

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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TIMOTHY J. SMITH, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 21-1576  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
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Place: Washington, D.C.  
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TIMOTHY J. SMITH, )

Petitioner, )

v. ) No. 21-1576

UNITED STATES, )

Respondent. )

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Washington, D.C.

Tuesday, March 28, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

SAMIR DEGER-SEN, ESQUIRE, New York, New York; on behalf of the Petitioner.

SOPAN JOSHI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-1576, Smith versus United States.

Mr. Deger-Sen.

ORAL ARGUMENT OF SAMIR DEGER-SEN

ON BEHALF OF THE PETITIONER

MR. DEGER-SEN: Mr. Chief Justice, and may it please the Court:

The government agrees that when it elects to take the question of venue before a jury and fails to satisfy its burden of proof, a judgment of acquittal is the appropriate result and the government is barred from seeking reprosecution. The jury instruction it agreed to in this case, on JA 113, states exactly that. If the government fails to establish proper venue for any count, you must find the defendant not guilty as to that count.

The government's position is that this result should somehow differ when an appellate panel reviewing a Rule 29 motion for judgment of acquittal finds that the jury erred in its determination and there is insufficient evidence

1 to sustain the conviction.

2 Put another way, the government's  
3 position is that when a jury does its job  
4 correctly and acquits, a defendant may not be  
5 reprosecuted, but, when the jury fails to  
6 correctly discharge its duty, the government  
7 gets a do-over.

8 That is what this Court in Burks  
9 called a purely arbitrary distinction. The  
10 government has no real explanation for that  
11 result. It anchors its view on what it  
12 describes as a settled and unbroken practice of  
13 permitting retrials when a jury acquits for lack  
14 of venue.

15 But there was no such practice. At  
16 both the common law and at the founding, the  
17 government's failure of proof as to venue  
18 resulted in a general verdict of acquittal,  
19 which carried all of the ordinary consequences  
20 of an acquittal. The rule the government relies  
21 on is instead the one this Court squarely  
22 rejected in Ball, that a prosecutor was entitled  
23 to a second bite at the apple even after a  
24 general verdict of acquittal on any ground for  
25 -- by challenging the insufficiency of the

1 indictment in the first trial.

2 But, if the framers rejected that rule  
3 for purposes of the Fifth Amendment, they  
4 absolutely would have done so for violations of  
5 the venue right. As Justice Story explained,  
6 the venue right was an area where the framers  
7 sought to leave as little discretion in the  
8 government's hands as possible.

9 There is no reason to think that the  
10 framers would have singled out venue as the one  
11 issue that goes to a jury, but the government's  
12 failure of proof does not yield an acquittal but  
13 rather a do-over.

14 At bottom, an insufficiency-of-the-  
15 evidence determination, whether by a jury, a  
16 judge, or an appellate panel, must lead to a  
17 judgment of acquittal.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: When we have --  
20 normally have constitutional errors at trial,  
21 isn't our rule a -- a -- a -- a mistrial or a  
22 retrial?

23 MR. DEGER-SEN: That -- that's  
24 correct, Your Honor. But the -- at the venue  
25 right is, I think, fundamentally different to

1 all other kinds of rights because what it means  
2 to violate the venue right is that the  
3 government fails to satisfy its burden of proof  
4 before a jury. So that's -- it's not that the  
5 defendant has to show his right was violated.  
6 The meaning of the violation is the failure to  
7 satisfy the government's burden.

8           And then the question is, what should  
9 the consequences of that be? And the  
10 consequences of that, you know, at common law  
11 and at the founding were the same as when the  
12 government fails to satisfy its burden of proof  
13 --

14           JUSTICE THOMAS: How is it different  
15 --

16           MR. DEGER-SEN: -- any other way.

17           JUSTICE THOMAS: -- from other  
18 constitutional errors?

19           MR. DEGER-SEN: It -- it -- it's --  
20 it's different in that sense, that the meaning  
21 of the violation is that the government has a  
22 burden that it takes to the jury as to -- as --  
23 as -- to establish venue, and if it fails to do  
24 that, that is a violation of the venue right.  
25 And so no other constitutional violation looks

1 like that.

