1 IN THE SUPREME COURT OF THE UNITED STATES
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3 F. SCOTT YEAGER, :
4 Petitioner :
5 v. : No. 08-67
6 UNITED STATES. :
7 - x
8 Washington, D.C.
9 Monday, March 23, 2009
10
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:06 a.m.
14 APPEARANCES:
15 SAMUEL J. BUFFONE, ESQ., Washington, D.C.; on behalf of
16 the Petitioner.
17 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf
19 of the Respondent.
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1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE
3 SAMUEL J. BUFFONE, ESQ.
4 On behalf of the Petitioner 3
5 MICHAEL R. DREEBEN, ESQ.
6 On behalf of the Respondent 21
7 REBUTTAL ARGUMENT OF
8 SAMUEL J. BUFFONE, ESQ.
9 On behalf of the Petitioner 49
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear

4 argument today in Yeager v. United States.

5 Mr. Buffone.

6 ORAL ARGUMENT OF SAMUEL J. BUFFONE

7 ON BEHALF OF THE PETITIONER

8 MR. BUFFONE: Mr. Chief Justice, and may it

9 please the Court:

10 When a jury's acquittal resolves an issue in

11 a defendant's favor, that determination is final and the

12 government may not seek an inconsistent determination of

13 that issue from a second jury. Unlike acquittals, hung

14 counts are not verdicts. They decide nothing, and

15 therefore a hung count cannot be inconsistent with an

16 acquittal. A straightforward application of this

17 Court's decision in Ashe v. Swenson is all that is

18 called for in this case. A new rule is not necessary.

19 JUSTICE SOUTER: Mr. Buffone, may I raise

20 one preliminary issue? And it's an issue which is --

21 does not go to the reason we took the case, but I'd like

22 your response to it. Your argument, your Ashe v.

23 Swenson argument, assumes, as you have said in the

24 brief, that the -- that the verdicts of acquittal

25 essentially determined that your client did not possess

1 insider knowledge, and I question whether the verdicts
2 of acquittal did necessarily establish that fact. I've
3 looked at the -- at the jury instructions, and I -- I
4 will be candid to say I did not parse the whole jury
5 instruction, so you may very well correct me in the
6 assumption that I'm going to make. But the point of the
7 -- of the jury instruction that seemed to go to your
8 argument is set out on page 105 of the Joint Appendix,
9 and the judge is telling the jurors what they had to
10 find. And one of them was that your client made any
11 untrue statement of material fact or omitted to state a
12 material fact necessary in order to make the statements
13 made, in the light of the circumstances under which they
14 were made, not misleading as charged.
15 It seems to me that the jury under that
16 instruction could have come back with a verdict of
17 acquittal simply on the assumption that your client had
18 not made affirmative statements at the -- at the meeting
19 in question, therefore he had no obligation to -- to
20 correct any statements, because it is not clear from
21 this instruction that he had to correct the statements
22 of other people who omitted material facts, and that
23 therefore the only thing that the verdict proves or the
24 only thing that the verdict may have assumed is that he
25 didn't speak up and say anything.

1 Is that a possible analysis?
2 MR. BUFFONE: I do not believe so, Your
3 Honor, for two reasons. First, under the Ashe test as
4 interpreted by this Court in Dowling, the record as a
5 whole must be analyzed. And in Dowling, the Court
6 looked at admissions made by the defendant's attorney
7 during the course of the second proceeding that
8 identification of his client was not an issue.
9 Similarly here, looking at the entirety of
10 the record, in its arguments closing and opening, and
11 most importantly in its cross-examination of Mr. Yeager,
12 the government made clear to the jury its theory of
13 omissions. And that theory of omission was that Mr.
14 Yeager when he was at the 2000 analysts conference had a
15 duty to stand up and correct omissions if there were any
16 misstatements made by others. They argued to the jury
17 that he would be guilty of omissions if he did not
18 affirmatively correct it.
19 JUSTICE SOUTER: No, I -- I agree that --
20 that did seem to be the point of the cross-examination,
21 and in fact I guess you set it out in one of the briefs.
22 But is -- is that enough? We -- to my knowledge, we've
23 never held that that is enough to convert or -- let's
24 say, to -- to -- for us to assume, despite a more
25 protean jury instruction, that the jury necessarily had

1 to find a -- a fact. And I guess maybe my question
2 boils down to is: Why should what perhaps consumed 60
3 or 80 seconds of cross-examination suffice to tighten up
4 a jury instruction which -- which basically is
5 open-ended?
6 MR. BUFFONE: Well, Your Honor, first there
7 was more to the trial record than a snippet of
8 cross-examination. Again, in opening statement the
9 government began by arguing to the jury that Mr. Yeager
10 was the man behind the screen, that he was --
11 JUSTICE ALITO: That's the government's --
12 that's the government's argument. And in order to
13 convict for securities fraud based on an omission, isn't
14 it necessary for there to be a duty to disclose? And
15 what would prevent -- how can we be sure that the jury
16 here did not find that there was no securities fraud
17 because, insofar as the government was proceeding on an
18 omissions theory, your client didn't have a duty to
19 disclose, did not cause a material fact to be omitted?
20 MR. BUFFONE: Your Honor, first, the
21 instructions permitted alternative ways to reach the
22 first element of securities fraud, and one of the three
23 alternatives was either misstatements or omissions. And
24 I think the instruction, for all of its frailty, was
25 clear that the jury could convict on an omissions

1 theory. Now, Your Honor's question --
2 JUSTICE ALITO: I agree with that, but why
3 couldn't they find that there was no securities fraud
4 based on an omissions theory because there wasn't any
5 duty on Mr. Yeager's part to disclose?
6 MR. BUFFONE: Your Honor, the indictment was
7 an integrated theory of fraud, that had charged that Mr.
8 Yeager and others had planned to make misrepresentations
9 and material omissions for one purpose, and that purpose
10 was to enhance the price of Enron stock so that they
11 could later engage in insider trading to sell that
12 stock. The omissions theory was grounded in the
13 indictment. It was elucidated by the instructions, and
14 it was clarified so that there could be no uncertainty
15 by the cross-examination and arguments of counsel.
16 This jury -- under an Ashe analysis, the
17 question is what did this jury believe and what did they
18 rationally decide? They --
19 JUSTICE GINSBURG: But Ashe is quite a
20 different case. Ashe is a seriatim prosecution. It was
21 one event, a robbery. There were six victims. Victim
22 number one -- the charge relating to victim number one,
23 was an acquittal that necessarily decided that the
24 defendant was not among the robbers. So that is quite a
25 different situation from what we have here.

1 MR. BUFFONE: Justice Ginsburg, first, it is
2 my belief that seriatim prosecutions raise no greater
3 threat to the core values of double jeopardy than was
4 raised here. Those core values are, first of all, the
5 finality of acquittals. And the acquittal here was
6 offended by any effort to retry an issue of fact
7 necessarily decided. This --
8 JUSTICE GINSBURG: You're not -- you're not
9 contending that double jeopardy itself was at issue? In
10 other words, claim preclusion. There would be no claim
11 preclusion, so we're talking only about issue
12 preclusion?
13 MR. BUFFONE: Yes, Your Honor, I'd like to
14 --
15 JUSTICE GINSBURG: That means it was
16 necessarily -- the issue was necessarily decided?
17 MR. BUFFONE: That's correct, Your Honor.
18 We do not argue claim preclusion here. Our argue is
19 issue preclusion or previously known as collateral
20 estoppel before clarification by this Court.
21 Your Honor, to the question of seriatim
22 prosecution, again, although Ashe was in a sense a
23 seriatim prosecution, in all of the Ashe-type cases
24 decided by this Court jeopardy had not even attached,
25 let alone terminated.

1 The issue we believe should be addressed in
2 terms of what was the finality of the judgment. The
3 finality of the judgment here were six acquittals.
4 Those acquittals were final and were not subject to
5 redetermination. The issue preclusive effect arises
6 from the jury's acquittals, not from the hung counts,
7 the hung counts which were not final and which resolved
8 nothing.
9 JUSTICE GINSBURG: So the hung counts are
10 equivalent -- equivalent to an acquittal then?
11 MR. BUFFONE: No, Your Honor, I think
12 precisely the opposite. Hung counts have none of the
13 force of an acquittal. They have none of what this
14 Court has historically recognized as the powerful way
15 that a jury speaks when it acquits in cases such as
16 Martin Linen, where the court recognized that. The hung
17 counts historically, as we set out in our brief, were
18 not even accepted at common law as an option for a jury.
19 JUSTICE SCALIA: But we said -- we said in
20 Ashe, didn't we, that you should take into account all
21 the circumstances in determining what was decided in the
22 first acquittal, all the circumstances. How can -- how
23 can you close your eyes to the circumstance that is
24 alleged here, that the -- the hung jury portion of the
25 jury's verdict is simply inconsistent with the acquittal

1 portion, and therefore you should not count the
2 acquittal for double jeopardy purposes? Isn't this part
3 of the total circumstances?
4 MR. BUFFONE: Justice Scalia, first, we
5 believe that the -- I believe that the Ashe test relates
6 to the total circumstances on the record. What is it
7 from the record that the Court can derive meaning from?
8 The Court can derive meaning from all that was presented
9 to the jury, and from all that the jury decided. In its
10 hung counts, the jury did not speak with the unanimity
11 and the finality that it did in its acquittals. As this
12 Court, speaking through -- in both the majority and the
13 concurring opinions -- dissenting opinions in Sattazahn,
14 recognized, hung counts speak nothing. Hung counts --
15 JUSTICE KENNEDY: But in a sense that's
16 Justice Scalia's point, that the jury has in effect told
17 us nothing, and in effect that argument hurts your case
18 in one sense. Hung counts are meaningless.
19 MR. BUFFONE: Justice Kennedy, I agree that
20 the hung counts are meaningless and that is my point,
21 but I believe that it does further our analysis and the
22 proper analysis that this Court should engage in. And
23 that is, do the acquittals have finality, and is there
24 anything inconsistent with the jury's inability to reach
25 a determination with the finality of its acquittals?

1 The jury did not speak unanimously in its acquittals.
2 There is no record way to determine why they failed to
3 reach a determination, and they are therefore not
4 inconsistent with the final determination of acquittal.
5 JUSTICE SCALIA: It shows -- it shows that
6 -- that the point on which they -- you assert they were
7 unanimous and the point on which you say later
8 prosecution should be disallowed was in fact a point on
9 which the jury was confused, because they would have
10 come out the other way if indeed they were unanimous on
11 the counts that -- that acquitted. They should have
12 come out the same way on the -- on the hung counts.
13 MR. BUFFONE: Your Honor, we simply don't
14 know that. The jury may have failed to reach a verdict
15 for any number of reasons. On the basis of this record,
16 it's quite possible that the reason that the jury failed
17 to reach a verdict was that it had 176 counts before it;
18 that the jury, as set out in our reply brief, had made
19 known to the district court that it was under severe
20 financial stress. The jurors wanted the trial to be
21 over so that they could get back to their full-time
22 employment, and one of the jurors actually asked to be
23 removed from the jury because of that financial
24 distress.
25 In the face of that, the court gave a very

1 unusual Allen charge; that after the jury had sent out a
2 note saying that they were deadlocked, the court issued
3 an Allen charge and 70 minutes later discharged the
4 jury. It -- the -- the point, Your Honor, is that we
5 will never know why this jury --
6 JUSTICE SCALIA: The point is that they were
7 deadlocked and would not have been deadlocked, assuming
8 we don't inquire into -- into the issue that Justice
9 Souter raised. They were deadlocked and would not have
10 been deadlocked if indeed they made the -- the acquittal
11 finding that you're relying upon for double jeopardy.
12 MR. BUFFONE: Your Honor, we know that they
13 acquitted. That is a certainty. We have finality to
14 those acquittals. They were unanimous and are not
15 subject to question again. They cannot be subject to
16 appeal, and they cannot be subject to overturning, even
17 if they are egregiously erroneous.
18 When we lay next to that the hung counts and
19 the way that hung counts have historically been looked
20 at, first not tolerated by courts: Coercive means
21 applied depriving jurors of food and drink and heat in
22 cold climates until they reached a verdict; contemporary
23 law where we permit Allen charges in a quest for
24 unanimity to, wherever possible, have a jury speak its
25 will. We cannot equate, in the light of that history

