IN THE SUPREME COURT OF THE UNITED STATES

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F. SCOTT YEAGER, :

Petitioner :

v. : No. 08-67

UNITED STATES. :

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Washington, D.C.

Monday, March 23, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

SAMUEL J. BUFFONE, ESQ., Washington, D.C.; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument today in Yeager v. United States.

Mr. Buffone.

ORAL ARGUMENT OF SAMUEL J. BUFFONE

ON BEHALF OF THE PETITIONER

MR. BUFFONE: Mr. Chief Justice, and may it please the Court:

When a jury's acquittal resolves an issue in a defendant's favor, that determination is final and the government may not seek an inconsistent determination of that issue from a second jury. Unlike acquittals, hung counts are not verdicts. They decide nothing, and therefore a hung count cannot be inconsistent with an acquittal. A straightforward application of this Court's decision in Ashe v. Swenson is all that is called for in this case. A new rule is not necessary.

JUSTICE SOUTER: Mr. Buffone, may I raise one preliminary issue? And it's an issue which is -- does not go to the reason we took the case, but I'd like your response to it. Your argument, your Ashe v. Swenson argument, assumes, as you have said in the brief, that the -- that the verdicts of acquittal essentially determined that your client did not possess

insider knowledge, and I question whether the verdicts of acquittal did necessarily establish that fact. I've looked at the -- at the jury instructions, and I will be candid to say I did not parse the whole jury instruction, so you may very well correct me in the assumption that I'm going to make. But the point of the -- of the jury instruction that seemed to go to your argument is set out on page 105 of the Joint Appendix, and the judge is telling the jurists what they had to find. And one of them was that your client made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading as charged.

It seems to me that the jury under that instruction could have come back with a verdict of acquittal simply on the assumption that your client had not made affirmative statements at the -- at the meeting in question, therefore he had no obligation to correct any statements, because it is not clear from this instruction that he had to correction the statements of other people who omitted material facts, and that therefore the only thing that the verdict proves or the only thing that the verdict may have assumed is that he didn't speak up and say anything.

Is that a possible analysis?

MR. BUFFONE: I do not believe so, Your Honor, for two reasons. First, under the Ashe test as interpreted by this Court in Dowling, the record as a whole must be analyzed. And in Dowling the Court looked at admissions made by the defendant's attorney during the course of the second proceeding that identification of his client was not an issue. Similarly here, looking at the entirety of the record, in its arguments closing and opening, and most importantly in its cross-examination of Mr. Yeager, the government made clear to the jury its theory of omissions. And that theory of omission was that Mr. Yeager when he was at the 2000 Analysts Conference had a duty to stand up and correct omissions if there were any misstatements made by others. They argued to the jury that he would be guilty of omissions if he did not affirmatively correct it.

JUSTICE SOUTER: No, no, I agree that did seem to be the point of the cross-examination, and in fact I guess you set it out in one of the briefs. But is that enough? To my knowledge, we've never held that that is enough to convert or, let's say, to -- for us to assume, despite a more protean jury instruction, that the jury necessarily had to find a fact. And I guess

maybe my question boils down to is: Why should what perhaps consumed 60 or 80 seconds of cross-examination suffice to tighten up a jury instruction which -- which basically is open-ended?

MR. BUFFONE: Well, Your Honor, first there was more to the trial record than a snippet of cross-examination. Again, in opening statement the government began by arguing to the jury that Mr. Yeager was the man behind the screen, that he was --

JUSTICE ALITO: That's the government's -- that's the government's argument. And in order to convict for securities fraud based on an omission, isn't it necessary for there to be a duty to disclose? And what would prevent -- how can we be sure that the jury here did not find that there was no securities fraud because, insofar as the government was proceeding on an omissions theory, your client didn't have a duty to disclose, did not cause a material fact to be omitted.

MR. BUFFONE: Your Honor, first, the instructions permitted alternative ways to reach the first element of securities fraud, and one of the three alternatives was either misstatements or omissions. And I think the instruction, for all of its frailty, was clear that the jury could convict on an omissions theory. Now, Your Honor's question --

JUSTICE ALITO: I agree with that, but why couldn't they find that there was no securities fraud based on an omissions theory because there wasn't any duty on Mr. Yeager's part to disclose?

MR. BUFFONE: Your Honor, the indictment was an integrated theory of fraud, that it charged that Mr. Yeager and others had planned to make misrepresentations and material omissions for one purpose, and that purpose was to enhance the price of Enron stock so that they could later engage in insider trading to sell that stock. The omissions theory was grounded in the indictment. It was elucidated by the instructions, and it was clarified so that there could be no uncertainty by the cross-examination and arguments of counsel.

This jury -- under an Ashe analysis, the question is what did this jury believe and what did they rationally decide?

JUSTICE GINSBURG: But Ashe is quite a different case. Ashe is a seriatim prosecution. It was one event, a robbery. There were six victims. Victim number one, the charge relating to victim number one, was an acquittal. That necessarily decided that the defendant was not among the robbers. So that is quite a different situation from what we have here.

MR. BUFFONE: Justice Ginsburg, first, it is

my belief that seriatim prosecutions raise no greater threat to the core values of double jeopardy than was raised here. Those core values are, first of all, the finality of acquittals; and the acquittal here was offended by any effort to retry an issue of fact necessarily decided.

JUSTICE GINSBURG: You're not contending that double jeopardy itself was at issue? In other words, claim preclusion. There would be no claim preclusion, so we're talking only about issue preclusion?

MR. BUFFONE: Yes, Your Honor, I would like to --

JUSTICE GINSBURG: That means it was necessarily, the issue was necessarily decided?

MR. BUFFONE: That's correct, Your Honor. We do not argue claim preclusion here. Our argue is issue preclusion or previously known as collateral estoppel before clarification by this Court.

