offenses."[221] The Fifth Amendment took its cue from common law pleas that "barred only repeated prosecution for the same identical act and crime, not the retrial of particular issues or evidence."[222] The double jeopardy test propounded in *Blockburger* confirms this understanding: "the defendant must show an identity of *statutory elements* between the two charges against him; it's not enough that a substantial overlap exists in the *proof* offered to establish the crimes."[223] "[T]his Court has emphatically refused to import into criminal double jeopardy law the civil law's more generous 'same transaction' or same criminal 'episode' test."[224]

This distinction was present in *Ashe*, as well, the plurality claimed. "[E]ven there a court's ultimate focus remains on the practical identity of offenses, and the only available remedy is the

[216] 557 U.S. 110, 119 (2009).
[217] *Currier v. Virginia*, 138 S. Ct. 2144 (2018).
[218] *Id*. at 2149 (emphasis added).
[219] *Id*.
[220] *Id*. at 2150 (citation omitted, emphasis in original).
[221] *Id*. at 2152 (plurality).
[222] *Id*. at 2152-53 (internal quotation omitted).
[223] *Id*. at 2153 (quotation and alterations omitted, emphasis in *Currier*).
[224] *Id*. at 2154.

traditional double jeopardy bar against the retrial of the same offense—not a bar against the relitigation of issues or evidence."[225] It suggested that, "within a single action," the "law of the case doctrine" would be the better choice.[226] In addition to its legal objections, the plurality outlined the general poor fit that civil preclusion principles have to criminal proceedings in which one party cannot obtain review of past trials or claim the benefits in future ones.[227]

E. Things to consider when raising preclusion.

i. *Was the prior proceeding a qualifying proceeding?*

This may sound dumb, but there cannot be double jeopardy without a prior jeopardy. In *State v. Waters*,[228] the Court of Criminal Appeals reversed a 1986 opinion that said a negative finding on an allegation at a probation revocation hearing would have preclusive effect on a trial for the conduct underlying the allegation. Jeopardy does not attach to an offense alleged as grounds for revocation because a defendant is not on trial for that offense and faces no punishment for it.[229] Put bluntly, "no aspect of the Fifth Amendment's double jeopardy protections appl[ies.]"[230]

ii. *Did it happen to your client?*

In *Standefer v. U.S.*,[231] Standefer was indicted for, *inter alia*, aiding and abetting a revenue official in accepting payments of what amounts to a bribe. Prior to trial, that public official was acquitted of accepting those payments. Standefer moved to have the charges against him dismissed in part because of the doctrine of nonmutual collateral estoppel; if the official never accepted payments, Standefer could not have aided and abetted him. The government, he argued, should not be able to effectively relitigate the official's guilt. The Supreme Court held, in a footnote, that the Double Jeopardy Clause had no application between defendants.[232] "While symmetry of results may be intellectually satisfying, it is not required."[233]

iii. *Did you create your own problem?*

In *Currier*, the Supreme Court considered whether a defendant who agrees to have related charges against him tried in two trials instead of one can prevent the second trial by claiming a jeopardy violation by collateral estoppel. Currier helped steal a safe full of guns and cash from a

[225] *Id*. at 2153.
[226] *Id*. at 2154.
[227] *Id*. at 2154-55.
[228] *State v. Waters*, 560 S.W.3d 651 (Tex. Crim. App. 2018), *overruling Ex parte Tarver*, 725 S.W.2d 195 (Tex. Crim. App. 1986).
[229] *Waters*, 560 S.W.3d at 659.
[230] *Id*. at 660. The Court also held that common-law estoppel would not apply as between a revocation proceeding and a full-on trial, for multiple reasons. *Id*. at 661-63.
[231] 447 U.S. 10 (1980).
[232] *Standefer*, 447 U.S. at 22 n.16. But the Court addressed the applicability *vel non* of the doctrine as a matter of federal criminal procedure.
[233] *Id*. at 25.

house. He was charged with burglary, larceny, and unlawful possession of a firearm because he had a previous felony conviction for burglary and larceny. Currier agreed to a severance of the charges so the prior felonies, admissible to prove unlawful possession, would not prejudice the jury's consideration of the charged burglary and larceny. The burglary/larceny was tried first, and Currier was acquitted. Currier then moved to stop the second trial because it would constitute double jeopardy and, alternatively, that the government should be prevented from relitigating any issue resolved in his favor in the first. The trial court proceeded with trial, and he was convicted of felon-in-possession.

The majority did not have to determine whether the government was attempting to relitigate facts necessarily decided in Currier's favor in the first trial, however, because Currier consented to the sequence of trials. "If a defendant's consent to two trials can overcome concerns lying at the historic core of the Double Jeopardy Clause, so too we think it must overcome a double jeopardy complaint under *Ashe*."[234] In short, "consenting to two trials when one would have avoided a double jeopardy problem precludes any constitutional violation associated with holding a second trial."[235]

Notably, this is not a case in which a defendant is forced to trade one constitutional right for another; there is no constitutional bar to joint trials of related cases with appropriate cautionary instructions.[236] Instead, "Mr. Currier faced a lawful choice between two courses of action that each bore potential costs and rationally attractive benefits. It might have been a hard choice. But litigants every day face difficult decisions."[237]

iv. *Do you have a prior determination to hang your hat on?*

It is easy enough to say neither the Clause nor collateral estoppel apply within a single (non-continued) proceeding. It is appropriately difficult to prove that a prior determination was necessarily based on a specific fact. But it can be unnecessarily difficult to know if you even have a prior determination because the effect of inconsistent outcomes on preclusion is counter-intuitive.