1 and the firm precedent of this Court, an inability to
2 reach a decision with the finality and persuasion of an
3 acquittal.
4 CHIEF JUSTICE ROBERTS: Counsel, if Powell
5 extends to subsequent prosecutions -- I know you argue
6 that it doesn't -- but if it does, isn't it unusual that
7 the defendant is in better shape if a jury hangs on the
8 non-acquitted count than if he is convicted on the non-
9 acquitted count?
10 MR. BUFFONE: Well, Your Honor, that's a --
11 a two-edged sword, Mr. Chief Justice. The defendant is
12 on the opposite horns of that dilemma. If the counts
13 are not joined, then the effect of the acquittal would
14 be to bar them by res judicata. So, by joinder, he's on
15 the other side of that fence. It's, as this Court
16 recognized, whose ox is being gored in Powell by either
17 the acquittals or the convictions.
18 Well, this is a case of whose ox is being
19 gored by the joinder, and it should not be dispositive.
20 Collateral estoppel effect should apply to counts within
21 an indictment, just as res judicata would apply if they
22 were separated.
23 JUSTICE BREYER: It's an obvious question, I
24 guess. I'd just like to hear your answer directly.
25 Case 1, count 1, selling drugs; count 2, using the

1 telephone to sell the drugs. All right? The jury
2 acquits of the first, convicts of the second. Logically
3 impossible, but permitted under the law, right?
4 MR. BUFFONE: I agree, Your Honor. Under
5 Powell --
6 JUSTICE BREYER: Okay. Case 2 --
7 MR. BUFFONE: -- there's no question. We
8 have conflicting verdicts --
9 JUSTICE BREYER: Yes, yes.
10 MR. BUFFONE: -- and we are not going to try
11 to determine what the --
12 JUSTICE BREYER: Okay. Absolutely
13 illogical. Okay. Case 2, there is no count 1. Case 2,
14 telephone count, hung jury. We retry it. Permitted,
15 right?
16 MR. BUFFONE: Now, Your Honor, that would
17 depend on what happened at the trial.
18 JUSTICE BREYER: All that happened was that
19 they hung.
20 MR. BUFFONE: Well, if they hung, Your
21 Honor, yes, it would be permitted.
22 JUSTICE BREYER: Yes. Okay. Case 2, hung
23 jury, telephone count. We retry it. All right. So
24 now, why is it, when we put them together and -- case 3,
25 count 1, substantive drugs, acquitted; count 2,

1 telephone, hung jury. Well, in case 2, we could get a
2 retrial of the telephone count. Why can't we get a
3 retrial of the telephone count now?
4 MR. BUFFONE: Your Honor, it would depend.
5 JUSTICE BREYER: All that happened is they
6 are retrying it just as they did in case 2. Why does
7 the presence of count 1 there mean that they can't retry
8 it?
9 MR. BUFFONE: Your Honor, the presence of
10 count 1 in your hypothetical is not dispositive. An
11 acquittal on count 1 says --
12 JUSTICE BREYER: I -- I'm going too fast
13 because you didn't take the cases in. Do you want me to
14 repeat them? Maybe it's too complicated.
15 I'm just saying case 1, count 1, the
16 substantive count, conviction. On count 2, telephone
17 count, acquittal. Everybody agrees that's permissible.
18 Case 2 is only the telephone. That's all they indicted
19 him for. And if they have a hung jury, you can, can't
20 you, retry him?
21 MR. BUFFONE: Yes, sir.
22 JUSTICE BREYER: So, now, when we have case
23 3, which is the same as case 1 except that, instead of
24 convicting him, they had a hung jury, why can't you
25 retry him, just as you could in case 2?

1 MR. BUFFONE: Because a hung jury resolves
2 nothing, Your Honor. It doesn't --
3 JUSTICE BREYER: Oh, everybody agrees it
4 resolves nothing, and that's why you could retry him in
5 -- that's why you could retry him in case 2, because it
6 resolves nothing. So if you could retry him in case 2,
7 why can't you retry him in case 3? What does the
8 presence of this other substantive count have to do with
9 it? Since it never would have blocked the conviction on
10 count 2, why does it stop you from retrying count 2? It
11 would never have blocked the conviction of count 2. Why
12 does it stop you from retrying it?
13 Do you see -- do you see my --
14 MR. BUFFONE: Yes, Your Honor.
15 JUSTICE BREYER: That's the logical point I
16 thought the other side was making, and maybe they're not
17 because it seems to be striking you as surprising or
18 maybe I'm not making it in a clear way. But what I
19 wanted was a clear answer to it.
20 MR. BUFFONE: Your Honor, I believe the --
21 the clear answer is that for collateral estoppel to
22 attach, there must be a necessary determination of a
23 factual issue, and the necessary determination of that
24 factual issue can occur in your count 1 through an
25 acquittal or a conviction. It cannot occur through a

1 hung count because there is nothing to be resolved.
2 There is nothing that would be necessarily decided.
3 JUSTICE SOUTER: Mr. Buffone, you're --
4 you're going through a logical analysis. If I
5 understand your position, the logical analysis is not
6 going to win the case for you because, as I understand
7 the case that we've got in front of us, we have in
8 effect two lines of authority, two models, that describe
9 what the law might be in these circumstances.
10 One model, on -- on the assumption that -- that the
11 acquittals determined what you say they did -- on that
12 model there -- there is -- there is an issue preclusion
13 that is raised.
14 On the second model, the model of what we do
15 in the case of a hung jury, there is no -- of course, no
16 preclusion, and there is no bar to a retrial. And we've
17 simply got both in the same case. The question is:
18 Which model do we follow? Do we say preclusion is the
19 most important issue here, or do we say the
20 open-endedness and uncertainty of the hung jury, the --
21 the failure to reach a verdict, is the model that --
22 that tells us what we ought to do? How do we choose
23 between those two possibilities, each of which is open
24 to us?
25 MR. BUFFONE: Yes, Your Honor, I believe

1 that that is a clear choice, and the rationale for the
2 clarity of that choice is that acquittals have long been
3 recognized as being important for finality purposes for
4 double jeopardy law. So, for example --
5 JUSTICE SOUTER: Look, I know that, and --
6 and by the same token, hung juries have long been
7 recognized as raising no bar to a further trial. And
8 the question is: Why are the values in the -- the
9 acquittal case predominating, as you say they are, over
10 the values of the retrial possibilities? Why do I
11 choose one rather than another?
12 MR. BUFFONE: Yes, Your Honor. The -- the
13 Perez line that tells us that when there is manifest
14 necessity arising from a jury not reaching a verdict,
15 that retrial is appropriate following a hung count.
16 That line of cases stands in -- as I believe it's the
17 basis of Your Honor's question, stands in sharp contrast
18 to the line of cases that require that jury acquittals
19 be given final effect, cases like Foo Fong -- Fong Foo,
20 excuse me.
21 JUSTICE SOUTER: We have got both.
22 MR. BUFFONE: All right, so what --
23 JUSTICE SOUTER: What -- what is it -- and I
24 would almost suggest that it has to be something outside
25 the lines of authority, because the issue here is which

1 line of authority are you going to pick? What is it
2 outside the lines of authority that says we should -- we
3 should pick the acquittal model rather than the hung
4 jury model to determine what to do here?
5 MR. BUFFONE: Your Honor, I think we should
6 go -- the Court should go to the history of its double
7 jeopardy jurisprudence, and that makes clear that the
8 core concepts underlying the Double Jeopardy Clause are,
9 first, finality of jury verdicts, and, second, to avoid
10 all of the constitutional perils of successive trials,
11 because successive trials --
12 JUSTICE ALITO: Can I ask you this about the
13 finality of jury verdicts? Is -- does the Constitution
14 require either Federal or State law to permit the -- a
15 partial verdict?
16 MR. BUFFONE: Your Honor, I do not believe
17 that -- I am not aware of a constitutional underpinning
18 for that, but certainly the practices in the courts are
19 to permit partial verdicts.
20 JUSTICE ALITO: In every State?
21 MR. BUFFONE: I do not know the answer to
22 that question.
23 JUSTICE ALITO: Well, if the Constitution
24 doesn't require that, then why does the Constitution, in
25 your view, require that issue preclusion occur when the

1 jury acquits on certain counts but hangs on other
2 counts? If -- if a partial verdict were not required,
3 and if the jury came back and said, we -- we've reached
4 a verdict on some counts but not all counts, the remedy
5 would be a mistrial on all counts and a retrial on all
6 counts.
7 Why -- why is it -- does the Constitution
8 require a different result if Federal law or State law
9 chooses to allow the return of a partial verdict?
10 MR. BUFFONE: Your Honor, I don't believe
11 that it would be a different result because I think in
12 -- in most jurisdictions, as I understand it, the
13 reaction to that kind of a split verdict would be to try
14 to get the jury to reach a full and final verdict, to
15 give some form of an Allen charge to encourage
16 additional deliberations, to seek unanimity in the
17 jury's verdict. Where we don't have that unanimity, the
18 court is forced for collateral estoppel, for issue
19 preclusion purposes, to Justice Ginsburg's point, not to
20 claim preclusion issues.
21 If we set aside claim preclusion, the Perez
22 line of cases tells us to do what we do with claim
23 preclusion. For issue preclusion, the question is, is
24 there some finality to what the jury did, in your
25 hypothetical its partial verdict, that speaks to the

1 counts that it was not able to resolve? And if it
2 speaks that, after the Ashe analysis, that there was an
3 issue necessarily decided, then there is a bar under the
4 doctrine of issue preclusion to the re-litigation of
5 that question.
6 If there are no further questions, I'd like
7 to reserve the remainder of my time for rebuttal.
8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Dreeben.
10 ORAL ARGUMENT OF MICHAEL R. DREEBEN
11 ON BEHALF OF THE RESPONDENT
12 MR. DREEBEN: Mr. Chief Justice, and may it
13 please the Court:
14 Two separate lines of double jeopardy
15 analysis lead to the conclusion that the government can
16 retry hung counts that occur in a verdict simultaneously
17 with acquittals. The first is the principle that the
18 government may, under the doctrine of continuing
19 jeopardy, try to obtain a verdict when a jury is hung.
20 The basic principle there is that the government is
21 entitled to one full and fair opportunity to convict and
22 that the hung counts, when the jury cannot agree,
23 interrupt and prevent the government from achieving
24 that. Double jeopardy, therefore, does not bar the
25 government from completing its opportunity to obtain a

1 verdict.

2 The second doctrinal line is that which

3 grows out of the Powell case. Collateral estoppel is

4 premised on the idea that the jury has acted rationally.

5 CHIEF JUSTICE ROBERTS: You -- you are

6 asking us for a pretty dramatic extension of Powell.

7 Powell was not a case involving subsequent prosecutions.

8 MR. DREEBEN: No. Powell was a case in

9 which the Court rejected the doctrine of collateral

10 estoppel as a means of upsetting a mixed verdict of

11 acquittals and convictions, and --

12 CHIEF JUSTICE ROBERTS: Well, that's because

13 in the same proceeding you have two different jury

14 verdicts, one going the other way and one -- obviously,

15 one way and one the other way. So to protect the jury's

16 conclusions, you couldn't give effect to one without

17 undermining the other.

18 It's a very different case here. The only

19 jury determination you have is the acquittal. If you

20 give effect -- if you don't give effect to the findings

21 in the acquittal, you are undermining the jury, the only

22 determination by the jury.