Your Honor, to the question of seriatim prosecution, again, although Ashe was in a sense a seriatim prosecution, in all of the Ashe-type cases decided by this Court jeopardy had not even attached, let alone terminated.

The issue we believe should be addressed in

terms of what was the finality of the judgment. The finality of the judgment here were six acquittals. Those acquittals were final and were not subject to redetermination. The issue preclusive effect arises from the jury's acquittals, not from the hung counts, the hung counts which were not final and which resolved nothing.

JUSTICE GINSBURG: So the hung counts are equivalent, equivalent to an acquittal?

MR. BUFFONE: No, Your Honor, I think precisely the opposite. Hung counts have none of the force of an acquittal. They have none of what this Court has historically recognized as the powerful way that a jury speaks when it acquits in cases such as Martin Linen, where the court recognized that. The hung counts historically, as we set out in our brief, were not even accepted at common law as an option for a jury.

JUSTICE SCALIA: But we said -- we said in Ashe, didn't we, that you should take into account all the circumstances in determining what was decided in the first acquittal, all the circumstances. How can -- how can you close your eyes to the circumstance that is alleged here, that the -- the hung jury portion of the jury's verdict is simply inconsistent with the acquittal portion, and therefore you should not count the

acquittal for double jeopardy purposes? Isn't this part of the total circumstances?

MR. BUFFONE: Justice Scalia, first, we believe that the -- I believe that the Ashe test relates to the total circumstances on the record. What is it from the record that the Court can derive meaning from? The Court can derive meaning from all that was presented to the jury, and from all that the jury decided. In its hung counts, the jury did not speak with the unanimity and the finality that it did in its acquittals. As this Court, speaking through -- in both the majority and the concurring opinions, dissenting opinions in Sattazahn, recognized, hung counts speak nothing.

JUSTICE KENNEDY: But in a sense that's Justice Scalia's point, that the jury has in effect told us nothing, and in effect that argument hurts your case in one sense. Hung counts are meaningless.

MR. BUFFONE: Justice Kennedy, I agree that the hung counts are meaningless and that is my point, but I believe that it does further our analysis and the proper analysis that this Court should engage in. And that is, do the acquittals have finality, and is there anything inconsistent with the jury's inability to reach a determination with the finality of its acquittals? The jury did not speak unanimously in its acquittals.

There is no record way to determine why they failed to reach a determination, and they are therefore not inconsistent with the final determination --

JUSTICE SCALIA: It shows -- it shows that -- that the point on which they -- you assert they were unanimous and the point on which you say later prosecution should be disallowed was in fact a point on which the jury was confused, because they would have come out the other way if indeed they were unanimous on the counts that -- that acquitted. They should have come out the same way on the -- on the hung counts.

MR. BUFFONE: Your Honor, we simply don't know that. The jury may have failed to reach a verdict for any number of reasons. On the basis of this record, it's quite possible that the reason that the jury failed to reach a verdict was that it had 176 counts before it; that the jury, as set out in our reply brief, had made known to the district court that it was under severe financial stress. The jurors wanted the trial to be over so that they could get back to their full-time employment, and one of the jurors actually asked to be removed from the jury because of that financial distress.

In the face of that, the court gave a very unusual Allen charge; that after the jury had sent out a

note saying that they were deadlocked, the court issued an Allen charge and 70 minutes later discharged the jury. It -- the -- the point, Your Honor, is that we will never know why this jury --

JUSTICE SCALIA: The point is that they were deadlocked and would not have been deadlocked, assuming we don't inquire into -- into the issue that Justice Souter raised -- they were deadlocked and would not have been deadlocked if indeed they made the -- the acquittal finding that you're relying upon for double jeopardy.

MR. BUFFONE: Your Honor, we know that they acquitted. That is a certainty. We have finality to those acquittals. They were unanimous and are not subject to question again. They cannot be subject to appeal, and they cannot be subject to overturning, even if they are egregiously erroneous.

When we lay next to that the hung counts and the way that hung counts have historically been looked at, first not tolerated by courts: Coercive means applied depriving jurors of food and drink and heat in cold climates until they reached a verdict; contemporary law where we permit Allen charges in a quest for unanimity to, wherever possible, have a jury speak its will. We cannot equate, in the light of that history and the firm precedent of this Court, an inability to

reach a decision with the finality and persuasion of an acquittal.

CHIEF JUSTICE ROBERTS: Counsel, if Powell extends to subsequent prosecutions -- I know you argue that it doesn't, but if it does, isn't it unusual that the defendant is in better shape if a jury hangs on the non-acquitted count than if he is convicted on the non-acquitted count?

MR. BUFFONE: Well, Your Honor, that's a -- a two-edged sword, Mr. Chief Justice. The defendant is on the opposite horns of that dilemma. If the counts are not joined, then the effect of the acquittal would be to bar them by res judicata. So by joinder, he's on the other side of that fence. It's, as this Court recognized, whose ox is being gored in Powell by either the acquittals or the convictions. Well, this is a case of whose ox is being gored by the joinder, and it should not be dispositive. Collateral estoppel effect should apply to counts within an indictment just as res judicata would apply if they were separated.

JUSTICE BREYER: It's an obvious question, I guess. I would just like to hear your answer directly. Case 1, count 1, selling drugs; count 2, using the telephone to sell the drugs. All right? The jury acquits of the first, convicts of the second. Logically

impossible, but permitted under the law, right?

MR. BUFFONE: I agree, Your Honor. Under Powell --

JUSTICE BREYER: Okay. Case 2 --

MR. BUFFONE: -- there is no question. We have conflicting verdicts, and we are not going to try to determine what the --

JUSTICE BREYER: Okay. Absolutely illogical. Case 2, there is no count 1. Case 2, telephone count, hung jury; we retry it. Permitted, right?

MR. BUFFONE: Now, Your Honor, that would depend on what happened at the trial.