2 JUSTICE THOMAS: So how do you know  
3 that in a general -- in a general verdict?

4 MR. DEGER-SEN: You -- you -- you  
5 don't know in a general -- in -- in a general  
6 verdict, and you didn't know it at the founding.  
7 The longstanding practice has always been to  
8 take the question of venue to a jury, and that  
9 yields a judgment -- a general verdict and a  
10 judgment of acquittal.

11 And so, at the founding, venue had  
12 equal status to anything else. If for any  
13 reason -- you know, if -- if the government  
14 fails on one of the conduct elements, if the  
15 government fails as to an affirmative defense,  
16 if the government fails as to a venue, the  
17 result was a general verdict of acquittal.

18 And the government agrees that's what  
19 happens in this case. You know, that was the  
20 jury instruction it submitted to in -- in -- in  
21 this case. It said you must find the defendant  
22 not guilty. That's very likely what happened as  
23 to one of the counts here.

24 JUSTICE JACKSON: So is it your  
25 position that venue is an element? I mean, I



1 saw that assertion in your cert petition, but,  
2 for some reason, it wasn't in your briefs here.

3 So is -- is that the position that  
4 you're taking in this case?

5 MR. DEGER-SEN: I -- I think the word  
6 "element" is sort of a word with -- of many  
7 meanings, but if by "element" you mean something  
8 that the government bears the burden of proof,  
9 and if it fails the burden of -- you know, they  
10 must establish that and if it fails that, to --  
11 to establish that --

12 JUSTICE JACKSON: Well, I guess I  
13 mean, you know, you're setting up an argument  
14 that, you know, if a jury decides it, and as a  
15 result, you say, if the jury was wrong because  
16 it's reversed on appeal, then there would be no  
17 retrial.

18 We've said that with respect to  
19 elements, but elements have to be presented to a  
20 jury, and they have to be proven beyond a  
21 reasonable doubt. I don't know that venue has  
22 to be presented to a jury in every case.

23 Is that your position?

24 MR. DEGER-SEN: No, it doesn't. It's  
25 -- it's similar to an affirmative defense in

1 that sense. It has to be put at issue.

2 JUSTICE JACKSON: All right. So, if  
3 venue is not presented because it's not an  
4 element, I guess, what result? Does your  
5 argument change?

6 MR. DEGER-SEN: If -- if -- if the  
7 defendant doesn't ever present venue, then venue  
8 is waived. Indeed, it -- it would -- it could  
9 never even go to the jury. So that I don't --

10 JUSTICE JACKSON: So you're saying, if  
11 a judge -- because I -- I -- I understood your  
12 original comments to say, you know, if the judge  
13 got it wrong as well, you would have the same  
14 answer. But --

15 MR. DEGER-SEN: If -- if -- if it's a  
16 sufficiency determination. So, if -- if when it  
17 is put in issue by the defendant then and the  
18 government takes it to the jury, like it did in  
19 this case, so we put it in issue at the  
20 indictment stage and said this indictment should  
21 be dismissed for lack of venue. The government  
22 said, no, no, no, this is actually a fact  
23 question, and we should take it to the jury, the  
24 jury should decide. The government went to the  
25 jury.

1           The government agrees that if the jury  
2 had then acquitted, that's the end of the story.  
3 It bars reprosecution.

4           JUSTICE JACKSON: Does it matter that  
5 it's -- do you -- do you contest that the  
6 standard of proof is different for venue than it  
7 is for elements?