23 MR. DREEBEN: Well, I don't think that it

24 undermines that determination, Mr. Chief Justice,

25 because the acquittals will stand as acquittals, and

1 they will bar re-prosecution on that offense. To the
2 extent that there are determinations that are made by
3 the acquittals that are independent of any inconsistency
4 with the hung counts, that too can have collateral
5 estoppel effect in a successive prosecution.
6 But I think the crucial thing here is that
7 this is not properly viewed as a successive prosecution
8 for double jeopardy purposes. Ashe v. Swenson and the
9 cases --
10 JUSTICE STEVENS: Well, why not? It is a
11 successive prosecution.
12 MR. DREEBEN: No, it's not in the sense, I
13 think, Justice Stevens that the Court used that in Ashe.
14 JUSTICE STEVENS: It is in the sense of an
15 indictment that took place after the other acquittal.
16 MR. DREEBEN: Well, that indictment simply
17 embodies non-jeopardy-barred counts that were in the --
18 JUSTICE STEVENS: Isn't there a difference
19 in the fact that in the first case where there's --
20 where there was a conflicting simultaneous verdict, one
21 can explain the acquittal on grounds of leniency or
22 compromise or something like that, that says that,
23 therefore, we will give effect to the -- the conviction
24 when they're simultaneous because of the reasons why
25 there may be irrationality in the conflict. But there

1 is no reason to doubt the -- the validity of the
2 acquittal in this case.
3 MR. DREEBEN: Well, no, I think that there
4 is, Justice Stevens, if on the theory that the
5 Petitioner propounds the verdict on the acquittals is
6 inconsistent with the mistrial. And that's the only way
7 in which collateral estoppel could apply, only if the
8 jury had necessarily determined a fact on the acquittals
9 that should have led to acquittals on the insider
10 trading counts.
11 JUSTICE STEVENS: But if they had time. And
12 when you have 150 counts, it's entirely possible they
13 just didn't reach a decision on it.
14 MR. DREEBEN: Well, I -- Petitioner's theory
15 would be identical if there were one insider trading
16 count. And I think that for purposes of this case, the
17 Court should not get too distracted by the number of
18 counts, because all of the insider trading counts turned
19 on a common core of fact. They were all resolved
20 identically --
21 JUSTICE STEVENS: When you have a case in
22 which there is no conflict between a guilty and an
23 innocent verdict, there isn't -- there is no reason to
24 doubt the integrity of the acquittal.
25 MR. DREEBEN: We're not questioning the

1 integrity of the acquittal as far as it has direct
2 double jeopardy application. The question is whether
3 the doctrine of collateral estoppel ought to be applied.
4 JUSTICE BREYER: And why not? Because the
5 answer to my question was exactly what Justice Stevens
6 said. Why is it that -- that if you could have
7 inconsistent verdicts in Powell, well, then, why can't,
8 since they hung, couldn't you try him again on the hung
9 count? And the answer is, because you're trying him
10 again.
11 And that's why we have all the briefs that
12 we have, because the only way to answer this is and look
13 and see if the policies that underlie the collateral
14 estoppel part of double jeopardy apply here. And I
15 can't think of one that doesn't. I can't think of one
16 single one that wouldn't apply.
17 Maybe there are some. And I can't think of
18 any reason for allowing the government to have a second
19 bite at this apple. What is the reason?
20 MR. DREEBEN: The reason, Justice Breyer, is
21 that the hung counts do not constitute a resolution in
22 favor of the defendant.
23 JUSTICE BREYER: Of course, they don't. Of
24 course, they don't. Suppose that they never brought up
25 that hung count. Then you wouldn't even have the first

1 bite at the apple. So you would think it would be a
2 fortiori you could go ahead. But that's the case; you
3 clearly can't go ahead.
4 MR. DREEBEN: But there's a reason for that,
5 Justice Breyer, that is grounded in double jeopardy
6 policies, and I think it goes to the question that
7 Justice Souter asked as well: Why the Court should
8 prefer the double jeopardy doctrine that allows the
9 government to retry the hung counts when they are all
10 brought together in the same proceeding? And that is
11 this -- and I think it's made most vivid by imagining
12 Ashe v. Swenson in a slightly different posture.
13 Ashe v. Swenson involved robberies of six
14 individuals at a poker game. The government indicted
15 each one of them as a separate robbery, and the
16 government tried one of them first. And in that one,
17 the jury's acquittal was understood to mean that the
18 defendant was not the robber. If the government could
19 go sequentially through and try the other five, it has
20 the opportunity to try to wear the defendant down or
21 refine its case or improve its case in a way that the
22 Court regarded as impermissible.
23 But suppose that in Ashe the government
24 hadn't done that, it had brought all six robbery
25 prosecutions together, and the jury returned one verdict

1 of acquittal on one robber, and on the other five it
2 hung. In that situation, I think -- which is the
3 situation we have here --
4 JUSTICE STEVENS: But the reason for that is
5 there are doubts about the integrity of the acquittal.
6 They probably compromised, just to say not to be too
7 tough on --
8 MR. DREEBEN: But, Justice Stevens, that is
9 identical to this case. There is no difference to this
10 case.
11 JUSTICE STEVENS: No, here you have
12 sequential prosecutions, and there's no reason to
13 question the integrity of the acquittal in this case.
14 MR. DREEBEN: No. But, Justice Stevens, if
15 you would question the integrity of the acquittal, if
16 the jury acquits on one robber and hangs on five, that
17 is this case. The only difference in this case is it's
18 a securities fraud case.
19 JUSTICE BREYER: I didn't think it had
20 anything to do with integrity of anything. I thought
21 what it had to do with is that they are being tried at
22 the same time. And to test that out in my mind, I
23 imagine this: In February, we try the individual for
24 the drug count; he's acquitted. In June, we bring a
25 telephone count. Absolutely forbidden, right?

1 MR. DREEBEN: Correct.

2 JUSTICE BREYER: Okay. So why should the

3 government be one whit better off because, in addition

4 to doing that, they happened to bring a telephone count

5 in January along with the other?

6 MR. DREEBEN: There are two reasons for

7 that, Justice Breyer. The first is that the Double

8 Jeopardy Clause is not aimed at preventing the

9 government from attempting to bring its -- all of its

10 charges in one indictment against the defendant. What

11 the collateral estoppel component is aimed at is the

12 government going sequentially, carving its prosecution

13 up into pieces, and trying in different attempts.

14 JUSTICE SOUTER: But isn't -- isn't the real

15 problem that -- that you raised by your answer the

16 following problem: That in this age in which there are,

17 as Justice Breyer's hypo suggests, lots of overlapping

18 criminal statutes -- you can indict not only for drugs

19 but for telephones, and I don't know what other

20 overlapping crimes there -- there may be. Therefore,

21 that gives the government by joining a lot of

22 overlapping charges or lots of charges with common

23 elements in either one indictment through various counts

24 or simply by a series of indictments to be tried

25 together -- it gives the government a bigger chance of

1 getting a hung jury or some irrational resolution on
2 some of those issues. And if the government can bring
3 loads of counts, increase the likelihood of getting a
4 hung jury on one issue or one indictment, the government
5 in effect has a key to avoiding just what Justice
6 Breyer's hypothetical suggested.
7 If they wait and bring the second count in
8 June, there's an issue preclusion. But if they bring it
9 together, they've got an irrational verdict, and there's
10 no issue preclusion. Therefore, isn't the policy behind
11 both double jeopardy and the issue preclusion extension
12 a policy that argues in favor of saying, don't let the
13 government have all these bites at the apple, because in
14 fact it results or can result in seriatim prosecutions?
15 What's -- what's your response to that argument?
16 MR. DREEBEN: My response to that, Justice
17 Souter, is that double jeopardy has always consisted of
18 a balance of values. There is, of course, the interest
19 that Your Honor has identified, but the countervailing
20 interest is that the government should have one full and
21 fair opportunity to convict a defendant on charges that
22 have been preferred by a grand jury on a showing of
23 probable cause, and that does not occur when the hung
24 counts deprive the government of that one opportunity.
25 JUSTICE SOUTER: But does the -- does the

1 government ask for something more than one fair chance
2 when it comes in with 117 counts? Maybe the fair chance
3 consists of a fair chance with a number of counts or a
4 number of indictments that one can reasonably expect a
5 -- a jury to handle without either getting totally
6 confused or totally exhausted.
7 MR. DREEBEN: Well, let me -- let me give
8 two answers to that, Justice Souter. First of all, the
9 position for which Petitioner argues does not depend on
10 the number of counts. If there had been two counts in
11 the indictment --
12 JUSTICE SOUTER: Oh, that's right. I'm
13 making an argument that he did not make.
14 MR. DREEBEN: -- it would be the same.
15 But more fundamentally, I think that the
16 number of counts in this indictment should not lead the
17 Court to think that this was a case in which the
18 government overcharged in some nefarious effort. First
19 of all, nefarious efforts like that tend to backfire on
20 the government, and that's why sound prosecution policy
21 dictates against overcharging. Here, I don't think it's
22 fair to regard the number of counts as a proxy for
23 overcharging, and that is because they break up into
24 logically distinct units.
25 JUSTICE GINSBURG: Why not, when considering

1 what the government did on its second chance? It
2 trimmed 5 -- if there were 20 insider trading, on the
3 new indictment, there were 5. There were 99 counts of
4 laundering, which were trimmed to 8, something within
5 the jury's ken. But isn't the most likely thing in this
6 case that the jury was simply exhausted?
7 MR. DREEBEN: I don't think so, Justice
8 Ginsburg, because all of the insider trading counts turn
9 on the same fact: Did Petitioner have inside
10 information -- did he know that the Enron broadband
11 system that he was integrally involved in, was the
12 strategic manager in charge of, wasn't working? If he
13 had that knowledge and he traded, the number of counts
14 is really irrelevant. And I think that the fact that
15 the jury resolved all of the insider trading counts the
16 same way, and the money laundering counts just had to do
17 with the disposition of the proceeds, they're all
18 resolved the same way.
19 The jury obviously deadlocked on whether
20 some fact that the government needed to prove for those
21 counts was established. And the bizarre thing, I think,
22 about Petitioner's position is that he seeks to get
23 through a legal doctrine, collateral estoppel, which is
24 a big extension from what the Double Jeopardy Clause
25 textually prohibits, exactly what the jury would not

1 give him. The jury --
2 CHIEF JUSTICE ROBERTS: Well, the -- the
3 point about the big extension, you were rather coy in
4 your brief about what you think about Ashe v. Swenson.
5 Are you asking us to revisit that?
6 MR. DREEBEN: No, Mr. Chief Justice, I don't
7 think that the Court needs to revisit Ashe v. Swenson in
8 order to resolve this case, but I think it's fair to say
9 that Ashe v. Swenson is a doctrine that transposed
10 certain civil policies that are -- are expressed through
11 the doctrine of issue preclusion into the double
12 jeopardy context in a way that was not supported by the
13 history of the Fifth Amendment and is not supported by
14 the text of the Double Jeopardy Clause, which requires
15 the same events.
16 CHIEF JUSTICE ROBERTS: Well, you're not
17 going to talk about -- you're not going to talk about
18 the text of the Double Jeopardy Clause, are you?
19 MR. DREEBEN: Well, I --
20 CHIEF JUSTICE ROBERTS: If we rely on that
21 the case is pretty easy, isn't it?
22 MR. DREEBEN: I think that it is because it
23 says that the same offense is what you're protected
24 against for double jeopardy, and the offenses in this
25 case are distinct under Blockburger. But my point

1 about --

2 CHIEF JUSTICE ROBERTS: The person was in

3 jeopardy on the hung offense as well.

4 MR. DREEBEN: Well, this Court has made

5 clear that the jeopardy continues until the government

6 has the opportunity to obtain a verdict. So the fact

7 that his jeopardy began is not what entitles him to --

8 CHIEF JUSTICE ROBERTS: Under this Court's

9 decisions, but not under the text of the Double Jeopardy

10 Clause.

11 MR. DREEBEN: I think it then becomes a

12 question of what is the meaning of "jeopardy." But

13 insofar as the Court imported collateral estoppel into

14 the Double Jeopardy Clause, it should keep in mind, in

15 deciding whether to extend that doctrine, that in the

16 civil context a crucial predicate for collateral

17 estoppel is the ability of the adversely affected party

18 to appeal, and that is because before we rely on

19 collateral estoppel, we want to have some assurances

20 that there actually is integrity to the necessarily

21 determined fact that is going to preclude litigation in

22 another case.

23 JUSTICE STEVENS: But the key to your

24 argument is the government is entitled to one full and

25 fair opportunity to try its case. It had that

1 opportunity the first time around.

2 MR. DREEBEN: Well, I think that this

3 Court's decisions since --

4 JUSTICE STEVENS: If there were no separate

5 counts, that would have been -- that would have been a

6 fair -- that would be the end of the matter.

7 MR. DREEBEN: Since 1824, this Court has

8 defined the government's full and fair opportunity to

9 include the right to retry if the jury hangs, and here

10 what the defendant --

11 JUSTICE STEVENS: But it has -- but it has

12 the right to retry in the same position as it would have

13 been if it had not brought the first proceeding. And if

14 it had not brought the first proceeding in this case, it

15 would have been barred.