What if there is an acquittal on one count but a mistrial on a related count? In *Yeager v. U.S.*,[238] the Court held that a retrial on the hung count may be precluded by acquittal on related charges. Yeager, a senior vice president of a broadband company, was alleged to have made false and misleading statements to investors about a nationwide fiberoptic system under development (fraud) and making $19 million from the sales of stock he sold thereafter (insider trading). There were 126 counts. Following 13 weeks of trial, four days of deliberations, and an *Allen* charge, the jury acquitted Yeager on the fraud counts but hung on the insider trading counts.

[234] *Currier*, 138 S. Ct. at 2150.
[235] *Id*. at 2151.
[236] *Id*.
[237] *Id*. at 2152.
[238] 557 U.S. 110 (2009).

The government re-indicted Yeager on some of the insider trading counts, narrowing their focus. He moved to dismiss on issue-preclusion grounds, arguing that the acquittals on fraud meant the jury necessarily found that he did not possess material, nonpublic information—an element essential to both offenses. Despite acknowledging the government's interest in "one complete opportunity to convict"—the rationale for allowing retrials after mistrials—the Court did not see that as the applicable interest because it concluded that hanging on insider training was a "logical wrinkle," a "nonevent" that was "not a 'relevant' part of the 'record of [the] prior proceeding.'"[239] "Because a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle."[240] "To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room."[241] Once any consideration of the hung counts was eliminated from the analysis, the test was easy. "[I]f the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element."[242]

In a footnote, the Court made an observation that should have given it pause: having to rebut all the possible motivations for the hung count would make it impossible for the defendant to satisfy his burden of showing the jury necessarily decided the issue in his favor.[243] But that's the point of the *Ashe* analysis, which the Court has increasingly said must be applied rigorously.

What if you are convicted of an offense, acquitted of conspiring to commit it, and the conviction is reversed on appeal? Bravo-Fernandez (Bravo) was an entrepreneur in Puerto Rico.[244] Bravo took Martinez-Maldonado (Martinez), a senator for the Commonwealth, on an all-expenses-paid trip to Las Vegas. The government alleged that this trip was intended as a bribe to facilitate the passage of legislation that would help Bravo's business. Bravo and Martinez were charged with bribery, conspiracy to commit bribery, and traveling in interstate commerce in furtherance of that bribery. Both were convicted of bribery but acquitted of the conspiracy and travel charges. The bribery convictions were vacated on appeal due to charge error that would have affected all the verdicts. On remand, both moved for acquittals based on issue-preclusion; the only contested issue at trial was the offer and acceptance of a bribe and they were acquitted of the charges related to that bribery.

The question for the Court was whether the Double Jeopardy Clause bars retrial when the jury returns irreconcilably inconsistent verdicts but the verdict of guilt is vacated for legal error unrelated to the inconsistency.[245] The "critical inquiry" was whether the jury "actually decided"

[239] *Id*. at 118, 120-21 (citing *Ashe*).
[240] *Id*. at 121.
[241] *Id*.
[242] *Id*. at 123.
[243] *Id*. at 121 n.6.
[244] *Bravo-Fernandez v. U.S.*, 137 S. Ct. 352 (2016).
[245] *Id*. at 362.

that Bravo and Martínez did not violate the bribery statute.[246] It did, but not the way Bravo wanted or that was consistent with the acquittal on the other charges. Later invalidation of the conviction did not erase or explain that inconsistency.[247] Unlike the hung count in *Yeager*, that conviction was relevant to the determination because it was real; if left unchallenged, it would have been a valid conviction. And because the charge error tainted both verdicts, it is impossible to know what the jury would have done had it been properly instructed and therefore which verdict reflects what the jury intended.[248]

F. Choices

Much of the Supreme Court's jeopardy jurisprudence is based on the ideas that the Constitution does not 1) force a State to either bundle or sever related cases, or 2) rescue a defendant from tough choices. The result is that defendants have the power but often no great options.

For example, in Texas, a defendant may be prosecuted in a single criminal action for all offenses arising out of the same "criminal episode."[249] The offenses may be greater and lesser-included offenses but do not have to be.[250] Under most circumstances, the defendant has the right to sever the charges.[251] If he chooses not to, in most cases any sentences will run concurrently[252] but the jury will get to hear everything. Due to the number of related charges, the jury may grant leniency where none should lie and issue inconsistent verdicts.

If a defendant chooses to sever, however, the jury might not hear about any of the other charges but the sentences can be stacked. And because successive trials came at the behest of the defendant, he cannot complain that the State has multiple opportunities to prove a contested fact issue. The loss of a preclusion issue is yet another consideration when opting to sever charges arising out of a single criminal episode.

V. Conclusion

The Double Jeopardy Clause can provide valuable protection for a defendant if it is raised in a timely manner, even when a successive trial is not for "the same offence" as originally intended by the Founders. Hopefully this paper will help advocates on both sides save their clients the time, anxiety, and expense of a trial that should never take place.

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[246] *Id*. at 364.
[247] *Id*.
[248] *Id*. at 364, 366.
[249] TEX. PENAL CODE § 3.02(a).
[250] TEX. PENAL CODE § 3.01.
[251] TEX. PENAL CODE § 3.04(a), (c).
[252] TEX. PENAL CODE § 3.03.