8           MR. DEGER-SEN: No, but the standard  
9 of proof for affirmative defenses is different  
10 than it is for elements, and affirmative  
11 defenses are also something where you have --  
12 the defendant has an initial burden to put it in  
13 issue, and then, if the government fails to  
14 satisfy its burden of rebutting the defendant's  
15 affirmative defense, then --

16           JUSTICE JACKSON: It's a mistrial and  
17 you could do it over, no?

18           MR. DEGER-SEN: No. It's a -- it's --  
19 it's a -- it's an acquittal. That -- that's  
20 this -- this Court's decision in Burks. And so  
21 that -- that leads to an acquittal. And just as  
22 in Burks here, it's -- this case, I think, is in  
23 that sense on all fours with Burks. The jury in  
24 Burks got it wrong. They said that the  
25 government had satisfied its burden. And then

1 the appellate court said, you know, no, that was  
2 incorrect, the government failed on the  
3 sufficiency of the evidence, there was a  
4 sufficiency-of-the-evidence ruling, and then the  
5 appellate court said but the result here could  
6 be a retrial.

7 This Court granted certiorari from  
8 that decision and said, no, when you have a  
9 sufficiency-of-the-evidence determination by an  
10 appellate court, that is exactly the same thing  
11 as a Rule 29 determination by a judge, and  
12 that's exactly the same thing as a judgment of  
13 acquittal by the jury. It would be a purely  
14 arbitrary distinction to say, because the jury  
15 got it wrong the first time, suddenly the  
16 government has a chance to re prosecute.

17 JUSTICE JACKSON: And was Burks a  
18 double jeopardy case? Was it a Sixth Amendment  
19 case --

20 MR. DEGER-SEN: It was a double  
21 jeopardy case.

22 JUSTICE JACKSON: -- a Fifth Amendment  
23 case?

24 MR. DEGER-SEN: A double jeopardy  
25 case.

1 JUSTICE JACKSON: You don't make a  
2 Fifth Amendment arguing -- argument here, do  
3 you?

4 MR. DEGER-SEN: Oh, I -- I think our  
5 argument is interwoven with the Fifth Amendment  
6 because our point is, just as in Burks, that the  
7 remedy here -- the remedy for a violation of the  
8 -- of the venue right should be a judgment of  
9 acquittal that then is going to have -- you  
10 know, bear all the ordinary consequences of a  
11 judgment of acquittal, which would include  
12 barring reprosecution --

13 JUSTICE JACKSON: But, in your brief  
14 --

15 MR. DEGER-SEN: -- under double  
16 jeopardy.

17 JUSTICE JACKSON: -- you said they  
18 were separate, so I'm trying to understand. I  
19 mean, I did not appreciate from the question  
20 presented that you were making a Fifth Amendment  
21 argument, and then, in your brief, at page 44,  
22 you're very clear that the Fifth Amendment  
23 argument and the Article III and Sixth Amendment  
24 arguments are independent.

25 MR. DEGER-SEN: I -- I there -- there

1 is sort of an independent Fifth Amendment  
2 argument if you think of the Fifth Amendment  
3 just standing alone. You know, with the Fifth  
4 Amendment standing alone without the venue  
5 right, you know, we don't necessarily raise that  
6 argument.

7 But our Sixth Amendment argument  
8 itself is interwoven with the Double Jeopardy  
9 Clause. It has to be because the thing we're  
10 asking for is a judgment of acquittal, which  
11 bears the ordinary consequences of a judgment of  
12 acquittal, and that includes preclusion and  
13 objecting.

14 JUSTICE JACKSON: But it's not  
15 interwoven just because of that. I mean, you  
16 can't make a Sixth Amendment argument in this  
17 case, I think, because the government hasn't put  
18 you in jeopardy, or has he?

19 MR. DEGER-SEN: Well, it's exactly  
20 like Burks. I mean, in -- in Burks, that was  
21 certiorari from a decision by the court of  
22 appeals that said retrial is permitted in this  
23 circumstance. There wasn't a reprosecution, but  
24 there was a decision by the court of appeals  
25 saying you can be retried.

