When a Defendant Agrees to Two Trials Instead of One, Can He Claim that Double Jeopardy Bars the Second?

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A Virginia grand jury indicted Michael Currier for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon for his alleged involvement in stealing a safe containing guns and cash from another man's home in March 2012. Currier's prior convictions for burglary and larceny gave rise to the felon-in-possession charge. To avoid having evidence about those prior convictions introduced in connection with the new burglary and larceny charges, Currier (and the government) agreed to severance of the felon-in-possession charge so that it could be tried separately. The burglary and larceny charges were tried first, and Currier was acquitted. Currier then moved to dismiss the felon-in-possession charge, arguing that the second trial was barred by double jeopardy, or, alternatively, that the government should be precluded from introducing at that trial any evidence about the burglary and larceny for which he had just been acquitted. The trial court rejected Currier's arguments, and he was tried and convicted of being a felon in possession of a firearm. Virginia's appellate courts affirmed the conviction. The United States Supreme Court granted review and, last Friday, issued its opinion in the case.

Currier v. Virginia**, 585 U.S. ___ (2018).** The Supreme Court affirmed Currier's conviction in a 5-4 decision. Justice Gorsuch wrote the majority opinion, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. The majority held that Currier's consent to two trials when having only one trial would have avoided any double jeopardy concerns precluded his later claim that double jeopardy barred the second trial. A plurality (Gorsuch, Roberts, Thomas and Alito) would also have held that the Double Jeopardy Clause does not incorporate principles of issue preclusion so as to bar the relitigation of issues in a subsequent criminal trial or prevent the introduction of evidence about issues determined in a previous trial. Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan, dissented, reasoning that Currier's acquiescence to severance of the charges did not prevent him from raising a claim of issue preclusion based on his acquittal in the first trial.

About *Ashe*. Currier argued that his second trial was barred under principles announced by the court in *Ashe v. Swenson*, 397 U.S. 438 (1970). *Ashe* involved the robbery of six poker players by three or four masked men. The government first tried Ashe for the robbery of a single victim. While the proof at trial that an armed robbery had occurred was "unassailable," proof that Ashe was one of the perpetrators was weak. The jury was instructed that if Ashe was one of the robbers, he was guilty even if he had not personally robbed the named victim. The jury found Ashe not guilty.

Six weeks later, the government tried Ashe for robbing a different participant in the same poker game. This time, the witnesses' testimony was "substantially stronger" as to Ashe being one of the robbers. *Id.* at 440. Ashe was convicted and appealed, arguing that his second prosecution violated the Double Jeopardy Clause. The Supreme Court agreed, determining that principles of collateral estoppel were embodied in the Fifth Amendment guarantee against double jeopardy and that the second prosecution of Ashe ran afoul of those principles. The court concluded that "[t]he single rationally conceivable issue in dispute before the jury was whether [Ashe] had been one of the robbers" and noted that "the jury by its verdict found that he had not." *Id.* at 455. The court held that after a jury determined that Ashe was not one of the robbers, the double jeopardy clause barred the state from haling Ashe before a new jury – even in a second trial related to a separate victim – to relitigate that issue.

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The majority opinion. The majority in *Currier* distinguished *Ashe* based on Currier's consent to a second trial when, had all three charges been tried together, Currier would have had no basis for a double jeopardy complaint. As support, the court cited *Jeffers v. United States*, 432 U.S. 137 (1977). There, the defendant sought, and was granted, a separate trial on greater and lesser-included offenses. After he was convicted in the first trial of a lesser-included offense, he argued that the prosecution could not try him for the greater offense, which was the same offense for purposes of double jeopardy. A plurality of the court rejected the defendant's argument, reasoning that he had waived any double jeopardy protections by seeking separate trials.

