DOUBLE JEOPARDY AND ISSUE PRECLUSION

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I. INTRODUCTION

Double jeopardy and issue preclusion perform important roles in the U.S. criminal justice system. While the principle that underlies the Double Jeopardy Clause, that "no man is to be brought into jeopardy of his life more than once for the same offence,"[1] has been in existence for more than five centuries,[2] issue preclusion is of relatively more recent origin. The latter came to the forefront with the U.S. Supreme Court's 1970 decision in *Ashe v. Swenson*.[3]

While both double jeopardy and issue preclusion serve interests in finality, they function quite differently. Double jeopardy "reflects the wisdom of the founding generation . . . 'that one acquittal or conviction should satisfy the law,'"[4] and therefore, the government may not continue to pursue defendant with additional punitive consequences.[5] The language of the Clause is deceivingly simple: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."[6] A Kentucky case illustrates its application.[7] Mel Ignatow was charged with torturing and murdering his fiancée, but a jury acquitted him.[8] Later, when evidence came

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1. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: BOOK IV: ON PUBLIC WRONGS 335–36 (Rees Welsh & Co., 1902).

2. *See* Steven V. Debraccio, *The Double Jeopardy Clause, Newly Discovered Evidence, and an "Unofficial" Exception to Double Jeopardy: A Comparative International Perspective*, 76 ALB. L. REV. 1821, 1823 (2012–2013).

3. Ashe v. Swenson, 397 U.S. 436 (1970).

4. Blueford v. Arkansas, 566 U.S. 599, 601, 622–23 (2012) (Sotomayor, J., dissenting) (quoting *Ex parte* Lange, 21 L. Ed. 872 (1874)) ("The Double Jeopardy Clause protects against being tried twice for the same offense.") (Roberts, C.J., majority).

5. *See* RUSSELL L. WEAVER, JOHN M. BURKOFF & CATHERINE HANCOCK, CRIMINAL PROCEDURE: A CONTEMPORARY APPROACH 1138–64 (2d ed. 2018).

6. U.S. CONST. amend. V; *see also* WEAVER, *supra* note 5, at 1138–64.

7. Ignatow v. Ryan, 40 S.W.3d 861 (Ky. 2001).

8. *See Ignatow's Son Reacts to His Father's Death*, WLKY TV (Sept. 1, 2008), https://www.wave

to light that conclusively demonstrated Ignatow's guilt, he confessed to the crime.[9] Even though double jeopardy principles precluded the prosecution from retrying Ignatow for the murder, they did not prevent the prosecution from charging Ignatow with perjuring himself in the original trial.[10] Nevertheless, double jeopardy principles perpetuated an injustice because they precluded his conviction for the far more serious crime of murder.[11]

Collateral estoppel, or issue preclusion, while serving similar interests, functions quite differently. While double jeopardy prevents a defendant from being retried for the same crime, issue preclusion prohibits the relitigation of previously decided facts and issues.[12] Even if a second case involves a different crime or different charges, and therefore, may not strictly be subject to double jeopardy protections, the second prosecution might be prohibited if one or more of the facts or issues involved in the second case were previously decided in a prior prosecution.[13] Thus, the focus is on issues rather than on charges.

Although courts apply issue preclusion principles in criminal cases, they have struggled to determine when such principles apply.[14] Not uncommonly, courts find it difficult to determine which issues were decided in prior cases, and therefore, which issues are precluded from retrial.[15] This Article examines the subject of issue preclusion.

II. DISTINGUISHING DOUBLE JEOPARDY FROM ISSUE PRECLUSION

As noted, double jeopardy and issue preclusion serve many of the same interests. Double jeopardy is grounded in the idea that the State:

> [W]ith all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a

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3.com/story/8932145/ignatows-son-reacts-to-his-fathers-death/.