16 MR. DREEBEN: No, I don't -- I don't agree

17 that it's in the same position --

18 JUSTICE STEVENS: Why not?

19 MR. DREEBEN: -- as if it had not bought it.

20 JUSTICE STEVENS: Oh.

21 MR. DREEBEN: It's -- it -- in this case

22 what the government did was to bring all of its cases

23 together. And I return to the hypothetical about

24 Ashe v. Swenson because I think it -- it strikes

25 everyone as very strange to say that if the jury in Ashe

1 v. Swenson had been presented with all six robbers and
2 had acquitted on only one and had a returned -- you
3 know, an inability to reach a verdict --
4 JUSTICE STEVENS: That's because we have the
5 Dunn doctrine, which itself is questionable. It
6 basically says there is a certain situation in which we
7 will tolerate what may be an irrational verdict, and the
8 reason we tolerate it is that the acquittal itself may
9 be explained on other grounds. Namely --
10 MR. DREEBEN: I'm not relying on Dunn in
11 this hypothetical. I'm presupposing that the jury hung
12 with respect to the other five robbers. And all the
13 government would come back and say is: For two separate
14 reasons, we should be able to retry those counts against
15 the other five robbers. One is that when there is a
16 hung jury it's settled double jeopardy law that the
17 government has an opportunity to retry; and the other is
18 if you accept the proposition that the jury's action was
19 inconsistent because one of the robbers earned an
20 acquittal and the other five logically should have been
21 the same if the jury had found that the defendant wasn't
22 the robber, the jury was unable to return a verdict.
23 Collateral estoppel depends on the idea that
24 there is a rational jury, and if a jury has acted
25 inconsistently, we don't have that basis of rationality

1 that supports the policy justifications of collateral
2 estoppel.
3 JUSTICE STEVENS: But the whole -- whole
4 doctrine of inconsistent verdicts depends on the
5 assumption that what appears to be an irrational
6 inconsistency may have another explanation.
7 MR. DREEBEN: Yes, such as lenity for the
8 defendant. The government doesn't get the opportunity
9 to appeal an acquittal. The government doesn't get the
10 opportunity to go behind the acquittal and ask whether
11 the jury acted rationally. All of things -- those
12 things are true in civil cases where the doctrine of
13 issue preclusion applies.
14 JUSTICE BREYER: Start the other side, which
15 I think Justice Stevens was suggesting. Assume that
16 there was only one trial on the substantive count in
17 January. Now you decide -- he's acquitted. Now you
18 decide to indict him in July on the telephone count.
19 You argue to the judge: Judge, there shouldn't be
20 double jeopardy here because maybe the jury just
21 acquitted him the first time because they were lenient.
22 Maybe they liked his looks. Maybe they were distracted
23 by a fly. Maybe they were, maybe they were -- and we
24 didn't even get an appeal. Are you going to win that
25 case?

1 MR. DREEBEN: Not under --

2 JUSTICE BREYER: No, not even a close.

3 Okay. Not even close.

4 Now, since you're going to lose that case, I

5 grant you there's thousands of cases talking about your

6 ability to bring more cases if you have a hung jury. I

7 concede all those. None of them talks about double

8 jeopardy, to my knowledge.

9 So we're back to the hypothetical. You've

10 lost your case. Now, all that you did to turn that case

11 into a winning case was you also indicted him on the

12 telephone count in January. Now, that was my question

13 the first time, and you began to have two answers. I

14 just didn't see why the government should be any better

15 off because they also indicted him in January. Given

16 the language "double jeopardy," you might think the

17 government, if anything, should be worse off, but let's

18 keep them neutral.

19 So what is the reason that the government

20 should be worse off because they indicted him in January

21 on the telephone count as well as in June?

22 MR. DREEBEN: Well, the government should

23 not be worse off.

24 JUSTICE BREYER: No, no -- better. I

25 misspoke.

1 MR. DREEBEN: I think that the reason is
2 that when, Justice Breyer, you said that double jeopardy
3 is not involved in the cases involving the government's
4 ability to retry on a hung count, that's not accurate.
5 The Court has regarded the doctrine of double jeopardy
6 as a balance of policies, and one of the fundamental
7 policies is when the jury cannot agree, the government
8 has the right to retry.
9 CHIEF JUSTICE ROBERTS: I think that's
10 right, and your argument depends upon that interest
11 balancing against the interest in giving effect to the
12 acquittal verdict.
13 Now, what if I think, under the Seventh
14 Amendment, that's -- that what is important is
15 protecting jury verdicts? And the interest in the
16 irrational case, when you have a conviction and
17 acquittal, is that you have two jury verdicts and you
18 can't go one way or the other without undermining one of
19 them.
20 Here, however, you can give full effect to
21 the verdict of acquittal without undermining another
22 jury verdict. You certainly undermine the government's
23 interest in prosecuting after a hung jury, but if I
24 think what's important under the Seventh Amendment is
25 the jury verdicts, then the case comes out the other

1 way, right?

2 MR. DREEBEN: Well, I don't think so, Mr.

3 Chief Justice, because I think you still have to focus

4 on the intrinsic character of the doctrine of issue

5 preclusion, which does depend on a rational jury. Let's

6 apply it to the facts of this case, because there is --

7 JUSTICE GINSBURG: Well, you qualify it in

8 your statement of the facts. Is there any insider

9 information with relation to the insider information

10 charges that is different in any respect from the

11 insider information in connection with the substantive

12 charge?

13 MR. DREEBEN: No, Justice Ginsburg, there is

14 not. The government's theory here was that on the

15 substantive securities fraud count, which related to the

16 January 20th, 2000, analysts meeting, Mr. Yeager was

17 integrally involved in formulating the message and was

18 therefore accountable for misstatements to the

19 marketplace about Enron broadband communications

20 efficacy and effectiveness and technological value. The

21 jury, if it rejected that, would acquit on those counts

22 -- on that count, without reaching the question did Mr.

23 Yeager know factually that the statements that were made

24 by others at that analysts conference and in the press

25 releases subsequently were inaccurate? If the answer to

1 that question is yes, he had the information, then he
2 could be liable for insider trading even though he is
3 not liable for substantive securities fraud because he
4 had nothing to do with creating the statements or
5 misstatements to the marketplace.
6 And I think I do take issue with
7 Petitioner's suggestion that the theory of this case was
8 an omissions theory. The way that Mr. Yeager argued the
9 case to the jury was that I didn't have any involvement
10 in preparing or making statements at that January 20th
11 analysts conference; you can't convict me of what other
12 people may have said. And the jury instructions advised
13 the jury that it had to find that he participated in the
14 scheme and that he either made the statements or caused
15 the statements or omissions to be made. If it rejected
16 that, it easily acquits on the securities fraud.
17 And as a result, even if this Court were
18 inclined to apply collateral estoppel across mixed
19 counts in a verdict of acquittals and hung counts, which
20 we submit it should not do, the defendant still has to
21 carry his burden of showing necessarily that the jury
22 resolved an issue of fact in his favor that would
23 preclude the next prosecution.
24 CHIEF JUSTICE ROBERTS: Well, he -- he
25 carried that burden before the court of appeals.

1 MR. DREEBEN: But the court of appeals
2 relied on the view that Mr. Yeager did not contest that
3 he participated in the planning and preparation and
4 statements that were made.
5 CHIEF JUSTICE ROBERTS: Revisiting of that
6 issue was not included within the question presented.
7 MR. DREEBEN: Well, I think it's included in
8 our ability to defend the judgment. The district court
9 in this case made it quite clear that collateral
10 estoppel did not apply because the acquittals could rest
11 on the basis that Mr. Yeager did not participate in the
12 analysts conference and in the press statements that
13 were the basis for the wire fraud and the securities
14 fraud omissions.
15 CHIEF JUSTICE ROBERTS: So if we -- if we
16 agree with you on that proposition, then the conflict
17 that we granted cert to resolve would still continue?
18 MR. DREEBEN: Well, you could resolve it. I
19 would hope that you would resolve it in a favor of a
20 disposition that doesn't require you to reach the
21 factual issue, but if the Court resolves the legal issue
22 against us, I think it should revisit the analysis of
23 the court of appeals because government isn't defending
24 the precise way in which the court of appeals went about
25 analyzing the double jeopardy issue, and its question of

1 what facts were necessarily determined was resolved
2 incorrectly, I think, as a matter of clear error. I
3 don't even think Mr. Yeager will stand up on rebuttal
4 and tell you that he didn't argue to the jury that his
5 client was not involved in -- in the creation of the
6 statements at that analyst meeting because he did make
7 that argument.
8 And I do think that it's important that if
9 the Court is going to go down a track of allowing
10 collateral estoppel for mixed verdicts, that it
11 encourage rigor in the way that courts determine whether
12 a fact was necessarily decided by the jury.
13 JUSTICE KENNEDY: Well, on that first
14 theory, in your theory that a retrial on hung counts is
15 always permitted, I -- I take it there are no court of
16 appeals opinions or decisions that agree with you on
17 that point, or am I incorrect?
18 MR. DREEBEN: They have not reasoned it the
19 way that the government reasons it, but I think that the
20 Fifth Circuit's result is equivalent to what the
21 government argued as well as the D.C. Circuit.
22 JUSTICE KENNEDY: A different question:
23 Suppose you prevail. The hung counts are retried. And
24 the jury hangs again, and the jury hangs a second time.
25 Is there any point at which the district court can

1 intervene in the exercise of its own authority and
2 discretion just to dismiss the charges?
3 MR. DREEBEN: I don't think so, Justice
4 Kennedy, because I think that the interest that's being
5 vindicated here is a balance of interests, and it's --
6 as I responded to the Chief Justice and -- and referred
7 to Justice Souter's question earlier, double jeopardy
8 has never been a jurisprudence of black and white. You
9 could you read the clause as saying one trial for a
10 defendant. If the defendant is -- doesn't get a
11 conviction at that trial, game over. But the Court has
12 never done that because the double jeopardy clause has
13 always involved a balance of the -- society's very
14 important interests in having the opportunity for a
15 decision up or down on whether a defendant is guilty.
16 JUSTICE KENNEDY: Then the government can
17 try year after year to get a conviction and wear the
18 defendant down? Nothing the Court can do so long as
19 there's a hung jury?
20 MR. DREEBEN: If the -- if the jury hangs,
21 the government can retry. There have been cases where
22 --
23 JUSTICE KENNEDY: Is that the rule in all of
24 the States? Don't some States give authority to the
25 judges to say, enough is enough?

1 MR. DREEBEN: I am not aware whether any
2 States do, but certainly as a matter of double jeopardy,
3 this Court has never suggested that there is. I think
4 as a matter of common sense, prosecutors who are unable
5 to achieve a verdict after a certain number of trials do
6 tend to conclude that it's not in the interest of
7 society to keep trying. But certainly one hung jury
8 followed by a retrial is customary rather than an
9 exception to the rule, and the reason why that's --
10 JUSTICE STEVENS: But one hung jury followed
11 by a second when there has been an acquittal the first
12 time around is not customary.
13 MR. DREEBEN: But the --
14 JUSTICE STEVENS: So the difference is in
15 the -- in the first trial, you're not impugning the
16 integrity of the jury's verdict. You're following the
17 acquittal, and that's true in the compromise cases, the
18 Dunn case and those cases, but that's not the case here
19 because you're talking about two different juries.
20 You're saying the second jury should have an -- an
21 opportunity to correct what the first jury did, even
22 though it would not have that opportunity if the first
23 jury had not faced the issue.
24 MR. DREEBEN: Well, I -- I -- Justice
25 Stevens, all I can say is that if the first jury had

1 really believed that Mr. Yeager acted in good faith and
2 was completely innocent, it should have acquitted on all
3 counts.
4 JUSTICE STEVENS: It should have, but it
5 didn't. We know that. And we just know they did not
6 reach a conclusion on this issue, but they did reach a
7 conclusion on the count on which they acquitted.
8 MR. DREEBEN: We should -- we should presume
9 that, as we do in other areas of the law, that the jury
10 followed the instructions that it was given, and the
11 instructions that it was given --
12 JUSTICE STEVENS: But you make the same
13 presumption when there's an inconsistent verdict, but
14 you say even if it's irrational we'll go along with it
15 because of the one jury, and they may have had non --
16 unsound legal reasons for saying, well, we'll let the
17 guy off on the one count.
18 MR. DREEBEN: But I think that there is no
19 reason for the fact that a jury takes irrational action
20 to then be used for the jury's acquittal to block
21 complete prosecution.
22 JUSTICE STEVENS: The jury did not take
23 irrational action in this case. The only action --
24 that's relevant was the acquittal. The other they
25 didn't act.