1           And that's essentially what we're  
2 coming to court and asking for, is we want that  
3 judgment of acquittal. We want that piece of  
4 paper that says you can't re prosecute us.

5           And the -- and what the Eleventh  
6 Circuit gave us is the opposite. It gave us a  
7 piece of paper that says the government can  
8 re prosecute you. You don't have the ordinary  
9 effects that you'd get with a judgment of  
10 acquittal.

11           And so that's the injury that we're  
12 suffering here. And so what we're saying is the  
13 remedy here should be that judgment of  
14 acquittal, that piece of paper that allows us to  
15 -- entitle -- you know, entitles us to the  
16 subsequent defense.

17           JUSTICE SOTOMAYOR: Counsel --

18           JUSTICE ALITO: Do you have --

19           JUSTICE SOTOMAYOR: No, no, go ahead.

20           JUSTICE ALITO: Do you have any  
21 decision from the founding era that actually  
22 precluded retrial based on a prior verdict of  
23 improper venue?

24           MR. DEGER-SEN: But I -- I don't think  
25 that there's any -- the -- the dominant practice

1 at the founding is that it always went to a  
2 general verdict. And so that would have the  
3 ordinary consequences of a general verdict. In  
4 the mine run of cases, the government's not  
5 going to retry.

6 The rule that they point to, the --  
7 the rule, is the one rejected in Ball, which is,  
8 if you have a general verdict of acquittal, even  
9 if that's on a conduct element, you know, the  
10 jury -- somehow we know the jury said they  
11 really didn't do it, you know, he's completely  
12 innocent, even in that situation, the government  
13 was allowed to subsequently collaterally attack  
14 that and say there was a deficiency in the  
15 indictment, including a deficiency in venue.

16 JUSTICE ALITO: I -- I -- I take it  
17 your answer is no, you don't have any case from  
18 the founding era that actually precluded retrial  
19 based on a prior verdict of improper venue.

20 MR. DEGER-SEN: I mean, I think any --  
21 any -- you -- you -- you wouldn't really know  
22 whether it's a prior verdict, just like today, a  
23 prior verdict of an improper venue, because you  
24 would have a general verdict of acquittal. So  
25 you wouldn't know if that verdict of acquittal



1 was based on, you know, venue or something else.

2 JUSTICE ALITO: Do you dispute the  
3 argument that many -- that there are many  
4 treatises from the founding era and extending  
5 into the 19th Century that say quite from  
6 respective authorities, Blackstone, et cetera,  
7 that say that a -- a reversal based on improper  
8 venue does not preclude retrial?

9 MR. DEGER-SEN: We do dispute that.  
10 So I think what the government does is it has  
11 sort of a mishmash of two kinds of cases, one of  
12 a motion to arrest judgment cases, and that's  
13 Arundel's Case, that's Tharbeau, that's the Coke  
14 treatise.

15 And a motion to arrest judgment was,  
16 after a conviction, a defendant challenges the  
17 indictment, and that's how this Court described  
18 it in -- in -- in -- in United States versus  
19 Sisson. That's a -- that's a challenge to the  
20 indictment, not -- so that doesn't involve any  
21 determination that the government failed its  
22 proof. That's not an insufficiency context.

23 In that situation, we completely  
24 agree. The same thing would be true. If we had  
25 an appeal where we were challenging the

1       sufficiency of the indictment or instructional  
2       error or anything other than sufficiency and  
3       then that was the -- the, you know, the --  
4       the -- we got a reversal from the court of  
5       appeals, absolutely, the government could  
6       reprosecute. That would be the modern analogy  
7       to the motion to arrest judgment and that would  
8       be a mistrial. But that's not a sufficiency  
9       situation.

10               And in the other kind of case that the  
11       government relies on are the cases I was just  
12       describing, which is the Ball case, and -- and  
13       -- which is -- which is the rule rejected in  
14       Ball, and that is that you can collaterally  
15       attack even any kind of judgment of acquittal by  
16       saying there was no venue.