9. *Id.*

10. *Id.*

11. Even though the language of the Double Jeopardy Clause is deceivingly simple, courts have struggled to define and apply it. *See* Debraccio, *supra* note 2, at 1821. Some principles are clear. For example, double jeopardy protections attach when a jury has been empaneled and sworn. *See* Crist v. Bretz, 437 U.S. 28, 38 (1978); Downum v. United States, 372 U.S. 734, 736 (1963). In a non-jury trial, double jeopardy attaches when the first witness has been sworn or when the judge accepts a guilty plea. *See Crist*, 437 U.S. at 37. Once double jeopardy attaches, if a defendant is acquitted of a crime, that defendant cannot be retried for that same crime. *See* Evans v. Michigan, 568 U.S. 313, 330 (2013); Sanabria v. United States, 437 U.S. 54, 75 (1978). When a defendant successfully appeals or collaterally attacks a conviction, double jeopardy principles generally do not preclude a retrial. *See* Lockhart v. Nelson, 488 U.S. 33, 34 (1988).

12. Bravo-Fernandez v. United States, 137 S. Ct. 352, 359 (2016).

13. *Id.* at 358.

14. *Id.* at 359.

15. *Id.*

> continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[16]

Thus, "[t]he Clause 'protects against a second prosecution for the same offense after conviction'; as well [as], . . . 'against a second prosecution for the same offense after acquittal.'"[17] "'[A] verdict of acquittal [in our justice system] is final,' the last word on a criminal charge, and therefore operates as 'a bar to a subsequent prosecution for the same offense.'"[18] Although issue preclusion focuses on issues rather than charges, it applies similarly.[19] If particular issues or facts have been litigated and decided in a prior prosecution, a defendant should not be forced to relitigate those same issues and facts over and over.[20]

A common concern in both double jeopardy and issue preclusion cases is the idea that successive trials can take a toll on a defendant, and there is a desire to prohibit prosecutors from "treat[ing] trials as dress rehearsals until they secure the convictions they seek."[21] During the pendency of criminal charges, an accused might justifiably be required to "suffer the anxiety of not knowing whether he will be found criminally liable and whether he will have to suffer a prison term,"[22] and "defendant's ability to conduct his life [is justifiably] hampered by the fear of renewed exposure to the 'embarrassment, expense and ordeal' of trial."[23] However, there comes a point when defendant has an interest in reaching "repose"[24] and in concluding "his confrontation with society."[25] In addition, multiple trials create a higher likelihood of conviction because most defendants have inferior resources at their disposal compared to the State, and there is a risk that they will be found guilty even when they are innocent.[26] Thus, there is a risk that governments can simply "wear down" defendants.[27] So, the goal in both double jeopardy and issue preclusion cases is to protect "a person from 'the harassment traditionally associated with multiple prosecutions.'"[28]

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16. *See* Green v. United States, 355 U.S. 184, 187–88 (1957).

17. *Bravo-Fernandez*, 137 S. Ct. at 357 (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

18. *Id.* at 357–58 (alteration in original) (quoting *Green*, 355 U.S. at 188).

19. *Id.* at 356–57.

20. *Id.* at 358.

21. Currier v. Virginia, 138 S. Ct. 2144, 2149 (2018) (referring to the societal objective in "avoidance of prosecutorial oppression and overreaching through successive trials") (quoting Currier v. Commonwealth, 65 Va. App. 605, 609–13 (2015)); *see also Green*, 355 U.S. at 871.

22. Donald Burton, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799, 803 (1988) (quoting James D. Gordon III, *Double Jeopardy and Appeal of Dismissals: A Before-and-After Approach*, 69 CALIF. L. REV. 863, 865 (1981)).

23. *Id.* (quoting *Green*, 355 U.S. at 187).

24. *Id*. (quoting Benton v. Maryland, 395 U.S. 784, 810 (1969) (Harlan, J., dissenting)).

25. *Id.* (quoting United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion)).

26. *Id.* at 803–04.