If the waiver rule applied in *Jeffers* to concerns "lying at the historic core of the Double Jeopardy Clause," it must, the majority reasoned, "overcome a double jeopardy complaint under *Ashe*." Slip op. at 6. While acknowledging that *Ashe*'s protections applied only to trials following acquittals, the Court noted that the Double Jeopardy 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. A defendant's consent to a second trial should, the majority reasoned, have equal effect in both situations. Furthermore, the court opined that when a second trial follows as a result of a defendant's motion, the defendant "wins a potential benefit and experiences none of the prosecutorial 'oppression' the Double Jeopardy Clause exists to prevent." Slip op. at 7.

Plurality. Part III of Justice Gorsuch's opinion did not command a majority. That portion of the opinion rejected Currier's argument that principles of issue preclusion required the trial court to exclude evidence suggesting that he possessed the guns in the home he was acquitted of burglarizing, leaving the prosecution to prove that he possessed them only later, perhaps near the river from which they were recovered. The plurality explained that an examination of the Fifth Amendment's text and the historical understanding of its safeguards revealed that the Double Jeopardy Clause addresses only the relitigation of offenses – not the relitigation of issues. The plurality further asserted that more contemporary double jeopardy jurisprudence confirmed its interpretation of the clause, citing the elements-based test for determining when two offenses are the same propounded in *Blockburger v. United States*, 284 U.S. 299 (1932). While *Ashe* may have "pressed *Blockburger*'s boundaries by suggesting that, in narrow circumstances, the retrial of an issue can be considered tantamount to the retrial of an offense," the plurality stated that even in that context "a court's ultimate focus remains on the practical identity of offenses, and the only available remedy is the traditional double jeopardy bar against the retrial of the same offense—not a bar against the relitigation of issues or evidence." Slip op. at 11-12. The plurality then discussed the impracticality of applying issue preclusion in a criminal case, which, it said could lead to the government invoking the doctrine to bar criminal defendants from relitigating issues decided against them in a prior trial. That's already a reality in North Carolina courts, as Jessie Smith discussed in this post.

Dissent. Justice Ginsburg's dissent noted that courts began to apply issue preclusion protection for defendants in the late 19th century to protect them from prosecutorial excesses associated with the proliferation of overlapping and related statutory offenses. Since *Ashe*, the dissent explained, the Court has reaffirmed that issue preclusion as well as claim preclusion is a component of the Double Jeopardy Clause. "Given criminal codes of prolix character," Ginsburg wrote, "issue preclusion both arms defendants against prosecutorial excesses . . . and preserves the integrity of acquittals." Slip op. at 5 (Ginsburg, J., dissenting). The dissenting justices would have held that Currier's consent to severance did not waive his right to rely on the issue-preclusive effect of an acquittal. Applying the doctrine to the case at hand, the dissent stated that the government should not have been permitted in Currier's second trial to show that Currier participated in burglarizing a residence and stealing a safe containing money and guns when it failed to prove those allegations in the first trial.

Concluding thoughts. *Currier* isn't likely to introduce much change to criminal prosecutions in North Carolina. More than thirty years ago, the state court of appeals applied the same reasoning as the Supreme Court majority in *Currier* in determining that the defendant's acquittal of being a felon in possession of a firearm did not bar the State from subsequently prosecuting him for armed robbery arising from the same series of events. *See State v. Alston*, 82 N.C. App. 372 (1986), *affirmed on other grounds,* 323 N.C. 614 (1988). Trial on the charges had been severed at the defendant's request, and the court of appeals distinguished *Ashe* on that basis. *Id.* at 377-78 (noting that the State procured both indictments before placing defendant on trial for either charge and made no effort to use one of the

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charges as a “dry run” for the other). The supreme court affirmed the court of appeals in *Alston*, but reasoned that collateral estoppel did not apply since the jury may have acquitted Alston of being a felon in possession based on its conclusion that he did not possess a firearm when he was stopped by officers three hours after the alleged robbery. The acquittal did not, in the state supreme court’s view, necessarily reflect a determination by the jury as to whether Alston possessed a firearm during the alleged robbery. *State v. Alston*, 323 N.C. 614, 616-17 (1988).

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