JUSTICE BREYER: All that happened was that they hung.

MR. BUFFONE: Well, if they hung, Your Honor, yes.

JUSTICE BREYER: Okay. Case 2, hung jury, telephone count; we retry it. All right. So now why is it when we put them together and, case 3, count 1, substantive drugs, acquitted; count 2, telephone, hung jury. Well, in case 2 we could get a retrial of the telephone count. Why can't we get a retrial of the telephone count now?

MR. BUFFONE: Your Honor, it would depend.

JUSTICE BREYER: All that happened is they are retrying it just as they did in case 2. Why does the presence of count 1 there mean that they can't retry it?

MR. BUFFONE: Your Honor, the presence of count 1 in your hypothetical is not dispositive. An acquittal on count 1 says --

JUSTICE BREYER: I -- I'm going too fast because you didn't take the cases in. Do you want me to repeat them? Maybe it's too complicated.

I'm just saying case 1, count 1, the substantive count, conviction. On count 2, telephone count, acquittal. Everybody agrees that's permissible. Case 2 is only the telephone. That's all they indicted him for. And if they have a hung jury, you can, can't you, retry him?

MR. BUFFONE: Yes, sir.

JUSTICE BREYER: So, now, when we have case 3, which is the same as case 1 except that, instead of convicting him, they had a hung jury, why can't you retry him, just as you could in case 2?

MR. BUFFONE: Because a hung jury resolves nothing, Your Honor. It doesn't --

JUSTICE BREYER: Oh, everybody agrees it resolves nothing, and that's why you could retry him in

-- that's why you could retry him in case 2, because it resolves nothing. So if you could retry him in case 2, why can't you retry him in case 3? What does the presence of this other substantive count have to do with it. Since it never would have blocked the conviction on count 2, why does it stop you from retrying count 2?

It would never have blocked the conviction of count 2. Why does it stop you from retrying it?

Do you see -- do you see my --

MR. BUFFONE: Yes, Your Honor.

JUSTICE BREYER: That's the logical point I thought the other side was making, and maybe they're not because it seems to be striking you as surprising or maybe I'm not making it in a clear way. But what I wanted was a clear answer to it.

MR. BUFFONE: Your Honor, I believe the -- the clear answer is that for collateral estoppel to attach, there must be a necessary determination of a factual issue, and the necessary determination of that factual issue can occur in your count 1 through an acquittal or a conviction. It cannot occur through a hung count because there is nothing to be resolved. There is nothing that would be necessarily decided.

JUSTICE SOUTER: Mr. Buffone, you're -- you're going through a logical analysis. If I

understand your position, the logical analysis is not going to win the case for you because, as I understand the case that we've got in front of us, we have in effect two lines of authority, two models, that describe what the law might be in these circumstances.

One model, on -- on the assumption that -- that the acquittals determined what you say they did, on that model there -- there is -- there is an issue preclusion that is raised.

On the second model, the model of what we do in the case of a hung jury, there is no -- of course, no preclusion, and there is no bar to a retrial. And we've simply got both in the same case. The question is: Which model do we follow? Do we say preclusion is the most important issue here, or do we say the open-endedness and uncertainty of the hung jury, the -- the failure to reach a verdict, is the model that -- that tells us what we ought to do? How do we choose between those two possibilities, each of which is open to us?

MR. BUFFONE: Yes, Your Honor, I believe that that is a clear choice, and the rationale for the clarity of that choice is that acquittals have long been recognized as being important for finality purposes for double jeopardy law. So, for example --

JUSTICE SOUTER: Look, I know that, and -- and by the same token, hung juries have long been recognized as raising no bar to a further trial. And the question is: Why are the values in the -- the acquittal case predominating, as you say they are, over the values of the retrial possibilities? Why do I choose one rather than another?

MR. BUFFONE: Yes, Your Honor. The -- the Perez line that tells us that when there is manifest necessity arising from a jury not reaching a verdict, that retrial is appropriate following a hung count. That line of cases stands in -- as I believe is the basis of Your Honor's question, stands in sharp contrast to the line of cases that require that jury acquittals be given final effect, cases like Foo Fong -- Fong Foo, excuse me.

JUSTICE SOUTER: We have got both.

MR. BUFFONE: All right, so what --

JUSTICE SOUTER: What -- what is it -- and I would almost suggest THAT it has to be something outside the lines of authority, because the issue here is which line of authority are you going to pick. What is it outside the lines of authority that says we should -- we should pick the acquittal model rather than the hung jury model to determine what to do here?

MR. BUFFONE: Your Honor, I think we should go -- the Court should go to the history of its double jeopardy jurisprudence, and that makes clear that the core concepts underlying the Double Jeopardy Clause are: First finality of jury verdicts; and, second, to avoid all of the constitutional perils of successive trials, because successive trials --

JUSTICE ALITO: Can I ask you this about the finality of jury verdicts? Is -- does the Constitution require either Federal or State law to permit the -- a partial verdict?

MR. BUFFONE: Your Honor, I do not believe that -- I am not aware of a constitutional underpinning for that, but certainly the practices in the courts are to permit partial verdicts.

JUSTICE ALITO: In every State?

MR. BUFFONE: I do not know the answer to that question.

JUSTICE ALITO: Well, if the Constitution doesn't require that, then why does the Constitution, in your view, require that issue preclusion occur when the jury acquits on certain counts but hangs on other counts? If -- if a partial verdict were not required, and if the jury came back and said, we -- we've reached a verdict on some counts but not all counts, the remedy

would be a mistrial on all counts and a retrial on all counts.

Why -- why is it does the Constitution require a different result if Federal law or State law chooses to allow the return of a partial verdict?