27. *Id.* at 804 (quoting United States v. DiFrancesco, 449 U.S. 117, 130 (1980)).

28. *Id.* (quoting United States v. Wilson, 420 U.S. 332, 352 (1975)).

All of these issues arise with issue preclusion principles, which often arise in conjunction with double jeopardy issues.[29] The effect of preclusion is that a final judgment on the merits regarding a fact or issue can foreclose relitigation of that issue,[30] and therefore, like double jeopardy, precludes relitigation of that fact or issue.[31] In other words, issue preclusion prohibits "successive criminal prosecutions" on decided facts or issues.[32]

Judicial application of preclusion principles is premised on "an underlying confidence that the result achieved in the initial litigation was substantially correct."[33] In civil litigation, where preclusion principles—usually referred to as collateral estoppel in that context—first developed, the availability of appellate review is regarded as a prerequisite, providing "an underlying confidence that the result achieved in the initial litigation was substantially correct,"[34] and therefore, "foreclosing successive litigation of the very same claim."[35] In the civil context, in the absence of appellate review, "such confidence is often unwarranted."[36] However, in civil suits, appellate review is usually available.[37] By contrast, in criminal cases, while a defendant can usually appeal an adverse decision,[38] the prosecution is commonly prohibited from appealing an acquittal, even one "based upon an egregiously erroneous foundation."[39] Effectively, criminal juries enjoy an "unreviewable power . . . to return a verdict of not guilty for impermissible reasons," and "the Government is precluded from appealing or otherwise upsetting such an acquittal"[40] even though the jury's verdict may be the result of compromise, compassion, lenity, or a misunderstanding of the governing law.[41] The Government's inability to seek review "strongly militates against giving an acquittal [issue] preclusive effect."[42] Nevertheless, the Court has applied issue preclusion in the criminal context, although somewhat reluctantly.[43]

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29. *See* Currier v. Virginia, 138 S. Ct. 2144, 2154–56 (2018); *see* Turner v. Arkansas, 407 U.S. 366, 368–70 (1972).

30. Bravo-Fernandez v. United States, 137 S. Ct. 352, 357 (2016).

31. *Id.* at 357–58 (quoting 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402, 9 (2d ed. 2002)).

32. *Id.* at 357.

33. Standefer v. United States, 447 U.S. 10, 23 n.18 (1980).

34. *Id.* at 23.

35. New Hampshire v. Maine, 532 U.S. 742, 748 (2001).

36. *Standefer*, 447 U.S. at 23 n.18.

37. *See generally* U.S. COURTS, *Appeals*, https://www.uscourts.gov/about-federal-courts/types-cases/appeals (last visited Nov. 14, 2020).

38. Arizona v. Washington, 434 U.S. 497, 503 (1978).

39. *Id.* (quoting Fong Foo v. United States, 369 U.S. 141, 143 (1962)).

40. United States v. Powell, 469 U.S. 57, 63, 65 (1984).

41. *See Standefer*, 447 U.S. at 22–23.

42. *See id.* at 23.

43. *See* Ashe v. Swenson, 397 U.S. 436, 445–46 (1970).

III. THE *ASHE* DECISION

Ashe v. Swenson[44] illustrates the application of issue preclusion in the criminal context. In that case, defendant was tried for the armed robbery of a participant in a poker game.[45] Despite extensive testimony from participants in the game, the jury found that the prosecution failed to produce sufficient evidence of defendant's guilt, and therefore acquitted him.[46] Later, defendant was convicted of robbing a second participant in the same poker game, and he sought habeas relief on the basis that the second prosecution was prohibited by the first acquittal.[47] Agreeing with defendant, the Court held that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[48] In other words, collateral estoppel principles precluded the second prosecution.[49]