1 MR. DREEBEN: Well, they acted irrationally
2 in the sense that if a fact necessarily determined
3 acquittals on the -- on the insider trading counts --
4 JUSTICE STEVENS: It would be irrational if
5 they had returned a verdict, but they said we can't
6 agree -- for who knows why.
7 MR. DREEBEN: But the point is they should
8 have agreed logically if they believed that Mr. Yeager
9 never had inside information or acted in good faith.
10 And the jury is instructed to consider each count, count
11 by count. It was given instructions at the Allen phase
12 of the case that it should strive to achieve a verdict,
13 that Mr. Yeager is entitled to a verdict of not guilty
14 if, in fact, the jury believes that he is not guilty,
15 and that it should make every effort to reach the
16 verdict.
17 Now, the fact that it didn't, and it would
18 have been very easy for it to do, if it had determined
19 logically that he did not have inside information, is a
20 reason for hesitating before extrapolating out from
21 those acquittals and blocking the government's
22 opportunity to retry the hung counts.
23 Mr. Yeager's position logically --
24 JUSTICE STEVENS: It's not all that clear,
25 because, as you argue, the court -- the district court

1 was correct in analyzing the -- the estoppel issue. And
2 it's obviously a very difficult issue because judges
3 have disagreed about it and the government and your
4 opponent disagree on it. So, it's entirely possible
5 that the jury just wasn't able to figure it all out.
6 MR. DREEBEN: I -- I don't think that it is
7 that difficult of an issue. I think that the district
8 court, which was closer to it, which had presided over
9 the trial, and which read the closing arguments, made
10 findings that make it quite clear what Mr. Yeager argued
11 and how those arguments were totally consistent --
12 JUSTICE STEVENS: The jury could not have
13 been as confused as the court of appeals was.
14 MR. DREEBEN: I'm not sure that --
15 (Laughter.)
16 MR. DREEBEN: If the jury was confused and
17 it acted in an irrational manner, that's a reason not to
18 apply collateral estoppel, not a reason to do it. What
19 Mr. Yeager's theory implies is that if the jury had come
20 back and -- under the Federal Rules of Criminal
21 Procedure it can return partial verdicts. If the jury
22 had come back and said, we're struggling on some of the
23 counts, we have a partial verdict on others of them, and
24 the judge said, okay, we'll take the partial verdict;
25 and the jury came in and said, we acquit on five counts,

1 that Mr. Yeager's theory would be that the judge should
2 say, well, that's great, collateral estoppel now means
3 you don't get to finish the deliberations on the counts
4 on which you said you can't agree. And that result
5 makes no sense, neither does blocking retrial in this
6 case.
7 CHIEF JUSTICE ROBERTS: Your -- your theory
8 depends upon viewing a hung jury as constituting some
9 action by the jury. Now, obviously it does in some
10 sense.
11 But if you view -- if you accept the
12 proposition that juries only act by returning verdicts,
13 and that's the reason you can retry, because with a hung
14 jury, the jury hasn't really done anything in the way
15 jurors act, then the case comes out -- then the
16 defendant prevails, right?
17 MR. DREEBEN: I assume I can answer your
18 question, Mr. Chief Justice?
19 CHIEF JUSTICE ROBERTS: Yes.
20 MR. DREEBEN: No, because the -- the logic
21 of -- of the situation here is that in order for
22 collateral estoppel to apply, there needs to be a
23 rational jury verdict. And Ashe v. Swenson tells us
24 that in attempting to decide what the jury rationally
25 resolved, we look at all evidence in the record, not

1 just some.

2 So it isn't necessary to treat the jury's

3 hung counts as if they are verdicts of a sort. They

4 simply are data which show that if the jury had been

5 rational and it had resolved a fact in favor of the

6 defendant that was necessary for the government to prove

7 on the other counts, it would have resolved those as

8 acquittals as well. And once you take into account that

9 total record, the doctrine of collateral estoppel with

10 its premise of rationality cannot be applied.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 MR. DREEBEN: Thank you.

13 CHIEF JUSTICE ROBERTS: Mr. Buffone, you

14 have six minutes remaining.

15 REBUTTAL ARGUMENT OF SAMUEL J. BUFFONE

16 ON BEHALF OF THE PETITIONER

17 MR. BUFFONE: The Solicitor General has

18 essentially asked this Court to take a metaphysical view

19 of the Double Jeopardy Clause, but the teachings of this

20 Court from Sealfon through Ashe is that the important

21 protections of the Double Jeopardy Clause as applied to

22 issue preclusion must be approached with reason, with

23 rationality, with a non-hypertechnical view in order to

24 protect the public policies that underlie the Double

25 Jeopardy Clause. And that is quite simply that what

1 happened here should not occur. That a defendant should
2 not be forced to relitigate before a second jury an
3 issue that was necessarily decided.
4 I sat through and argued through a
5 13-and-a-half-week jury trial. A reasonable and
6 rational explanation of what occurred there is that we
7 had a conscientious jury that followed its instructions,
8 that tried to reach through a complex 176-count
9 indictment, and they simply were not able to. They
10 spoke the community will, and they spoke it forcefully
11 in their acquittals. Six of them.
12 And the only conclusion that can be reached
13 from those acquittals is that Mr. Yeager did not possess
14 insider information.
15 At the beginning of this trial, we filed two
16 motions, the first challenging the specificity of the
17 indictment, and the second seeking a bill of
18 particulars. The district court answered both with the
19 same answer. The insider information that Mr. Yeager is
20 charged with possessing in the insider trading counts is
21 the false statements made by others at the 2000 analysts
22 conference.
23 The omissions theory was not, as the
24 Solicitor General submits, some afterthought. It was
25 core to the government's prosecution, and it was core to

1 the case. The jury decided that the omissions theory
2 was not a basis to convict on the six counts that it
3 acquitted. It determined that Mr. Yeager did not
4 possess that information. And Mr. Yeager is entitled to
5 the benefits of those acquittals.
6 Thank you.
7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 The case is submitted.
9 (Whereupon, at 11:04 a.m., the case in the
10 above-entitled matter was submitted.)
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21
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23
24
25

A

ability 33:17 37:6 38:4 41:8
able 21:1 35:14 47:5 50:9
above-entitled 1:11 51:10
Absolutely 14:12 27:25
accept 35:18 48:11
accepted 9:18
account 9:20 49:8
accountable 39:18
accurate 38:4
achieve 44:5 46:12
achieving 21:23
acquit 39:21 47:25
acquits 9:15 14:2 20:1 27:16 40:16
acquittal 3:10 3:16,24 4:2,17 7:23 8:5 9:10 9:13,22,25 10:2 11:4 12:10 13:3,13 15:11,17 16:25 18:9 19:3 22:19,21 23:15 23:21 24:2,24 25:1 26:17 27:1,5,13,15 35:8,20 36:9 36:10 38:12,17 38:21 44:11,17 45:20,24
acquittals 3:13 8:5 9:3,4,6 10:11,23,25 11:1 12:14 13:17 17:11 18:2,18 21:17 22:11,25,25 23:3 24:5,8,9 40:19 41:10 46:3,21 49:8 50:11,13 51:5
acquitted 11:11 12:13 13:9 14:25 27:24 35:2 36:17,21 45:2,7 51:3
act 45:25 48:12 48:15
acted 22:4 35:24 36:11 45:1 46:1,9 47:17
action 35:18 45:19,23,23 48:9
addition 28:3
additional 20:16
addressed 9:1
admissions 5:6
adversely 33:17
advised 40:12
affirmative 4:18
affirmatively 5:18
afterthought 50:24
age 28:16
agree 5:19 7:2 10:19 14:4 21:22 34:16 38:7 41:16 42:16 46:6 48:4
agreed 46:8
agrees 15:17 16:3
ahead 26:2,3
aimed 28:8,11
ALITO 6:11 7:2 19:12,20,23
alleged 9:24
Allen 12:1,3,23 20:15 46:11
allow 20:9
allowing 25:18 42:9
allows 26:8
alternative 6:21
alternatives 6:23
Amendment 32:13 38:14,24
analysis 5:1 7:16 10:21,22 17:4 17:5 21:2,15 41:22
analyst 42:6
analysts 5:14 39:16,24 40:11 41:12 50:21
analyzed 5:5
analyzing 41:25 47:1
answer 13:24 16:19,21 19:21 25:5,9,12 28:15 39:25 48:17 50:19
answered 50:18
answers 30:8 37:13
appeal 12:16 33:18 36:9,24
appeals 40:25 41:1,23,24 42:16 47:13
APPEARAN... 1:14
appears 36:5
Appendix 4:8
apple 25:19 26:1 29:13
application 3:16 25:2
applied 12:21 25:3 49:10,21
applies 36:13
apply 13:20,21 24:7 25:14,16 39:6 40:18 41:10 47:18
48:22
approached 49:22
appropriate 18:15
areas 45:9
argue 8:18,18 13:5 36:19 42:4 46:25
argued 5:16 40:8 42:21 47:10 50:4
argues 29:12 30:9
arguing 6:9
argument 1:12 2:2,7 3:4,6,22 3:23 4:8 6:12 10:17 21:10 29:15 30:13 33:24 38:10 42:7 49:15
arguments 5:10 7:15 47:9,11
arises 9:5
arising 18:14
Ashe 3:17,22 5:3 7:16,19,20 8:22 9:20 10:5 21:2 23:8,13 26:12,13,23 32:4,7,9 34:24 34:25 48:23 49:20
Ashe-type 8:23
aside 20:21
asked 11:22 26:7 49:18
asking 22:6 32:5
assert 11:6
assume 5:24 36:15 48:17
assumed 4:24
assumes 3:23
assuming 12:7
assumption 4:6 4:17 17:10
36:5
assurances 33:19
attach 16:22
attached 8:24
attempting 28:9 48:24
attempts 28:13
attorney 5:6
authority 17:8 18:25 19:1,2 43:1,24
avoid 19:9
avoiding 29:5
aware 19:17 44:1
a.m 1:13 3:2 51:9

B

back 4:16 11:21 20:3 35:13 37:9 47:20,22
backfire 30:19
balance 29:18 38:6 43:5,13
balancing 38:11
bar 13:14 17:16 18:7 21:3,24 23:1
barred 34:15
based 6:13 7:4
basic 21:20
basically 6:4 35:6
basis 11:15 18:17 35:25 41:11,13 51:2
began 6:9 33:7 37:13
beginning 50:15
behalf 1:15,18 2:4,6,9 3:7 21:11 49:16
belief 8:2
believe 5:2 7:17 9:1 10:5,5,21

16:20 17:25 18:16 19:16 20:10
believed 45:1 46:8
believes 46:14
benefits 51:5
better 13:7 28:3 37:14,24
big 31:24 32:3
bigger 28:25
bill 50:17
bite 25:19 26:1
bites 29:13
bizarre 31:21
black 43:8
block 45:20
Blockburger 32:25
blocked 16:9,11
blocking 46:21 48:5
boils 6:2
bought 34:19
break 30:23
Breyer 13:23 14:6,9,12,18 14:22 15:5,12 15:22 16:3,15 25:4,20,23 26:5 27:19 28:2,7 36:14 37:2,24 38:2
Breyer's 28:17 29:6
brief 3:24 9:17 11:18 32:4
briefs 5:21 25:11
bring 27:24 28:4 28:9 29:2,7,8 34:22 37:6
broadband 31:10 39:19
brought 25:24 26:10,24 34:13 34:14
Buffone 1:15 2:3 2:8 3:5,6,8,19 5:2 6:6,20 7:6 8:1,13,17 9:11 10:4,19 11:13 12:12 13:10 14:4,7,10,16 14:20 15:4,9 15:21 16:1,14 16:20 17:3,25 18:12,22 19:5 19:16,21 20:10 49:13,15,17
burden 40:21,25

C

C 2:1 3:1
called 3:18
candid 4:4
carried 40:25
carry 40:21
carving 28:12
case 3:18,21 7:20 10:17 13:18,25 14:6 14:13,13,22,24 15:1,6,15,18 15:22,23,25 16:5,6,7 17:6,7 17:15,17 18:9 22:3,7,8,18 23:19 24:2,16 24:21 26:2,21 26:21 27:9,10 27:13,17,17,18 30:17 31:6 32:8,21,25 33:22,25 34:14 34:21 36:25 37:4,10,10,11 38:16,25 39:6 40:7,9 41:9 44:18,18 45:23 46:12 48:6,15 51:1,8,9
cases 8:23 9:15 15:13 18:16,18 18:19 20:22 23:9 34:22 36:12 37:5,6 38:3 43:21 44:17,18
cause 6:19 29:23
caused 40:14
cert 41:17
certain 20:1 32:10 35:6 44:5
certainly 19:18 38:22 44:2,7
certainty 12:13
challenging 50:16
chance 28:25 30:1,2,3 31:1
character 39:4
charge 7:22 12:1 12:3 20:15 31:12 39:12
charged 4:14 7:7 50:20
charges 12:23 28:10,22,22 29:21 39:10 43:2
Chief 3:3,8 13:4 13:11 21:8,12 22:5,12,24 32:2,6,16,20 33:2,8 38:9 39:3 40:24 41:5,15 43:6 48:7,18,19 49:11,13 51:7
choice 18:1,2
choose 17:22 18:11
chooses 20:9
Circuit 42:21
Circuit's 42:20
circumstance 9:23
circumstances 4:13 9:21,22 10:3,6 17:9
civil 32:10 33:16 36:12
claim 8:10,10,18 20:20,21,22
clarification 8:20
clarified 7:14
clarity 18:2
clause 19:8 28:8 31:24 32:14,18 33:10,14 43:9 43:12 49:19,21 49:25
clear 4:20 5:12 6:25 16:18,19 16:21 18:1 19:7 33:5 41:9 42:2 46:24 47:10
clearly 26:3
client 3:25 4:10 4:17 5:8 6:18 42:5
climates 12:22
close 9:23 37:2,3
closer 47:8
closing 5:10 47:9
Coercive 12:20
cold 12:22
collateral 8:19 13:20 16:21 20:18 22:3,9 23:4 24:7 25:3 25:13 28:11 31:23 33:13,16 33:19 35:23 36:1 40:18 41:9 42:10 47:18 48:2,22 49:9
come 4:16 11:10 11:12 35:13 47:19,22
comes 30:2 38:25 48:15
common 9:18 24:19 28:22 44:4
communicatio... 39:19
community 50:10
complete 45:21
completely 45:2
completing 21:25
complex 50:8
complicated 15:14
component 28:11
compromise 23:22 44:17
compromised 27:6
concede 37:7
concepts 19:8
conclude 44:6
conclusion 21:15 45:6,7 50:12
conclusions 22:16
concurring 10:13
conference 5:14 39:24 40:11 41:12 50:22
conflict 23:25 24:22 41:16
conflicting 14:8 23:20
confused 11:9 30:6 47:13,16
connection 39:11
conscientious 50:7
consider 46:10
considering 30:25
consisted 29:17