MR. BUFFONE: Your Honor, I don't believe that it would be a different result because I think in most jurisdictions, as I understand it, the reaction to that kind of a split verdict would be to try to get the jury to reach a full and final verdict, to give some form of an Allen charge to encourage additional deliberations, to seek unanimity in the jury's verdict. Where we don't have that unanimity, the Court is forced for collateral estoppel, for issue preclusion purposes, to Justice Ginsburg's point, not to claim preclusion issues.

If we set aside claim preclusion, the Perez line of cases tells us to do what we do with claim preclusion. For issue preclusion, the question is, is there some finality to what the jury did, in your hypothetical its partial verdict that speaks to the counts that it was not able to resolve. And if it speaks, that after the Ashe analysis that there was an issue necessarily decided, then there is a bar under the doctrine of issue preclusion to the re-litigation of

that question.

If there are no further questions, I would like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

MR. DREEBEN: Mr. Chief Justice, and may it please the Court:

Two separate lines of double jeopardy analysis lead to the conclusion that the government can retry hung counts that occur in a verdict simultaneously with acquittals. The first is the principle that the government may, under the doctrine of continuing jeopardy, try to obtain a verdict when a jury is hung. The basic principle there is that the government is entitled to one full and fair opportunity to convict and that the hung counts, when the jury cannot agree, interrupt and prevent the government from achieving that. Double jeopardy therefore does not bar the government from completing its opportunity to obtain a verdict.

The second doctrinal line is that which grows out of the Powell case. Collateral estoppel is premised on the idea that the jury has acted rationally.

CHIEF JUSTICE ROBERTS: You are asking us for a pretty dramatic extension of Powell. Powell is not a case involving subsequent prosecutions.

MR. DREEBEN: No. Powell was a case in which the Court rejected the doctrine of collateral estoppel as a means of upsetting a mixed verdict of acquittals and convictions.

CHIEF JUSTICE ROBERTS: Well, that's because in the same proceeding you have two different jury verdicts, one going the other way and one -- obviously, one way and one the other way. So to protect the jury's conclusions, you couldn't give effect to one without undermining the other.

It's a very different case here. The only jury determination you have is the acquittal. If you give effect -- if you don't give effect to the findings in the acquittal, you are undermining the jury, the only determination by the jury.

MR. DREEBEN: Well, I don't think that it undermines that determination, Mr. Chief Justice, because the acquittals will stand as acquittals, and they will bar reprosecution on that offense. To the extent that there are determinations that are made by the acquittals that are independent of any inconsistency with the hung counts, that too can have collateral

estoppel effect in a successive prosecution.

But I think the crucial thing here is that this is not properly viewed as a successive prosecution for double jeopardy purposes. Ashe v. Swenson and the cases --

JUSTICE STEVENS: Well, why not? It is a successive prosecution.

MR. DREEBEN: No, it is not in the sense, I think, Justice Stevens that the Court used that in Ashe.

JUSTICE STEVENS: It is in the sense of an indictment that took place after the other acquittal.

MR. DREEBEN: Well, that indictment simply embodies non-jeopardy-barred counts that --

JUSTICE STEVENS: Isn't there a difference in the fact that in the first case where there was a conflicting simultaneous verdict, one can explain the acquittal on grounds of leniency or compromise or something like that, that says that, therefore, we will give effect to the -- the conviction when they're simultaneous because of the reasons why there may be irrationality in the conflict. But there is no reason to doubt the -- the validity of the acquittal in this case.

MR. DREEBEN: Well, no, I think that there is, Justice Stevens, if on the theory that the

Petitioner propounds the verdict on the acquittals is inconsistent with the mistrial. And that's the only way in which collateral estoppel could apply, only if the jury had necessarily determined a fact on the acquittals that should have led to acquittals on the insider trading counts.

JUSTICE STEVENS: But if they had time. And when you have 150 counts, it's entirely possible they just didn't reach a decision on it.

MR. DREEBEN: Well, I -- Petitioner's theory would be identical if there were one insider trading count. And I think that for purposes of this case, the Court should not get too distracted by the number of counts, because all of the insider trading counts turned on a common core of fact. They were all resolved identically --

JUSTICE STEVENS: When you have a case in which there is no conflict between a guilty and an innocent verdict, there isn't -- there is no reason to doubt the integrity of the acquittal.

MR. DREEBEN: We're not questioning the integrity of the acquittal as far as it has direct double jeopardy application. The question is whether the doctrine of collateral estoppel ought to be applied.

JUSTICE BREYER: And why not? Because the

answer to my question was exactly what Justice Stevens said. Why is it that -- that if you could have the inconsistent verdicts in Powell, well, then, why can't, since they hung, couldn't you try him again on the hung count? And the answer is, because you're trying him again.

And that's why we have all the briefs that we have, because the only way to answer this is to look and see if the policies that underlie the collateral estoppel part of double jeopardy apply here. And I can't think of one that doesn't. I can't think of one single one that wouldn't apply.

Maybe there are some. And I can't think of any reason for allowing the government to have a second bite at this apple. What is the reason?

MR. DREEBEN: The reason, Justice Breyer, is that the hung counts do not constitute a resolution in favor of the defendant.

JUSTICE BREYER: Of course they don't. Of course they don't. Suppose that they never brought up that hung count. Then you wouldn't even have the first bite at the apple. So you would think it would be a fortiori you could go ahead. But that's the case; you clearly can't go ahead.

MR. DREEBEN: But there's a reason for that,

Justice Breyer, that is grounded in double jeopardy policies. And I think it goes to the question that Justice Souter asked as well, why the Court should prefer the double jeopardy doctrine that allows the government to retry the hung counts when they are all brought together in the same proceeding? And that is this -- and I think it's made most vivid by imagining Ashe v. Swenson in a slightly different posture.

Ashe v. Swenson involved robbery of six individuals at a poker game. The government indicted each one of them as a separate robbery and the government tried one of them first. And in that one, the jury's acquittal was understood to mean that the defendant was not the robber. If the government could go sequentially through and try the other five, it has the opportunity to try to wear the defendant down or refine its case or improve its case in a way that the Court regarded as impermissible.