Ashe provided the lower courts with a road map for applying preclusion principles in future cases.[50] A reviewing court should begin by examining "the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter," and attempt to determine "whether a rational jury could have grounded its verdict upon an issue other than that which defendant seeks to foreclose from consideration" in the second case.[51] In *Ashe*, while the first jury concluded that a robbery had occurred, it held that defendant was not present.[52] Therefore, issue preclusion principles precluded the State from trying defendant on the second robbery charge related to the same events:

> Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that the petitioner was one of the robbers, the State could not present the same or different identification evidence in a second

44. *Id.*
45. *Id.* at 438.
46. *Id.* at 439.
47. *Id.* at 439–40.
48. *Id.* at 443.
49. *Id.*
50. *Id.* at 444.
51. *Id.*; *see* Yawn v. United States, 244 F.2d 235, 237 (5th Cir. 1957); *see also* Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38–39 (1960).
52. *Ashe*, 397 U.S. at 445 ("[T]he record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. The federal rule of law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible.").

> prosecution for the robbery of Knight in the hope that a different jury might find that evidence more convincing.[53]

Although the second case involved a different victim, the Court held that the name of the victim "had no bearing what[so]ever upon the issue of whether the petitioner was one of the robbers."[54] Therefore, collateral estoppel principles precluded the second prosecution.[55]

For issue preclusion to apply, two conditions must be satisfied. First, the second prosecution must involve the same parties as the first trial.[56] Second, the fact finder must have actually and certainly determined the issue of fact that was decided in the earlier proceeding.[57] Because juries render general rather than special verdicts in most criminal cases, a determination of which issues were decided requires a careful analysis of the trial record and an assessment regarding which facts were essential to the first decision.[58] In order to make that assessment, a court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter."[59] In general, "[t]he burden is 'on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided'" by a prior jury's verdict of acquittal.[60]

IV. POST-*ASHE* APPLICATION OF ISSUE PRECLUSION PRINCIPLES

Following *Ashe*, issue preclusion principles have been applied in numerous cases. However, the decisions in those cases have not always produced consistent results and have not provided courts with clear guidance regarding how issue preclusion principles should apply.

Several cases have held that issue preclusion principles preclude future prosecutions. For example, in *Harris v. Washington*, defendant was tried and

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53. *Id.* at 445–46 ("The ultimate question to be determined, then, in the light of [*Benton v. Maryland*], [] is whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else that constitutional guarantee may embrace, [] it surely protects a man who has been acquitted from having to 'run the gantlet' a second time.") (internal citations omitted).

54. *Id.* at 446.

55. *Id.*; *see also* RUSSELL L. WEAVER ET AL., PRINCIPLES OF CRIMINAL PROCEDURE 455 (West Academic, 5th ed. 2016) ("Thus, when different offenses are charged and double jeopardy would normally not bar a second prosecution, collateral estoppel may, in effect, bar the second trial when a fact previously found in the defendant's favor is necessary to the second conviction."); *see also* Bravo-Fernandez v. United States, 137 S. Ct. 352, 366 (2016).

56. *See* Allen v. McCurry, 449 U.S. 90, 94 (1980); *see also* Standefer v. United States, 447 U.S. 10, 10 (1980) (holding that a defendant's acquittal on a bribery charge did not preclude a later prosecution of another defendant for aiding and abetting the same bribery).

57. *See Ashe*, 397 U.S. at 442.

58. *See id.* at 444.

59. *Bravo-Fernandez*, 137 S. Ct. at 359 (quoting *Ashe*, 397 U.S. at 444).