17               What the government does not have is  
18       anything, any case in the common law or at the  
19       founding that treats a venue acquittal as a  
20       lower status than other kinds of acquittals.  
21       They were treated in -- in equal status and had  
22       exactly the same kinds of effects. Those  
23       effects may now have changed over time as double  
24       jeopardy jurisprudence has changed, but they  
25       were always of equal status.

1           And the government agrees they're of  
2 equal status today when it goes to a jury. It  
3 just says on appeal somehow the rule should be  
4 different.

5           And I don't -- I almost think it's a  
6 non sequitur to use this --

7           JUSTICE ALITO: Well, part of your --  
8 part of your argument seems to be based on the  
9 original understanding of the Venue and Vicinage  
10 Clauses, but it doesn't seem to me that that is  
11 sufficient -- you -- that you can win on that  
12 alone. But you try to buttress it by injecting  
13 elements of our modern double jeopardy  
14 jurisprudence. So you have kind of a hybrid  
15 argument.

16           If we look just at our modern double  
17 jeopardy case law, have we said that retrial is  
18 barred when there is a reversal on appeal on a  
19 ground that does not concern the culpability of  
20 the defendant?

21           MR. DEGER-SEN: I mean, I think it  
22 depends what you mean by culpability, but I  
23 don't think that venue is any less about  
24 culpability than, for example, a jurisdictional  
25 element. You know, whether a bank is operating

1 in -- in -- in interstate commerce just doesn't  
2 seem like it goes to inherent culpability  
3 either. And then, if it's about elements, well,  
4 we know we have affirmative defenses.

5 So, you know, the what -- what -- what  
6 is the thing that unifies affirmative defenses,  
7 jurisdictional elements, and conduct elements?  
8 The only thing I think that substantively  
9 unifies them is they are things that go to a  
10 jury and the government bears the burden of  
11 proof, and when the government fails that burden  
12 of proof, there's a judgment of acquittal.

13 And that's exactly the same thing for  
14 the venue right. And what the government is  
15 basically saying is the venue right has some  
16 special status where it just is exempt from  
17 that, and they're saying, in addition, it only  
18 has that special status on appeal.

19 You know, if it went to the jury,  
20 we're happy to treat it in exactly the same way.  
21 We're happy to submit jury instructions that  
22 allow for general verdicts, that allow for  
23 preclusion. But, on appeal, the results somehow  
24 could be different. And I just don't think that  
25 follows.

1 CHIEF JUSTICE ROBERTS: Can a judge  
2 dismiss a prosecution because of erroneous venue  
3 in its discretion presumably?

4 MR. DEGER-SEN: I mean, it depends at  
5 which stage. The -- a judge, if -- if -- if you  
6 move to dismiss the indictment because it's  
7 insufficiently alleged, then the judge can do  
8 that, and that wouldn't have preclusive effects.

9 If it's after the close of the  
10 government's evidence and it's a Rule 29 motion  
11 for judgment of acquittal, then that would --  
12 you know, that's the sort of -- that, as this  
13 Court said in Evans, is basically the same thing  
14 as a jury acquittal, and so that would have  
15 preclusive effect.

16 CHIEF JUSTICE ROBERTS: And can he do  
17 that dismissal with prejudice or without  
18 prejudice depending upon the particular  
19 circumstances?