But suppose that in Ashe the government hadn't done that, it had brought all six robbery prosecutions together, and the jury returned one verdict of acquittal on one robber and on the other five it hung? In that situation I think -- which is the situation we have here --

JUSTICE STEVENS: But the reason for that is

there are doubts about the integrity of the acquittal. They probably compromised, just to say not to be too tough on --

MR. DREEBEN: But, Justice Stevens, that is identical to this case. There is no difference to this case --

JUSTICE STEVENS: No, here you have sequential prosecutions, and there is no reason to question the integrity of the acquittal in this case.

MR. DREEBEN: No. But, Justice Stevens, if you would question the integrity of the acquittal, if the jury acquits on one robber and hangs on five, that is this case. The only difference in this case is it's a securities fraud case.

JUSTICE BREYER: I didn't think it had anything to do with integrity of anything. I thought what it had to do with is that they are being tried at the same time. And to test that out in my mind, I imagine this. In February we try the individual for the drug count, he's acquitted. In June we bring a telephone count. Absolutely forbidden, right?

MR. DREEBEN: Correct.

JUSTICE BREYER: Okay. So why should the government be one whit better off because, in addition to doing that, they happened to bring a telephone count

in January along with the other?

MR. DREEBEN: There are two reasons for that, Justice Breyer. The first is that the Double Jeopardy Clause is not aimed at preventing the government from attempting to bring its -- all of its charges in one indictment against the defendant. What the collateral estoppel component is aimed at is the government going sequentially, carving its prosecution up into pieces, and trying in different attempts.

JUSTICE SOUTER: But -- isn't -- isn't the real problem that you raised by your answer the following problem: That in this age in which there are, as Justice Breyer's hypo suggests, lots of overlapping criminal statutes -- you can indict not only for drugs but for telephones, and I don't know what other overlapping crimes there -- there may be. Therefore, that gives the government by joining a lot of overlapping charges or lots of charges with common elements in either one indictment through various counts or simply by a series of indictments to be tried together -- it gives the government a bigger chance of getting a hung jury or some irrational resolution on some of those issues. And if the government can bring loads of counts, increase the likelihood of getting a hung jury on one issue or one indictment, the government

in effect has a key to avoiding just what Justice Breyer's hypothetical suggested.

If they wait and bring the second count in June, there's an issue preclusion. But if they bring it together, they've got an irrational verdict and there's no issue preclusion. Therefore, isn't the policy behind both double jeopardy and the issue preclusion extension a policy that argues in favor of saying don't let the government have all these bites at the apple, because in fact it results or can result in seriatim prosecutions? What's -- what's your response to that argument?

MR. DREEBEN: My response to that, Justice Souter, is that double jeopardy has always consisted of a balance of values. There is of course the interest that Your Honor has identified, but the countervailing interest is that the government should have one full and fair opportunity to convict a defendant on charges that have been preferred by a grand jury on a showing of probable cause, and that does not occur when the hung counts deprive the government of that one opportunity.

JUSTICE SOUTER: But does the -- does the government ask for something more than one fair chance when it comes in with 117 counts? Maybe the fair chance consists of a fair chance with a number of counts or a number of indictments that one can reasonably expect a

-- a jury to handle without either getting totally confused or totally exhausted.

MR. DREEBEN: Well, let me -- let me give two answers to that, Justice Souter. First of all, the position for which Petitioner argues does not depend on the number of counts. If there had been two counts in the indictment --

JUSTICE SOUTER: That's right, I'm making an argument that he did not make.

MR. DREEBEN: -- it would be the same.

But more fundamentally, I think that the number of counts in this indictment should not lead the Court to think that this was a case in which the government overcharged in some nefarious effort. First of all, nefarious efforts like that tend to backfire on the government, and that's why sound prosecution policy dictates against overcharging. Here I don't think it's fair to regard the number of counts as a proxy for overcharging, and that is because they break up into logically distinct units.

JUSTICE GINSBURG: Why not, when considering what the government did on its second chance? It trimmed 5 -- if there were 20 insider trading, on the new indictment, there were 5. There were 99 counts of laundering, which were trimmed to 8, something within

the jury's ken. But isn't the most likely thing in this case that the jury was simply exhausted?

MR. DREEBEN: I don't think so, Justice Ginsburg, because all of the insider trading counts turn on the same fact: did Petitioner have inside information, did he know that the Enron broadband system that he was integrally involved in, was the strategic manager in charge of, wasn't working? If he had that knowledge and he traded, the number of counts is really irrelevant, and I think that the fact that the jury resolved all of the insider trading counts the same way and the money laundering counts just had to do with the disposition of the proceeds, they're all resolved the same way.

The jury obviously deadlocked on whether some fact that the government needed to prove for those counts was established. And the bizarre thing, I think, about Petitioner's position is that he seeks to get through a legal doctrine, collateral estoppel, which is a big extension from what the Double Jeopardy Clause textually prohibits, exactly what the jury would not give him. The jury --

CHIEF JUSTICE ROBERTS: Well, the -- the point about the big extension, you were rather coy in your brief about what you think about Ashe v. Swenson.

Are you asking us to revisit that?

MR. DREEBEN: No, Mr. Chief Justice, I don't think that the Court needs to revisit Ashe v. Swenson in order to resolve this case, but I think it's fair to say that Ashe v. Swenson is a doctrine that transposed certain civil policies that are -- are expressed through the doctrine of issue preclusion into the double jeopardy context in a way that was not supported by the history of the Fifth Amendment and is not supported by the text of the Double Jeopardy Clause, which requires the same events.

CHIEF JUSTICE ROBERTS: Well, you're not going to talk about -- you're not going to talk about the text of the Double Jeopardy Clause, are you?