60. Schiro v. Farley, 510 U.S. 222, 233 (1994) (quoting Dowling v. United States, 493 U.S. 342, 350 (1990)).

acquitted of murder related to the bombing death of an individual.[61] Following the acquittal, the State sought to prosecute defendant for the murder of another person killed during the same bombing.[62] Relying upon *Ashe*, the Court reaffirmed the idea that collateral estoppel "is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments,"[63] and therefore, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[64] In analyzing the facts, the Court concluded that the first trial resulted in a finding that defendant was not the bomber,[65] and therefore, that finding must be treated as conclusive in the second case regardless of whether the "jury considered all relevant evidence, and irrespective of the good faith of the State in bringing successive prosecutions."[66] As a result, issue preclusion prohibited the second prosecution even though it involved a different victim.[67]

In *Turner v. Arkansas*, after a man was murdered and robbed, Turner was tried for the murder; however, he was acquitted.[68] Later, Turner was charged with robbery based on the same facts and evidence, and he moved to dismiss, claiming that the State was collaterally estopped from bringing the robbery charge against him because of the verdict in the murder trial.[69] *Turner* reaffirmed the applicability of collateral estoppel principles to criminal cases, regarding them as a "part of the Fifth Amendment's double jeopardy guarantee,"[70] but held that their application requires an "examination of the entire record" of the prior murder trial.[71] Based on that record, the State argued that the jury might have concluded that defendant was involved in the robbery, but that his accomplice actually committed the murder.[72] The Court rejected that argument, emphasizing the fact that the judge instructed the jury that anyone who was present at the scene of the crime and who aided and abetted in the commission should be convicted of the murder.[73] In other words, under the judge's instructions, if the jury had found that defendant was present at the crime scene, it was obligated to convict defendant of murder even if defendant did not actually pull the

61. *See* Harris v. Washington, 404 U.S. 55 (1971).
62. *Id.*
63. *Id.* at 56.
64. *Id.* (quoting *Ashe*, 397 U.S. at 443).
65. *Id.* at 56–57.
66. *Id.*
67. *Id.*
68. *See* Turner v. Arkansas, 407 U.S. 366 (1972).
69. *Id.*
70. *Id.* at 368.
71. *Id.* (quoting Ashe v. Swenson, 397 U.S. 436, 443 (1970)).
72. *Id.* at 369.
73. *Id.*

trigger.[74] When the jury concluded that defendant was not guilty, "[t]he only logical conclusion is that the jury found [that he was] not present at the scene of the murder and robbery,"[75] and therefore, collateral estoppel principles precluded the State from trying Turner for the robbery.[76]

Despite the holdings in *Harris* and *Turner*, there are numerous cases in which the Court has refused to apply issue preclusion principles in criminal cases, offering different reasons for the refusals. For example, in *Yeager v. United States*, the Court held that issue preclusion principles generally do not apply to the results of hung juries.[77] In Yeager's first trial, the jury acquitted him on fraud charges but "hung" on insider trading and money laundering charges.[78] When the Government sought to retry Yeager on the latter charges, he moved to dismiss on the basis that his acquittal on the fraud charges necessarily involved a determination that he did not possess material, nonpublic information about the project's performance and value, and therefore, he could not have committed the crimes of insider trading and money laundering.[79] The Court disagreed, concluding that issue preclusion only applies when the prior acquittal decided a necessary element of the current charges in defendant's favor.[80] The Court distinguished issue preclusion from double jeopardy,[81] and held that it need not consider a hung jury's conclusions in determining what the jury decided in the acquittal because "[a] hung count is not a 'relevant' part of the 'record of the prior proceeding.'"[82] The Court concluded that "there is no way to decipher what a hung count represents . . . [because] a hung count hardly 'make[s] the existence of any fact . . . more probable or less probable.'"[83]

Yeager concluded that there might have been a "host of reasons" why the jury was unable to reach a decision, including "sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few,"[84] and the Court was unwilling to speculate regarding the reasons for the jury's