consistent 47:11
consists 30:3
constitute 25:21
constituting 48:8
Constitution 19:13,23,24 20:7
constitutional 19:10,17
consumed 6:2
contemporary 12:22
contending 8:9
contest 41:2
context 32:12 33:16
continue 41:17
continues 33:5
continuing 21:18
contrast 18:17
convert 5:23
convict 6:13,25 21:21 29:21 40:11 51:2
convicted 13:8
convicting 15:24
conviction 15:16 16:9,11,25 23:23 38:16 43:11,17
convictions 13:17 22:11
convicts 14:2
core 8:3,4 19:8 24:19 50:25,25
correct 4:5,20 4:21 5:15,18 8:17 28:1 44:21 47:1
counsel 7:15 13:4 21:8 49:11 51:7
count 3:15 10:1 13:8,9,25,25 14:13,14,23,25 14:25 15:2,3,7 15:10,11,15,16 15:16,17 16:8 16:10,10,11,24 17:1 18:15 24:16 25:9,25 27:24,25 28:4 29:7 36:16,18 37:12,21 38:4 39:15,22 45:7 45:17 46:10,10 46:11
countervailing 29:19
counts 3:14 9:6 9:7,9,12,17 10:10,14,14,18 10:20 11:11,12 11:17 12:18,19 13:12,20 20:1 20:2,4,4,5,6 21:1,16,22 23:4,17 24:10 24:12,18,18 25:21 26:9 28:23 29:3,24 30:2,3,10,10 30:16,22 31:3 31:8,13,15,16 31:21 34:5 35:14 39:21 40:19,19 42:14 42:23 45:3 46:3,22 47:23 47:25 48:3 49:3,7 50:20 51:2
course 5:7 17:15 25:23,24 29:18
court 1:1,12 3:9 5:4,5 8:20,24 9:14,16 10:7,8 10:12,22 11:19 11:25 12:2 13:1,15 19:6 20:18 21:13 22:9 23:13 24:17 26:7,22 30:17 32:7 33:4,13 34:7 38:5 40:17,25 41:1,8,21,23 41:24 42:9,15 42:25 43:11,18 44:3 46:25,25 47:8,13 49:18 49:20 50:18
courts 12:20 19:18 42:11
Court's 3:17 33:8 34:3
coy 32:3
creating 40:4
creation 42:5
crimes 28:20
criminal 28:18 47:20
cross-examina... 5:11,20 6:3,8 7:15
crucial 23:6 33:16
customary 44:8 44:12

D

D 3:1
data 49:4
deadlocked 12:2 12:7,7,9,10 31:19
decide 3:14 7:18 36:17,18 48:24
decided 7:23 8:7 8:16,24 9:21 10:9 17:2 21:3 42:12 50:3 51:1
deciding 33:15
decision 3:17 13:2 24:13 43:15
decisions 33:9 34:3 42:16
defend 41:8
defendant 7:24 13:7,11 25:22 26:18,20 28:10 29:21 34:10 35:21 36:8 40:20 43:10,10 43:15,18 48:16 49:6 50:1
defendant's 3:11 5:6
defending 41:23
defined 34:8
deliberations 20:16 48:3
Department 1:18
depend 14:17 15:4 30:9 39:5
depends 35:23 36:4 38:10 48:8
deprive 29:24
depriving 12:21
Deputy 1:17
derive 10:7,8
describe 17:8
despite 5:24
determination 3:11,12 10:25 11:3,4 16:22 16:23 22:19,22 22:24
determinations 23:2
determine 11:2 14:11 19:4 42:11
determined 3:25 17:11 24:8 33:21 42:1 46:2,18 51:3
determining 9:21
dictates 30:21
difference 23:18 27:9,17 44:14
different 7:20 7:25 20:8,11 22:13,18 26:12 28:13 39:10 42:22 44:19
difficult 47:2,7
dilemma 13:12
direct 25:1
directly 13:24
disagree 47:4
disagreed 47:3
disallowed 11:8
discharged 12:3
disclose 6:14,19 7:5
discretion 43:2
dismiss 43:2
disposition 31:17 41:20
dispositive 13:19 15:10
dissenting 10:13
distinct 30:24 32:25
distracted 24:17 36:22
distress 11:24
district 11:19 41:8 42:25 46:25 47:7 50:18
doctrinal 22:2
doctrine 21:4,18 22:9 25:3 26:8 31:23 32:9,11 33:15 35:5 36:4,12 38:5 39:4 49:9
doing 28:4
double 8:3,9 10:2 12:11 18:4 19:6,8 21:14,24 23:8 25:2,14 26:5,8 28:7 29:11,17 31:24 32:11,14 32:18,24 33:9

33:14 35:16 36:20 37:7,16 38:2,5 41:25 43:7,12 44:2 49:19,21,24
doubt 24:1,24
doubts 27:5
Dowling 5:4,5
dramatic 22:6
Dreeben 1:17 2:5 21:9,10,12 22:8,23 23:12 23:16 24:3,14 24:25 25:20 26:4 27:8,14 28:1,6 29:16 30:7,14 31:7 32:6,19,22 33:4,11 34:2,7 34:16,19,21 35:10 36:7 37:1,22 38:1 39:2,13 41:1,7 41:18 42:18 43:3,20 44:1 44:13,24 45:8 45:18 46:1,7 47:6,14,16 48:17,20 49:12
drink 12:21
drug 27:24
drugs 13:25 14:1,25 28:18
Dunn 35:5,10 44:18
duty 5:15 6:14 6:18 7:5
D.C 1:8,15,18 42:21

E

E 2:1 3:1,1
earlier 43:7
earned 35:19
easily 40:16
easy 32:21 46:18
effect 9:5 10:16 10:17 13:13,20 17:8 18:19 22:16,20,20 23:5,23 29:5 38:11,20
effectiveness 39:20
efficacy 39:20
effort 8:6 30:18 46:15
efforts 30:19
egregiously 12:17
either 6:23 13:16 19:14 28:23 30:5 40:14
element 6:22
elements 28:23
elucidated 7:13
embodies 23:17
employment 11:22
encourage 20:15 42:11
engage 7:11 10:22
enhance 7:10
Enron 7:10 31:10 39:19
entirely 24:12 47:4
entirety 5:9
entitled 21:21 33:24 46:13 51:4
entitles 33:7
equate 12:25
equivalent 9:10 9:10 42:20
erroneous 12:17
error 42:2
ESQ 1:15,17 2:3 2:5,8
essentially 3:25 49:18
establish 4:2
established 31:21
estoppel 8:20 13:20 16:21 20:18 22:3,10 23:5 24:7 25:3 25:14 28:11 31:23 33:13,17 33:19 35:23 36:2 40:18 41:10 42:10 47:1,18 48:2 48:22 49:9
event 7:21
events 32:15
everybody 15:17 16:3
evidence 48:25
exactly 25:5 31:25
example 18:4
exception 44:9
excuse 18:20
exercise 43:1
exhausted 30:6 31:6
expect 30:4
explain 23:21
explained 35:9
explanation 36:6 50:6
expressed 32:10
extend 33:15
extends 13:5
extension 22:6 29:11 31:24 32:3
extent 23:2
extrapolating 46:20
eyes 9:23

F

F 1:3
face 11:25
faced 44:23
fact 4:2,11,12 5:21 6:1,19 8:6 11:8 23:19 24:8,19 29:14 31:9,14,20 33:6,21 40:22 42:12 45:19 46:2,14,17 49:5
facts 4:22 39:6,8 42:1
factual 16:23,24 41:21
factually 39:23
failed 11:2,14,16
failure 17:21
fair 21:21 29:21 30:1,2,3,22 32:8 33:25 34:6,8
faith 45:1 46:9
false 50:21
far 25:1
fast 15:12
favor 3:11 25:22 29:12 40:22 41:19 49:5
February 27:23
Federal 19:14 20:8 47:20
fence 13:15
Fifth 32:13 42:20
figure 47:5
filed 50:15
final 3:11 9:4,7 11:4 18:19 20:14
finality 8:5 9:2,3 10:11,23,25 12:13 13:2 18:3 19:9,13 20:24
financial 11:20 11:23
find 4:10 6:1,16 7:3 40:13
finding 12:11
findings 22:20 47:10
finish 48:3
firm 13:1
first 5:3 6:6,20 6:22 8:1,4 9:22 10:4 12:20 14:2 19:9 21:17 23:19 25:25 26:16 28:7 30:8,18 34:1,13,14 36:21 37:13 42:13 44:11,15 44:21,22,25 50:16
five 26:19 27:1 27:16 35:12,15 35:20 47:25
fly 36:23
focus 39:3
follow 17:18
followed 44:8,10 45:10 50:7
following 18:15 28:16 44:16
Fong 18:19,19
Foo 18:19,19
food 12:21
forbidden 27:25
force 9:13
forced 20:18 50:2
forcefully 50:10
form 20:15
formulating 39:17
fortiori 26:2
found 35:21
frailty 6:24
fraud 6:13,16,22 7:3,7 27:18 39:15 40:3,16 41:13,14
front 17:7
full 20:14 21:21 29:20 33:24

34:8 38:20
full-time 11:21
fundamental 38:6
fundamentally 30:15
further 10:21 18:7 21:6

G

G 3:1
game 26:14 43:11
General 1:17 49:17 50:24
getting 29:1,3 30:5
Ginsburg 7:19 8:1,8,15 9:9 30:25 31:8 39:7,13
Ginsburg's 20:19
give 20:15 22:16 22:20,20 23:23 30:7 32:1 38:20 43:24
given 18:19 37:15 45:10,11 46:11
gives 28:21,25
giving 38:11
go 3:21 4:7 19:6 19:6 26:2,3,19 36:10 38:18 42:9 45:14
goes 26:6
going 4:6 14:10 15:12 17:4,6 19:1 22:14 28:12 32:17,17 33:21 36:24 37:4 42:9
good 45:1 46:9
gored 13:16,19
government 3:12 5:12 6:9 6:17 21:15,18 21:20,23,25 25:18 26:9,14 26:16,18,23 28:3,9,12,21 28:25 29:2,4 29:13,20,24 30:1,18,20 31:1,20 33:5 33:24 34:22 35:13,17 36:8 36:9 37:14,17 37:19,22 38:7 41:23 42:19,21 43:16,21 47:3 49:6
government's 6:11,12 34:8 38:3,22 39:14 46:21 50:25
grand 29:22
grant 37:5
granted 41:17
great 48:2
greater 8:2
grounded 7:12 26:5
grounds 23:21 35:9
grows 22:3
guess 5:21 6:1 13:24
guilty 5:17 24:22 43:15 46:13,14
guy 45:17

H

handle 30:5
hangs 13:7 20:1 27:16 34:9 42:24,24 43:20
happened 14:17 14:18 15:5 28:4 50:1
hear 3:3 13:24
heat 12:21
held 5:23
hesitating 46:20
historically 9:14 9:17 12:19
history 12:25 19:6 32:13
Honor 5:3 6:6 6:20 7:6 8:13 8:17,21 9:11 11:13 12:4,12 13:10 14:4,16 14:21 15:4,9 16:2,14,20 17:25 18:12 19:5,16 20:10 29:19
Honor's 7:1 18:17
hope 41:19
horns 13:12
hung 3:13,15 9:6,7,9,12,16 9:24 10:10,14 10:14,18,20 11:12 12:18,19 14:14,19,20,22 15:1,19,24 16:1 17:1,15 17:20 18:6,15 19:3 21:16,19 21:22 23:4 25:8,8,21,25 26:9 27:2 29:1 29:4,23 33:3 35:11,16 37:6 38:4,23 40:19 42:14,23 43:19 44:7,10 46:22 48:8,13 49:3
hurts 10:17
hypo 28:17
hypothetical 15:10 20:25 29:6 34:23 35:11 37:9