MR. DREEBEN: Well, I --

CHIEF JUSTICE ROBERTS: If we rely on that the case is pretty easy, isn't it?

MR. DREEBEN: I think that it is because it says that the same offense is what you're protected against for double jeopardy, and the offenses in this case are distinct under Blockburger. But my point about --

CHIEF JUSTICE ROBERTS: The person was in jeopardy on the hung offense as well.

MR. DREEBEN: Well, this Court has made

clear that the jeopardy continues until the government has the opportunity to obtain a verdict. So the fact that his jeopardy began is not what entitles him to --

CHIEF JUSTICE ROBERTS: Under this Court's decisions, but not under the text of the Double Jeopardy Clause.

MR. DREEBEN: I think it then becomes a question of what is the meaning of jeopardy. But insofar as the Court imported collateral estoppel into the Double Jeopardy Clause, it should keep in mind in deciding whether to extend that doctrine that in the civil context a crucial predicate for collateral estoppel is the ability of the adversely affected party to appeal, and that is because before we rely on collateral estoppel, we want to have some assurances that there actually is integrity to the necessarily determined fact that is going to preclude litigation in another case.

JUSTICE STEVENS: But the key to your argument is the government is entitled to one full and fair opportunity to try its case. It had that opportunity the first time around.

MR. DREEBEN: Well, I think that this Court's decisions since --

JUSTICE STEVENS: If there were no separate

counts, that would have been -- that would have been a fair -- that would be the end of the matter.

MR. DREEBEN: Since 1824 this Court has defined the government's full and fair opportunity to include the right to retry if the jury hangs, and here what the defendant --

JUSTICE STEVENS: But it has -- but it has the right to retry in the same position as it would have been if it had not brought the first proceeding. And if it had not brought the first proceeding in this case, it would have been barred.

MR. DREEBEN: No, I don't -- I don't agree that it's in the same position --

JUSTICE STEVENS: Why not?

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

JUSTICE STEVENS: Oh.

MR. DREEBEN: It's -- it -- in this case what the government did was to bring all of its cases together. And I return to the hypothetical about Ashe v. Swenson because I think it strikes everyone as very strange to say that if the jury in Ashe v. Swenson had been presented with all six robbers and had acquitted on only one and had a returned -- you know, an inability to reach a verdict --

JUSTICE STEVENS: That's why we have the

Dunn doctrine, which itself is questionable. It basically says there is a certain situation in which we will tolerate what may be an irrational verdict, and the reason we tolerate it is that the acquittal itself may be explained on other grounds. Namely --

MR. DREEBEN: I'm not relying on Dunn in this hypothetical. I'm presupposing that the jury hung with respect to the other five robbers. And all the government would come back and say is: For two separate reasons, we should be able to retry those counts against the other five robbers. One is that when there is a hung jury it's settled double jeopardy law that the government has an opportunity to retry; and the other is if you accept the proposition that the jury's action was inconsistent because one of the robbers earned an acquittal and the other five logically should have been the same if the jury had found that the defendant wasn't the robber, the jury was unable to return a verdict.

Collateral estoppel depends on the idea that there is a rational jury, and if the jury has acted inconsistently, we don't have that basis of rationality that supports the policy justifications of collateral estoppel.

JUSTICE STEVENS: But the whole -- whole doctrine of inconsistent verdicts depends on the

assumption that what appears to be an irrational inconsistency may have another explanation.

MR. DREEBEN: Yes, such as lenity for the defendant. The government doesn't get the opportunity to appeal an acquittal. The government doesn't get the opportunity to go behind the acquittal and ask whether the jury acted rationally. All of things -- those things are true in civil cases where the doctrine of issue preclusion applies.

JUSTICE BREYER: Start the other side, which I think Justice Stevens was suggesting. Assume that there was only one trial on the substantive count in January. Now each -- he's acquitted. Now you decide to indict him in July on the telephone count. You argue to the judge: Judge, there shouldn't be double jeopardy here because maybe the jury just acquitted him the first time because they were lenient. Maybe they liked his looks. Maybe they were distracted by a fly. Maybe they were, maybe they were -- and we didn't even get an appeal. Are you going to win that case?

MR. DREEBEN: Not under --

JUSTICE BREYER: No, not even a close. Okay. Not even close.

Now, since you're going to lose that case, I grant you there's thousands of case talking about your

ability to bring more cases if you have a hung jury. I concede all those. None of them talks about double jeopardy, to my knowledge.

So we're back to the hypothetical. You've lost your case. Now, all that you did to turn that case into a winning case was you also indicted him on the telephone count in January. Now, that was my question the first time, and you began to have two answers. I just didn't see why the government should be any better off because they also indicted him in January. Given the language "double jeopardy," you might think the government, if anything, should be worse off, but let's keep them neutral.

So what is the reason that the government should be worse off because they indicted him in January on the telephone count as well as in June?

MR. DREEBEN: Well, the government should not be worse off.

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

MR. DREEBEN: I think the reason is that when, Justice Breyer, you said double jeopardy is not involved in the cases involving the government's ability to retry on a hung count, that's not accurate. The Court has regarded the doctrine of double jeopardy as a

balance of policies, and one of the fundamental policies is when the jury cannot agree, the government has the right to retry.

CHIEF JUSTICE ROBERTS: I think that's right, and your argument depends upon that interest balancing against the interest in giving effect to the acquittal verdict.

Now, what if I think, under the Seventh Amendment that's -- that what is important is protecting jury verdicts? And the interest in the irrational case, when you have a conviction and acquittal, is that you have two jury verdicts and you can't go one way or the other without undermining one of them. Here, however, you can give full effect to the verdict of acquittal without undermining another jury verdict. You certainly undermine the government's interest in prosecuting after a hung jury, but if I think what's important under the Seventh Amendment is the jury verdicts, then the case comes out the other way, right?