74. *Id.*
75. *Id.*
76. *Id.* at 370.
77. *See* Yeager v. United States, 557 U.S. 110 (2009).
78. *Id.* at 115.
79. *Id.*
80. *Id.* at 118–19 ("We must determine whether the interest in preserving the finality of the jury's judgment on the fraud counts, including the jury's finding that petitioner did not possess insider information, bars a retrial on the insider trading counts. This requires us to look beyond the Clause's prohibition on being put in jeopardy 'twice'; the jury's acquittals unquestionably terminated petitioner's jeopardy with respect to the issues finally decided in those counts.").
81. *Id.* at 119 ("In *Ashe*, we squarely held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial.").
82. *Id.* at 121.
83. *Id.*
84. *Id.*

actions,[85] or to invade "the jury's sovereign space."[86] Ultimately, the Court concluded that any inquiry into what happened at the prior trial should be limited "to the points in controversy" at the trial, "to the testimony given by the parties, and to the questions submitted to the jury for their consideration."[87] In analyzing Yeager's case, the Court noted that, "if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor [would] protect[] him from prosecution for any charge for which that is an essential element."[88] However, the Court did not find that possession was a critical issue on the insider trading charges, and therefore, it refused to hold that acquittal on the fraud charges necessarily precluded prosecution for insider trading.[89]

The Court was also reluctant to apply issue preclusion principles in situations involving a prior case that resulted in inconsistent verdicts. In *Bravo-Fernandez v. United States*, the Government alleged that Bravo-Fernandez, an entrepreneur, bribed Martínez-Maldonado, a Puerto Rican senator.[90] The alleged bribe took the form of an all-expenses-paid trip to Las Vegas, including an expensive ticket to a professional boxing match featuring a popular Puerto Rican contender.[91] After defendants were convicted on conspiracy and federal-program bribery charges, the trial court declared a mistrial on the conspiracy charge as to one defendant, and subsequently granted in part and denied in part defendants' motion for a judgment of acquittal, resulting in defendant being convicted on federal-program bribery charges and acquitted on charges related to conspiracy to commit federal-program bribery and traveling in interstate commerce in furtherance of federal-program bribery.[92] Defendant appealed, and the Court overturned the conviction.[93] Thus, there were inconsistent verdicts involving an acquittal and a conviction.[94] When the prosecution sought to retry defendant on charges related to the overturned conviction, defendant claimed that issue preclusion prohibited re-prosecution on the bribery charge, arguing that his acquittal on conspiracy and Travel Act charges precluded a retrial on the bribery charges.[95] The Court rejected defendant's argument, noting that the

85. *Id.* at 121–22 ("To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room. But that is not reasoned analysis; it is guesswork. Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return.").

86. *Id.* at 122.

87. *Id.* (quoting Wash., A. & G. Steam Packet Co. v. Sickles, 72 U.S. 580, 593 (1866)).

88. *Id.* at 123.

89. *Id.* at 121–24.

90. Bravo-Fernandez v. United States, 137 S. Ct. 352, 361 (2016).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 362.

95. *Id.* at 361–62.

original jury rendered "irreconcilably inconsistent verdicts of conviction and acquittal," and the convictions were later vacated for legal error unrelated to the inconsistency.[96] Because the verdicts were irreconcilable, the Court concluded that it was impossible to know which of the inconsistent verdicts reflected the jury's intent, and therefore, the Court did not bar retrial.[97]

In some instances, the Court found it difficult to determine which issues were decided in a prior case, and therefore, which issues should be precluded from relitigation in a subsequent case. For example, in *Dowling v. United States*, defendant was convicted of bank robbery based in part on evidence admitted against him at a prior trial for a different crime (robbery at a home) of which he was acquitted. [98] After the second trial, defendant argued that *Ashe* required exclusion of a witness from the second trial who was purportedly present at the home robbery.[99] The Court disagreed, noting that even though the jury acquitted defendant of the home robbery, the jury did not find that he did not enter the witness's home.[100] Indeed, at the first trial, defendant did not contest the question of whether he was present at the time of the robbery,[101] but instead simply claimed that he did not commit the crime.[102] Therefore, the jury at the first trial could have concluded that

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96. *Id.* at 362.