I

idea 22:4 35:23
identical 24:15 27:9
identically 24:20
identification 5:8
identified 29:19
illogical 14:13
imagine 27:23
imagining 26:11
impermissible 26:22
implies 47:19
important 17:19 18:3 38:14,24 42:8 43:14 49:20
importantly 5:11
imported 33:13
impossible 14:3
improve 26:21
impugning 44:15
inability 10:24 13:1 35:3
inaccurate 39:25
inclined 40:18
include 34:9
included 41:6,7
inconsistency 23:3 36:6
inconsistent 3:12,15 9:25 10:24 11:4 24:6 25:7 35:19 36:4 45:13
inconsistently 35:25
incorrect 42:17
incorrectly 42:2
increase 29:3
independent 23:3
indict 28:18 36:18
indicted 15:18 26:14 37:11,15 37:20
indictment 7:6 7:13 13:21 23:15,16 28:10 28:23 29:4 30:11,16 31:3 50:9,17
indictments 28:24 30:4
individual 27:23
individuals 26:14
information 31:10 39:9,9 39:11 40:1 46:9,19 50:14 50:19 51:4
innocent 24:23 45:2
inquire 12:8
inside 31:9 46:9 46:19
insider 4:1 7:11 24:9,15,18 31:2,8,15 39:8 39:9,11 40:2 46:3 50:14,19 50:20
insofar 6:17 33:13
instructed 46:10
instruction 4:5,7 4:16,21 5:25 6:4,24
instructions 4:3 6:21 7:13 40:12 45:10,11 46:11 50:7
integrally 31:11 39:17
integrated 7:7
integrity 24:24 25:1 27:5,13

27:15,20 33:20 44:16
interest 29:18 29:20 38:10,11 38:15,23 43:4 44:6
interests 43:5,14
interpreted 5:4
interrupt 21:23
intervene 43:1
intrinsic 39:4
involved 26:13 31:11 38:3 39:17 42:5 43:13
involvement 40:9
involving 22:7 38:3
irrational 29:1,9 35:7 36:5 38:16 45:14,19 45:23 46:4 47:17
irrationality 23:25
irrationally 46:1
irrelevant 31:14
issue 3:10,13,20 3:20 5:8 8:6,9 8:11,16,19 9:1 9:5 12:8 16:23 16:24 17:12,19 18:25 19:25 20:18,23 21:3 21:4 29:4,8,10 29:11 32:11 36:13 39:4 40:6,22 41:6 41:21,21,25 44:23 45:6 47:1,2,7 49:22 50:3
issued 12:2
issues 20:20 29:2

J

J 1:15 2:3,8 3:6 49:15
January 28:5 36:17 37:12,15 37:20 39:16 40:10
jeopardy 8:3,9 8:24 10:2 12:11 18:4 19:7,8 21:14 21:19,24 23:8 25:2,14 26:5,8 28:8 29:11,17 31:24 32:12,14 32:18,24 33:3 33:5,7,9,12,14 35:16 36:20 37:8,16 38:2,5 41:25 43:7,12 44:2 49:19,21 49:25
joinder 13:14,19
joined 13:13
joining 28:21
Joint 4:8
judge 4:9 36:19 36:19 47:24 48:1
judges 43:25 47:2
judgment 9:2,3 41:8
judicata 13:14 13:21
July 36:18
June 27:24 29:8 37:21
juries 18:6 44:19 48:12
jurisdictions 20:12
jurisprudence 19:7 43:8
jurors 4:9 11:20 11:22 12:21 48:15
jury 3:13 4:3,4,7 4:15 5:12,16 5:25,25 6:4,9 6:15,25 7:16 7:17 9:15,18 9:24 10:9,9,10 10:16 11:1,9 11:14,16,18,23 12:1,4,5,24 13:7 14:1,14 14:23 15:1,19 15:24 16:1 17:15,20 18:14 18:18 19:4,9 19:13 20:1,3 20:14,24 21:19 21:22 22:4,13 22:19,21,22 24:8 26:25 27:16 29:1,4 29:22 30:5 31:6,15,19,25 32:1 34:9,25 35:11,16,21,22 35:24,24 36:11 36:20 37:6 38:7,15,17,22 38:23,25 39:5 39:21 40:9,12 40:13,21 42:4 42:12,24,24 43:19,20 44:7 44:10,20,21,23 44:25 45:9,15 45:19,22 46:10 46:14 47:5,12 47:16,19,21,25 48:8,9,14,14 48:23,24 49:4 50:2,5,7 51:1
jury's 3:10 9:6 9:25 10:24 20:17 22:15 26:17 31:5 35:18 44:16 45:20 49:2
Justice 1:18 3:3 3:8,19 5:19 6:11 7:2,19 8:1 8:8,15 9:9,19 10:4,15,16,19 11:5 12:6,8 13:4,11,23 14:6,9,12,18 14:22 15:5,12 15:22 16:3,15 17:3 18:5,21 18:23 19:12,20 19:23 20:19 21:8,12 22:5 22:12,24 23:10 23:13,14,18 24:4,11,21 25:4,5,20,23 26:5,7 27:4,8 27:11,14,19 28:2,7,14,17 29:5,16,25 30:8,12,25 31:7 32:2,6,16 32:20 33:2,8 33:23 34:4,11 34:18,20 35:4 36:3,14,15 37:2,24 38:2,9 39:3,7,13 40:24 41:5,15 42:13,22 43:3 43:6,7,16,23 44:10,14,24 45:4,12,22 46:4,24 47:12 48:7,18,19 49:11,13 51:7
justifications 36:1

K

keep 33:14 37:18 44:7
ken 31:5
Kennedy 10:15 10:19 42:13,22 43:4,16,23
key 29:5 33:23
kind 20:13
know 11:14 12:5 12:12 13:5 18:5 19:21 28:19 31:10 35:3 39:23 45:5,5
knowledge 4:1 5:22 31:13 37:8
known 8:19 11:19
knows 46:6

L

language 37:16
Laughter 47:15
laundering 31:4 31:16
law 9:18 12:23 14:3 17:9 18:4 19:14 20:8,8 35:16 45:9
lay 12:18
lead 21:15 30:16
led 24:9
legal 31:23 41:21 45:16
leniency 23:21
lenient 36:21
lenity 36:7
let's 5:23 37:17 39:5
liable 40:2,3
light 4:13 12:25
liked 36:22
likelihood 29:3
line 18:13,16,18 19:1 20:22 22:2
Linen 9:16
lines 17:8 18:25 19:2 21:14
litigation 33:21
loads 29:3
logic 48:20

logical 16:15 17:4,5
logically 14:2 30:24 35:20 46:8,19,23
long 18:2,6 43:18
look 18:5 25:12 48:25
looked 4:3 5:6 12:19
looking 5:9
looks 36:22
lose 37:4
lost 37:10
lot 28:21
lots 28:17,22

M

majority 10:12
making 16:16 16:18 30:13 40:10
man 6:10
manager 31:12
manifest 18:13
manner 47:17
March 1:9
marketplace 39:19 40:5
Martin 9:16
material 4:11,12 4:22 6:19 7:9
matter 1:11 34:6 42:2 44:2,4 51:10
mean 15:7 26:17
meaning 10:7,8 33:12
meaningless 10:18,20
means 8:15 12:20 22:10 48:2
meeting 4:18 39:16 42:6
message 39:17
metaphysical 49:18
MICHAEL 1:17 2:5 21:10
mind 27:22 33:14
minutes 12:3 49:14
misleading 4:14
misrepresenta... 7:8
misspoke 37:25
misstatements 5:16 6:23 39:18 40:5
mistrial 20:5 24:6
mixed 22:10 40:18 42:10
model 17:10,12 17:14,14,18,21 19:3,4
models 17:8
Monday 1:9
money 31:16
motions 50:16

N

N 2:1,1 3:1
necessarily 4:2 5:25 7:23 8:7 8:16,16 17:2 21:3 24:8 33:20 40:21 42:1,12 46:2 50:3
necessary 3:18 4:12 6:14 16:22,23 49:2 49:6
necessity 18:14
needed 31:20
needs 32:7 48:22
nefarious 30:18 30:19
neither 48:5
neutral 37:18
never 5:23 12:5 16:9,11 25:24 43:8,12 44:3 46:9
new 3:18 31:3
non 13:8 45:15
non-acquitted 13:8
non-hypertec... 49:23
non-jeopardy-... 23:17
note 12:2
number 7:22,22 11:15 24:17 30:3,4,10,16 30:22 31:13 44:5

O

O 2:1 3:1
obligation 4:19
obtain 21:19,25 33:6
obvious 13:23
obviously 22:14 31:19 47:2 48:9
occur 16:24,25 19:25 21:16 29:23 50:1
occurred 50:6
offended 8:6
offense 23:1 32:23 33:3
offenses 32:24
Oh 16:3 30:12 34:20
okay 14:6,12,13 14:22 28:2 37:3 47:24
omission 5:13 6:13
omissions 5:13 5:15,17 6:18 6:23,25 7:4,9 7:12 40:8,15 41:14 50:23 51:1
omitted 4:11,22 6:19
once 49:8
open 17:23
opening 5:10 6:8
open-ended 6:5
open-endedness 17:20
opinions 10:13 10:13 42:16
opponent 47:4
opportunity 21:21,25 26:20 29:21,24 33:6 33:25 34:1,8 35:17 36:8,10 43:14 44:21,22 46:22
opposite 9:12 13:12
option 9:18
oral 1:11 2:2 3:6 21:10
order 4:12 6:12 32:8 48:21 49:23
ought 17:22 25:3
outside 18:24 19:2
overcharged 30:18
overcharging 30:21,23
overlapping 28:17,20,22
overturning 12:16
ox 13:16,18

P

P 3:1
page 2:2 4:8
parse 4:4
part 7:5 10:2 25:14
partial 19:15,19 20:2,9,25 47:21,23,24
participate 41:11
participated 40:13 41:3
particulars 50:18
party 33:17
people 4:22 40:12
Perez 18:13 20:21
perils 19:10
permissible 15:17
permit 12:23 19:14,19
permitted 6:21 14:3,14,21 42:15
person 33:2
persuasion 13:2
Petitioner 1:4 1:16 2:4,9 3:7 24:5 30:9 31:9 49:16
Petitioner's 24:14 31:22 40:7
phase 46:11
pick 19:1,3
pieces 28:13
place 23:15
planned 7:8
planning 41:3
please 3:9 21:13
point 4:6 5:20 10:16,20 11:6 11:7,8 12:4,6 16:15 20:19 32:3,25 42:17 42:25 46:7
poker 26:14
policies 25:13

26:6 32:10 38:6,7 49:24
policy 29:10,12 30:20 36:1
portion 9:24 10:1
position 17:5 30:9 31:22 34:12,17 46:23
possess 3:25 50:13 51:4
possessing 50:20
possibilities 17:23 18:10
possible 5:1 11:16 12:24 24:12 47:4
posture 26:12
Powell 13:4,16 14:5 22:3,6,7,8 25:7
powerful 9:14
practices 19:18
precedent 13:1
precise 41:24
precisely 9:12
preclude 33:21 40:23
preclusion 8:10 8:11,12,18,19 17:12,16,18 19:25 20:19,20 20:21,23,23 21:4 29:8,10 29:11 32:11 36:13 39:5 49:22
preclusive 9:5
predicate 33:16
predominating 18:9
prefer 26:8
preferred 29:22
preliminary 3:20
premise 49:10
premised 22:4
preparation 41:3
preparing 40:10
presence 15:7,9 16:8
presented 10:8 35:1 41:6
presided 47:8
press 39:24 41:12
presume 45:8
presumption 45:13
presupposing 35:11
pretty 22:6 32:21
prevail 42:23
prevails 48:16
prevent 6:15 21:23
preventing 28:8
previously 8:19
price 7:10
principle 21:17 21:20
probable 29:23
probably 27:6
problem 28:15 28:16
Procedure 47:21
proceeding 5:7 6:17 22:13 26:10 34:13,14
proceeds 31:17
prohibits 31:25
proper 10:22
properly 23:7
proposition 35:18 41:16 48:12
propounds 24:5
prosecuting 38:23
prosecution 7:20 8:22,23 11:8 23:5,7,11 28:12 30:20 40:23 45:21 50:25
prosecutions 8:2 13:5 22:7 26:25 27:12 29:14
prosecutors 44:4
protean 5:25
protect 22:15 49:24
protected 32:23
protecting 38:15
protections 49:21
prove 31:20 49:6
proves 4:23
proxy 30:22
public 49:24
purpose 7:9,9
purposes 10:2 18:3 20:19 23:8 24:16
put 14:24