MR. DREEBEN: Well, I don't think so, Mr. Chief Justice, because I think you still have to focus on the intrinsic character of the doctrine of issue preclusion, which does depend on a rational jury. Let's apply it to the facts of this case, because there is --

JUSTICE GINSBURG: Well, you qualify it in

your statement of the facts. Is there any insider information with relation to the insider information charges that is different in any respect from the insider information in connection with the substantive challenge?

MR. DREEBEN: No, Justice Ginsburg, there is not. The government's theory here was that on the substantive securities fraud count, which related to the January 20th, 2000, analysts meeting, Mr. Yeager was integrally involved in formulating the message and was therefore accountable for misstatements to the marketplace about Enron broadband communications efficacy and effectiveness and technological value. The jury, if it rejected that, would acquit on those counts -- on that count, without reaching the question did Mr. Yeager know factually that the statements that were made by others at that analysts conference and in the press releases subsequently were inaccurate? If the answer to that question is yes, he had the information, then he could be liable for insider trading even though he is not liable for substantive securities fraud because he had nothing to do with creating the statements or misstatements to the marketplace.

And I think I do take issue with Petitioner's suggestion that the theory of this case was

an omissions theory. The way that Mr. Yeager argued the case to the jury was that I didn't have any involvement in preparing or making statements at that January 20th analysts conference; you can't convict me of what other people may have said. And the jury instructions advised the jury that it had to find that he participated in the scheme and that he either made the statements or caused the statements or omissions to be made. If it rejected that, it easily acquits on the securities fraud. And as a result even if this Court were inclined to apply collateral estoppel across mixed counts in a verdict of acquittals and hung counts, which we submit it should not do, the defendant still has to carry his burden of showing necessarily that the jury resolved an issue of fact in his favor that would preclude the next prosecution.

CHIEF JUSTICE ROBERTS: Well, he -- he carried that burden before the court of appeals.

MR. DREEBEN: But the court of appeals relied on the view that Mr. Yeager did not contest that he participated in the planning and preparation and statements that were made.

CHIEF JUSTICE ROBERTS: Revisiting of that issue was not included within the question presented.

MR. DREEBEN: Well, I think it's included in

our ability to defend the judgment. The District Court in this case made it quite clear that collateral estoppel did not apply because the acquittals could rest on the basis that Mr. Yeager did not participate in the analysts conference and in the press statements that were the basis for the wire fraud and the securities fraud omissions.

CHIEF JUSTICE ROBERTS: So if we -- if we agree with you on that proposition, then the conflict that we granted cert to resolve would still continue.

MR. DREEBEN: Well, you could resolve it. I would hope that you would resolve it in a favor of a disposition that doesn't require you to reach the factual issue, but if the Court resolves the legal issue against us, I think it should revisit the analysis of the court of appeals because government isn't defending the precise way in which the court of appeals went about analyzing the double jeopardy issue, and its question of what facts were necessarily determined was resolved incorrectly, I think, as a matter of clear error. I don't even think Mr. Yeager will stand up on rebuttal and tell you that he didn't argue to the jury that his client was not involved in -- in the creation of the statements at that analyst meeting because he did make that argument.

And I do think that it's important that if the Court is going to go down a track of allowing collateral estoppel for mixed verdicts, that it encourage rigor in the way that courts determine whether a fact was necessarily decided by the jury.

JUSTICE KENNEDY: Well, on that first theory, and your theory that a retrial on hung counts is always permitted, I -- I take it there are no court of appeals opinions or decisions that agree with you on that point, or am I incorrect?

MR. DREEBEN: They have not reasoned it the way that the government reasons it, but I think that the Fifth Circuit's result is equivalent to what the government argued as well as the D.C. Circuit.

JUSTICE KENNEDY: A different question: Suppose you prevail. The hung counts are retried. And the jury hangs again and the jury hangs a second time. Is there any point at which the district court can intervene in the exercise of its own authority and discretion just to dismiss the charges?

MR. DREEBEN: I don't think so, Justice Kennedy, because I think the interest that's being vindicated here is a balance of interests, and it's -- as I responded to the Chief Justice and -- and referred to Justice Souter's question earlier, double jeopardy

has never been a jurisprudence of black and white. You could you read the clause as saying one trial for a defendant. If the defendant is -- doesn't get a conviction at that trial, game over. But the Court has never done that because the double jeopardy clause has always involved a balance of the society's very important interests in having the opportunity for a decision up or down on whether a defendant is guilty.

JUSTICE KENNEDY: Then the government can try year after year to get a conviction and were the defendant down? Nothing the Court can do so long as there's a hung jury?

MR. DREEBEN: If the -- if the jury hangs, the government can retry, and there have been cases where --

JUSTICE KENNEDY: Is that the rule in all of the States? Don't some States give authority to the judges to say, enough is enough?

MR. DREEBEN: I am not aware whether any States do, but certainly as a matter of double jeopardy, this Court has never suggested that there is. I think as a matter of common sense, prosecutors who are unable to achieve a verdict after a certain number of trials do tend to conclude that it's not in the interest of society to keep trying. But certainly one hung jury

followed by a retrial is customary rather than an exception to the rule, and the reason why that's --

JUSTICE STEVENS: But one hung jury followed by a second when there has been an acquittal the first time around is not customary.

MR. DREEBEN: But the --

JUSTICE STEVENS: So the difference is in the -- in the first trial, you're not impugning the integrity of the jury's verdict. You're following the acquittal, and that's true in the compromise cases, the Dunn case and those cases, but that's not the case here because you're talking about two different juries. You're saying the second jury should have an -- an opportunity to correct what the first jury did, even though it would not have that opportunity if the first jury had not faced the issue.

MR. DREEBEN: Well, I -- I -- Justice Stevens, all I can say is that if the first jury had really believed that Mr. Yeager acted in good faith and was completely innocent, it should have acquitted on all counts.