97. *Id.* at 363. A similar, but slightly different, decision was rendered in *United States v. Powell*, 469 U.S. 57 (1984). In that case, the State charged the respondent with fifteen violations of federal law, ten of which involved alleged violations of federal narcotics laws, including conspiracy to violate those laws. *See id*. A jury convicted defendant of ten of those violations but acquitted her of the remaining charges. *See id*. Powell appealed, claiming that the acquittals required reversal of the convictions because the verdicts were inconsistent:

> "[R]espondent argued that the verdicts were inconsistent, and that she therefore was entitled to reversal of the telephone facilitation convictions. She contended that proof that she had conspired to possess cocaine with intent to distribute, or had so possessed cocaine, was an element of each of the telephone facilitation counts; since she had been acquitted of these offenses in Counts 1 and 9, respondent argued that the telephone facilitation convictions were not consistent with those acquittals."

Id. at 64.

> "Inconsistent verdicts therefore present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course. . . . The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable."

Id.

98. Dowling v. United States, 493 U.S. 342, 347 (1990).

99. *Id.* at 347 ("[W]e decline to extend *Ashe v. Swenson* and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances, as Dowling would have it, relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.").

100. *Id.* at 350 ("[W]e agree with the Government that the challenged evidence was nevertheless admissible because Dowling did not demonstrate that his acquittal in his first trial represented a jury determination that he was not one of the men who entered Ms. Henry's home.").

101. *Id.* at 350–51.

102. *Id.*

defendant entered the home, where the home robbery occurred, even if it found that he was not involved in the robbery.[103]

However, each case must be viewed on its own merits. For example, in *Schiro v. Farley*, a homicide case, the jury was given ten possible verdicts and returned a verdict on only one count, convicting defendant of felony murder.[104] The jury did not return a verdict on the intentional murder count.[105] After the State imposed the death sentence on defendant, based on the State's claim that the homicide was intentionally committed (an aggravating factor), defendant sought habeas relief claiming that the jury's failure to return a verdict on the intentional murder charge constituted a rejection of the conclusion that the killing was intentional.[106] The Court disagreed, holding that the jury's "failure to return a verdict does not have collateral estoppel effect, . . . unless the record establishes that the issue was actually and necessarily decided in defendant's favor."[107] The Court concluded that the jury's failure to reach a verdict on the intentional homicide charge meant that the issue was not "actually and necessarily decided" by the jury.[108]

When a defendant requests a bifurcated trial on some charges, even though a defendant may waive double jeopardy protections on the bifurcated charges, issue preclusion principles might still prohibit a trial on those charges. For example in *Currier v. Virginia*, defendant was charged with burglary, grand larceny, and unlawful possession of a firearm by a felon.[109] Fearful that the prosecution would introduce potentially prejudicial evidence against him (the fact that he had prior similar convictions), Currier moved to sever the grand larceny and burglary charges from the unlawful possession charge.[110] After Currier was acquitted on the latter charges, he moved to dismiss the unlawful possession charge on double jeopardy grounds.[111] The trial court rejected the motion, and Currier was convicted of being a felon in possession of a firearm.[112] The Court affirmed, emphasizing that Currier had requested separate trials, and held that he thereby waived his double jeopardy claims related to the second trial:[113] "[A] defendant's consent dispels any specter of double jeopardy abuse that holding two trials might otherwise present."[114] Currier "faced a lawful choice between two courses of action that each bore potential costs and rationally attractive benefits[,]" and he made a

103. *Id.* at 348–49.
104. Schiro v. Farley, 510 U.S. 222, 236 (1994).
105. *Id.* at 222–23.
106. *Id.* at 227.
107. *Id.* at 236.
108. *Id.*
109. Currier v. Virginia, 138 S. Ct. 2144, 2148 (2018).
110. *Id.* at 2148–49.
111. *Id.*
112. *Id.* at 2149.
113. *Id.* at 2151 ("[C]onsenting to two trials when one would have avoided a double jeopardy problem precludes any constitutional violation associated with holding a second trial.").
114. *Id.*

choice.[115] While Currier might have faced "hard choice[s]," the Court emphasized that "litigants every day face difficult decisions."[116]