Q

qualify 39:7
quest 12:23
question 4:1,19 6:1 7:1,17 8:21 12:15 13:23 14:7 17:17 18:8,17 19:22 20:23 21:5 25:2,5 26:6 27:13,15 33:12 37:12 39:22 40:1 41:6,25 42:22 43:7 48:18
questionable 35:5
questioning 24:25
questions 21:6
quite 7:19,24 11:16 41:9 47:10 49:25

R

R 1:17 2:5 3:1 21:10
raise 3:19 8:2
raised 8:4 12:9 17:13 28:15
raising 18:7
rational 35:24 39:5 48:23 49:5 50:6
rationale 18:1
rationality 35:25 49:10,23
rationally 7:18 22:4 36:11 48:24
reach 6:21 10:24 11:3,14,17 13:2 17:21 20:14 24:13 35:3 41:20 45:6,6 46:15 50:8
reached 12:22 20:3 50:12
reaching 18:14 39:22
reaction 20:13
read 43:9 47:9
real 28:14
really 31:14 45:1 48:14
reason 3:21 11:16 24:1,23 25:18,19,20 26:4 27:4,12 35:8 37:19 38:1 44:9 45:19 46:20 47:17,18 48:13 49:22
reasonable 50:5
reasonably 30:4
reasoned 42:18
reasons 5:3 11:15 23:24 28:6 35:14 42:19 45:16
rebuttal 2:7 21:7 42:3 49:15
recognized 9:14 9:16 10:14 13:16 18:3,7
record 5:4,10 6:7 10:6,7 11:2 11:15 48:25 49:9
redeterminati... 9:5
referred 43:6
refine 26:21
regard 30:22
regarded 26:22 38:5
rejected 22:9 39:21 40:15
related 39:15
relates 10:5
relating 7:22
relation 39:9
releases 39:25
relevant 45:24
relied 41:2
relitigate 50:2
rely 32:20 33:18
relying 12:11 35:10
remainder 21:7
remaining 49:14
remedy 20:4
removed 11:23
repeat 15:14
reply 11:18
require 18:18 19:14,24,25 20:8 41:20
required 20:2
requires 32:14

res 13:14,21
reserve 21:7
resolution 25:21 29:1
resolve 21:1 32:8 41:17,18 41:19
resolved 9:7 17:1 24:19 31:15,18 40:22 42:1 48:25 49:5,7
resolves 3:10 16:1,4,6 41:21
respect 35:12 39:10
responded 43:6
Respondent 1:19 2:6 21:11
response 3:22 29:15,16
rest 41:10
result 20:8,11 29:14 40:17 42:20 48:4
results 29:14
retrial 15:2,3 17:16 18:10,15 20:5 42:14 44:8 48:5
retried 42:23
retry 8:6 14:14 14:23 15:7,20 15:25 16:4,5,6 16:7 21:16 26:9 34:9,12 35:14,17 38:4 38:8 43:21 46:22 48:13
retrying 15:6 16:10,12
return 20:9 34:23 35:22 47:21
returned 26:25 35:2 46:5
returning 48:12
revisit 32:5,7 41:22
Revisiting 41:5
re-litigation 21:4
re-prosecution 23:1
right 14:1,3,15 14:23 18:22 27:25 30:12 34:9,12 38:8 38:10 39:1 48:16
rigor 42:11
robber 26:18 27:1,16 35:22
robberies 26:13
robbers 7:24 35:1,12,15,19
robbery 7:21 26:15,24
ROBERTS 3:3 13:4 21:8 22:5 22:12 32:2,16 32:20 33:2,8 38:9 40:24 41:5,15 48:7 48:19 49:11,13 51:7
rule 3:18 43:23 44:9
Rules 47:20

S

S 2:1 3:1
SAMUEL 1:15 2:3,8 3:6 49:15
sat 50:4
Sattazahn 10:13
saying 12:2 15:15 29:12 43:9 44:20 45:16
says 15:11 19:2 23:22 32:23 35:6
Scalia 9:19 10:4 11:5 12:6
Scalia's 10:16
scheme 40:14
SCOTT 1:3
screen 6:10
Sealfon 49:20
second 3:13 5:7 14:2 17:14 19:9 22:2 25:18 29:7 31:1 42:24 44:11,20 50:2 50:17
seconds 6:3
securities 6:13 6:16,22 7:3 27:18 39:15 40:3,16 41:13
see 16:13,13 25:13 37:14
seek 3:12 20:16
seeking 50:17
seeks 31:22
sell 7:11 14:1
selling 13:25
sense 8:22 10:15 10:18 23:12,14 44:4 46:2 48:5 48:10
sent 12:1
separate 21:14 26:15 34:4 35:13
separated 13:22
sequential 27:12
sequentially 26:19 28:12
seriatim 7:20 8:2,21,23 29:14
series 28:24
set 4:8 5:21 9:17 11:18 20:21
settled 35:16
Seventh 38:13 38:24
severe 11:19
shape 13:7
sharp 18:17
show 49:4
showing 29:22 40:21
shows 11:5,5
side 13:15 16:16 36:14
Similarly 5:9
simply 4:17 9:25 11:13 17:17 23:16 28:24 31:6 49:4,25 50:9
simultaneous 23:20,24
simultaneously 21:16
single 25:16
sir 15:21
situation 7:25 27:2,3 35:6 48:21
six 7:21 9:3 26:13,24 35:1 49:14 50:11 51:2
slightly 26:12
snippet 6:7
society 44:7
society's 43:13
Solicitor 1:17 49:17 50:24
sort 49:3
sound 30:20
Souter 3:19 5:19 12:9 17:3 18:5 18:21,23 26:7 28:14 29:17,25 30:8,12
Souter's 43:7
speak 4:25 10:10,14 11:1 12:24
speaking 10:12
speaks 9:15 20:25 21:2
specificity 50:16
split 20:13
spoke 50:10,10
stand 5:15 22:25 42:3
stands 18:16,17
Start 36:14
state 4:11 19:14 19:20 20:8
statement 4:11 6:8 39:8
statements 4:12 4:18,20,21 39:23 40:4,10 40:14,15 41:4 41:12 42:6 50:21
States 1:1,6,12 3:4 43:24,24 44:2
statutes 28:18
Stevens 23:10 23:13,14,18 24:4,11,21 25:5 27:4,8,11 27:14 33:23 34:4,11,18,20 35:4 36:3,15 44:10,14,25 45:4,12,22 46:4,24 47:12
stock 7:10,12
stop 16:10,12
straightforward 3:16
strange 34:25
strategic 31:12
stress 11:20
strikes 34:24
striking 16:17
strive 46:12
struggling 47:22
subject 9:4 12:15,15,16
submit 40:20
submits 50:24
submitted 51:8

51:10
subsequent 13:5 22:7
subsequently 39:25
substantive 14:25 15:16 16:8 36:16 39:11,15 40:3
successive 19:10 19:11 23:5,7 23:11
suffice 6:3
suggest 18:24
suggested 29:6 44:3
suggesting 36:15
suggestion 40:7
suggests 28:17
supported 32:12 32:13
supports 36:1
suppose 25:24 26:23 42:23
Supreme 1:1,12
sure 6:15 47:14
surprising 16:17
Swenson 3:17 3:23 23:8 26:12,13 32:4 32:7,9 34:24 35:1 48:23
sword 13:11
system 31:11

T

T 2:1,1
take 9:20 15:13 40:6 42:15 45:22 47:24 49:8,18
takes 45:19
talk 32:17,17
talking 8:11 37:5 44:19
talks 37:7
teachings 49:19
technological 39:20
telephone 14:1 14:14,23 15:1 15:2,3,16,18 27:25 28:4 36:18 37:12,21
telephones 28:19
tell 42:4
telling 4:9
tells 17:22 18:13 20:22 48:23
tend 30:19 44:6
terminated 8:25
terms 9:2
test 5:3 10:5 27:22
text 32:14,18 33:9
textually 31:25
Thank 21:8 49:11,12 51:6 51:7
theory 5:12,13 6:18 7:1,4,7,12 24:4,14 39:14 40:7,8 42:14 42:14 47:19 48:1,7 50:23 51:1
thing 4:23,24 23:6 31:5,21
things 36:11,12
think 6:24 9:11 19:5 20:11 22:23 23:6,13 24:3,16 25:15 25:15,17 26:1 26:6,11 27:2 27:19 30:15,17 30:21 31:7,14 31:21 32:4,7,8 32:22 33:11 34:2,24 36:15 37:16 38:1,9 38:13,24 39:2 39:3 40:6 41:7 41:22 42:2,3,8 42:19 43:3,4 44:3 45:18 47:6,7
thought 16:16 27:20
thousands 37:5
threat 8:3
three 6:22
tighten 6:3
time 21:7 24:11 27:22 34:1 36:21 37:13 42:24 44:12
today 3:4
token 18:6
told 10:16
tolerate 35:7,8
tolerated 12:20
total 10:3,6 49:9
totally 30:5,6 47:11
tough 27:7
track 42:9
traded 31:13
trading 7:11 24:10,15,18 31:2,8,15 40:2 46:3 50:20
transposed 32:9
treat 49:2
trial 6:7 11:20 14:17 18:7 36:16 43:9,11 44:15 47:9 50:5,15
trials 19:10,11 44:5
tried 26:16 27:21 28:24 50:8
trimmed 31:2,4
true 36:12 44:17
try 14:10 20:13 21:19 25:8 26:19,20 27:23 33:25 43:17
trying 25:9 28:13 44:7
turn 31:8 37:10
turned 24:18
two 5:3 17:8,8 17:23 21:14 22:13 28:6 30:8,10 35:13 37:13 38:17 44:19 50:15
two-edged 13:11

U

unable 35:22 44:4
unanimity 10:10 12:24 20:16,17
unanimous 11:7 11:10 12:14
unanimously 11:1
uncertainty 7:14 17:20
underlie 25:13 49:24
underlying 19:8
undermine 38:22
undermines 22:24
undermining 22:17,21 38:18 38:21
underpinning 19:17
understand 17:5 17:6 20:12
understood 26:17
United 1:1,6,12 3:4
units 30:24
unsound 45:16
untrue 4:11
unusual 12:1 13:6
upsetting 22:10

V

v 1:5 3:4,17,22 23:8 26:12,13 32:4,7,9 34:24 35:1 48:23
validity 24:1
value 39:20
values 8:3,4 18:8,10 29:18
various 28:23
verdict 4:16,23 4:24 9:25 11:14,17 12:22 17:21 18:14 19:15 20:2,4,9 20:13,14,17,25 21:16,19 22:1 22:10 23:20 24:5,23 26:25 29:9 33:6 35:3 35:7,22 38:12 38:21,22 40:19 44:5,16 45:13 46:5,12,13,16 47:23,24 48:23
verdicts 3:14,24 4:1 14:8 19:9 19:13,19 22:14 25:7 36:4 38:15,17,25 42:10 47:21 48:12 49:3
victim 7:21,22
victims 7:21
view 19:25 41:2 48:11 49:18,23
viewed 23:7
viewing 48:8
vindicated 43:5
vivid 26:11

W

wait 29:7
want 15:13

33:19
wanted 11:20 16:19
Washington 1:8 1:15,18
wasn't 7:4 31:12 35:21 47:5
way 9:14 11:2 11:10,12 12:19 16:18 22:14,15 22:15 24:6 25:12 26:21 31:16,18 32:12 38:18 39:1 40:8 41:24 42:11,19 48:14
ways 6:21
wear 26:20 43:17
went 41:24
we'll 45:14,16 47:24
we're 8:11 24:25 37:9 47:22
we've 5:22 17:7 17:16 20:3
whit 28:3
white 43:8
win 17:6 36:24
winning 37:11
wire 41:13
words 8:10
working 31:12
worse 37:17,20 37:23
wouldn't 25:16 25:25

X

x 1:2,7

Y

Yeager 1:3 3:4 5:11,14 6:9 7:8 39:16,23 40:8 41:2,11 42:3 45:1 46:8,13 47:10 50:13,19 51:3,4
Yeager's 7:5 46:23 47:19 48:1
year 43:17,17

0

08-67 1:5

1

1 13:25,25 14:13 14:25 15:7,10 15:11,15,15,23 16:24
10:06 1:13 3:2
105 4:8
11:04 51:9
117 30:2
13-and-a-half-... 50:5
150 24:12
176 11:17
176-count 50:8
1824 34:7

2

2 13:25 14:6,13 14:13,22,25 15:1,6,16,18 15:25 16:5,6 16:10,10,11
20 31:2
20th 39:16 40:10
2000 5:14 39:16 50:21
2009 1:9
21 2:6
23 1:9

3

3 2:4 14:24 15:23 16:7

4

49 2:9

5

5 31:2,3

6

60 6:2

7

70 12:3

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8 31:4
80 6:3

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99 31:3