JUSTICE STEVENS: It should have, but it didn't. We know that. And we just know they did not reach a conclusion on this issue, but they did reach a conclusion on the count on which they acquitted.

MR. DREEBEN: We should have -- we should presume that, as we do in other areas of the law, that the jury followed the instructions that it was given, and the instructions that it was given --

JUSTICE STEVENS: Do you make the same presumption when there is an inconsistent verdict, but you say even if it's irrational we'll go along with it because of the one jury, and they may have had non -- unsound legal reasons for saying, well, we'll let the guy off on the one count.

MR. DREEBEN: But I think that there is no reason for the fact that a jury takes irrational action to then be used for the jury's acquittal to block complete prosecution.

JUSTICE STEVENS: The jury did not take irrational action in this case. The only action -- that's relevant was the acquittal. The other they didn't act.

MR. DREEBEN: Well, they acted irrationally in the sense that if a fact necessarily determined acquittals on the -- on the insider trading counts --

JUSTICE STEVENS: It would be irrational if they had returned a verdict, but they said we can't agree for who knows why.

MR. DREEBEN: But the point is they should

have agreed logically if they believed that Mr. Yeager never had inside information or acted in good faith. And the jury is instructed to consider each count, count by count, it was given instructions at the Allen phase of the case that it should strive to achieve a verdict, that Mr. Yeager is entitled to a verdict of not guilty if, in fact, the jury believes that he is not guilty and that it should make every effort to reach the verdict.

Now, the fact that it didn't, and it would have been very easy for it to do, if it had determined logically that he did not have inside information, is a reason for hesitating before extrapolating out from those acquittals and blocking the government's opportunity to retry the hung counts.

Mr. Yeager's position logically --

JUSTICE STEVENS: It's not all that clear, because as you argue the court -- the district court was correct in analyzing the -- the estoppel issue. And it's obviously a very difficult issue because judges have disagreed about it and the government and your opponent disagree on it. So, it's entirely possible that the jury wasn't able to figure it all out.

MR. DREEBEN: I -- I don't think it is that difficult of an issue. I think the district court which was closer to it, which had presided over the trial and

which read the closing arguments, made findings that make it quite clear what Mr. Yeager argued and how those arguments were totally consistent --

JUSTICE STEVENS: The jury could not have been as confused as the court of appeals was.

MR. DREEBEN: I'm not sure that --

(Laughter.)

MR. DREEBEN: If the jury was confused and it acted in an irrational manner, that's a reason not to apply collateral estoppel, not a reason to do it. What Mr. Yeager's theory implies is that if the jury had come back and -- under the Federal Rules of Criminal Procedure it can return partial verdicts. If the jury had come back and said we're struggling on some of the counts, we have a partial verdict on others of them, and the judge said, okay, we'll take the partial verdict; and the jury came in and said, we acquit on five counts, that Mr. Yeager's theory would be that the judge should say that's great, collateral estoppel now means you don't get to finish the deliberations on the counts on which you said you can't agree. And that result makes no sense, neither does blocking retrial in this case.

CHIEF JUSTICE ROBERTS: Your -- your theory depends upon viewing a hung jury as constituting some action by the jury. Now, obviously it does in some

sense.

But if you view -- if you accept the proposition that juries only act by returning verdicts, and that's the reason you can retry, because with a hung jury the jury hasn't really done anything in the way jurors act, then the case comes out -- then the defendant prevails, right?

MR. DREEBEN: I assume I can answer your question, Mr. Chief Justice?

CHIEF JUSTICE ROBERTS: Yes.

MR. DREEBEN: No, because the -- the logic of the situation here is that in order for collateral estoppel to apply, there needs to be a rational jury verdict. And Ashe versus Swenson tells us that in attempting to decide what the jury rationally resolved, we look at all evidence in the record, not just some.

So it isn't necessary to treat the jury's hung counts as if they are verdicts of a sort. They simply are data which show that if the jury had been rational and it had resolved a fact in favor of the defendant that was necessary for the government to prove on the other counts, it would have resolved those as acquittals as well. And once you take into account that total record, the doctrine of collateral estoppel with its premise of rationality cannot be applied.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Buffone, you have six minutes remaining.

REBUTTAL ARGUMENT OF SAMUEL J. BUFFONE

ON BEHALF OF THE PETITIONER

MR. BUFFONE: The Solicitor General has essentially asked this Court to take a metaphysical view of the Double Jeopardy Clause, but the teachings of this Court from Sealfon through Ashe is that the important protections of the Double Jeopardy Clause as applied to issue preclusion must be approached with reason, with rationality, with a non-hypertechnical view in order to protect the public policies that underlie the Double Jeopardy Clause. And that is quite simply that what happened here should not occur. That a defendant should not be forced to relitigate before a second jury an issue that was necessarily decided.

I sat through and argued through 13-and-a-half-week jury trial. A reasonable and rational explanation of what occurred there is that we had a conscientious jury that followed its instructions, that tried to reach through a complex 176-count indictment, and they simply were not able to. They spoke the community will, and they spoke it forcefully in their acquittals. Six of them.

And the only conclusion that can be reached

from those acquittals is that Mr. Yeager did not possess insider information.

At the beginning of this trial we filed two motions, the first challenging the specificity of the indictment, and the second seeking a Bill of Particulars. The district court answered both with the same answer. The insider information that Mr. Yeager is charged with possessing in the insider trader counts is the false statements made by others at the 2000 Analysts Conference.

The omissions theory was not as the Solicitor General submits, some afterthought. It was core to the government's prosecution and it was core to the case. The jury decided that the omissions theory was not a basis to convict on the six counts that it acquitted. It determined that Mr. Yeager did not possess that information. And Mr. Yeager is entitled to the benefits of those acquittals. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)