Currier also rejected defendant's claim that the second trial was prohibited under issue preclusion principles. While emphasizing that issue preclusion has "only 'guarded application . . . in criminal cases,'"[117] the Court held that it applies "only if to secure a conviction[,] the prosecution must prevail on an issue the jury necessarily resolved in defendant's favor in the first trial,"[118] and does not apply when "it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question."[119] The Court distinguished between the application of issue preclusion principles in the civil context from their application in the criminal context.[120] In the civil context, "a claim generally may not be tried if it arises out of the same transaction or common nucleus of operative facts as another already tried."[121] By contrast, in criminal cases, the question is whether the prior case involved the same statutory elements.[122] In rejecting defendant's claim, the Court emphasized that it has generally "refused to import into criminal double jeopardy law the . . . more generous 'same transaction' or same criminal 'episode' test" used in the civil context.[123]

V. CONCLUSION

The prohibition against double jeopardy has long and well-established roots in the British common law, and its prohibition was incorporated into the U.S. Constitution.[124] Less established, and less well-defined, is the concept of issue preclusion. In *Ashe v. Swenson*, the Court held that a second trial might be prohibited on issue preclusion grounds even though it might not be precluded based on double jeopardy principles.[125]

Although *Ashe* made clear that issue preclusion principles might prohibit a second trial in appropriate cases, the Court has struggled to define when preclusion principles apply. Although the Court has applied preclusion principles in a handful of cases, it has refused to apply them in several other cases. [126] Sometimes, the refusal is based on the fact that the prior case did

115. *Id.* at 2151–52.
116. *Id.* at 2152.
117. *Id.* (quoting Bravo-Fernandez v. United States, 137 S. Ct. 352, 358 (2016)).
118. *Id.* at 2150.
119. *Id.* (quoting Yeager v. United States, 129 S. Ct. 2360, 2375 (2009) (Alito, J., dissenting)).
120. *Id.* at 2154.
121. *Id.* (citing Restatement (Second) of Judgments § 19 (1982)).
122. *Id.*
123. *Id.*
124. U.S. CONST. amend. V.
125. Ashe v. Swenson, 397 U.S. 436 (1970).
126. *See* Turner v. Arkansas, 407 U.S. 366 (1972); Harris v. Washington, 404 U.S. 55 (1971); *Ashe*, 397 U.S. at 436.

not actually resolve the issue or fact presented in the second case.[127] The Court has also refused to apply issue preclusion principles when the first trial ended in a hung jury,[128] when the first jury did not necessarily resolve the contested issue or fact,[129] when the first trial ended in inconsistent verdicts,[130] and when the first case ended in a mistrial.[131]

In general, the Court seems more reluctant to apply issue preclusion principles in criminal cases than in civil cases. As the Court stated in *Currier v. Virginia*, "issue preclusion principles . . . have only 'guarded application in . . . criminal cases.'"[132] That reluctance may be attributable to the fact that appellate review is available less often in criminal cases. Although defendant can appeal a criminal conviction, the prosecution is usually precluded from appealing even if the jury may have committed an egregious error.[133]

127. *See Currier*, 138 S. Ct. at 2144; Dowling v. United States, 493 U.S. 342 (1990).
128. *See* Yeager v. United States, 557 U.S. 110 (2009).
129. *See Dowling*, 493 U.S. 342.
130. *See* Bravo-Fernandez v. United States, 137 S. Ct. 352 (2016).
131. *See* Lemke v. Ryan, 719 F.3d 1093 (9th Cir. 2013).
132. *Currier*, 138 S. Ct. at 2152 (alteration in original) (quoting *Bravo-Fernandez*, 137 S. Ct. at 358).
133. *See* Arizona v. Washington, 434 U.S. 497, 503 (1978); United States v. Powell, 469 U.S. 57, 63 (1984).