20 MR. DEGER-SEN: I -- I don't think he  
21 could do it without -- if -- if he's making a  
22 sufficiency-of-the-evidence determination on a  
23 Rule 29, as in he said the government's evidence  
24 is closed, the -- I just don't think the  
25 government has provided sufficient evidence to

1 support venue here, then he would --

2 CHIEF JUSTICE ROBERTS: What -- what  
3 about -- what about before that?

4 MR. DEGER-SEN: As in mid-trial? I  
5 think mid -- I don't know if there's a vehicle  
6 --

7 CHIEF JUSTICE ROBERTS: Or at the --  
8 or at the indictment stage.

9 MR. DEGER-SEN: Oh -- oh, yeah, at the  
10 indictment stage, the government could say the  
11 indictment isn't sufficient, that -- the -- the  
12 defendant could say, as we tried to say, it's  
13 not sufficiently alleged, the government can  
14 withdraw and try and go to a different venue,  
15 the judge can dismiss the indictment, he can go  
16 to a different venue. I think it might have  
17 issues with --

18 CHIEF JUSTICE ROBERTS: Well, can he  
19 dismiss it with prejudice?

20 MR. DEGER-SEN: He can -- he can  
21 dismiss it with prejudice probably as to  
22 refiling in the same venue under issue  
23 preclusion principles. I don't think he could  
24 dismiss the indictment with prejudice as to any  
25 other prosecution in another venue, but that's

1 -- that's -- you know, there are basically two  
2 kinds of dismissals. There's the indictment  
3 stage and there's the sufficiency stage, and the  
4 government's cases try to blur that line.

5           But this Court has always said that  
6 distinction has fundamental consequences because  
7 one is a sufficiency determination, and all  
8 agree this was a sufficiency determination, and  
9 the other is a question of, you know, the  
10 indictment and whether it's sufficiently  
11 alleged, and the government does get another  
12 chance in that --

13           JUSTICE KAGAN: But -- but, if the  
14 government can come back again if a -- if it's  
15 dismissed pretrial, why -- why isn't what you're  
16 saying, you know, why doesn't the difference lie  
17 in the Double Jeopardy Clause, not in the venue  
18 provision?

19           MR. DEGER-SEN: I mean, I think the  
20 difference lies in the double jeopardy  
21 principles that would have animated the -- the  
22 framers in thinking through what the remedy was  
23 for purposes of the double -- for -- for  
24 purposes of the venue clause. I mean, as this  
25 Court sort of describes --

1 JUSTICE KAGAN: I guess what I'm  
2 suggesting is, if -- if the government can  
3 refile in another venue pretrial and then you  
4 say, well, there's a big difference once the  
5 government submits its case, I mean, there might  
6 be a big difference, but it might be a double  
7 jeopardy difference, not a venue difference.

8 MR. DEGER-SEN: I -- I just think  
9 they're -- they're inseparably interwoven here  
10 because what it means for the venue right to be  
11 violated is for the government to fail its  
12 burden of proof before a jury. That is what it  
13 has always meant. There's no such thing as a  
14 venue violation separate from the government's  
15 failure of proof before a jury.

16 And so you only ever really know that  
17 the venue right has been violated and requires  
18 a -- a remedy once the government has failed its  
19 proof in front of a jury.

20 JUSTICE JACKSON: Why can't the remedy  
21 just be to vacate the conviction? I mean, what  
22 you're asking for is a vacatur plus a statement  
23 by the Court that you can't be retried, and I  
24 guess Justice Kagan's point is, why don't you  
25 get that one when the -- when the government



1 tries to retry you and then you invoke double  
2 jeopardy?

3 MR. DEGER-SEN: I mean, in -- in  
4 Burks, that's not what this Court did, but I  
5 guess, at an absolute minimum, we would need --  
6 you know, we couldn't have a decision on the  
7 books that the Eleventh Circuit's saying we  
8 don't have the ability to assert double  
9 jeopardy. So, at a minimum, then the -- the  
10 Eleventh Circuit --

11 JUSTICE JACKSON: I don't think that  
12 -- is that what the Eleventh Circuit said in  
13 this case? It just said you're not entitled to  
14 a statement from the judge right now that says  
15 you can't be reprosecuted. I don't think it  
16 made a double jeopardy holding.

17 MR. DEGER-SEN: I guess I read -- I  
18 read the Eleventh Circuit's decision as saying  
19 that the remedy is vacated and so the government  
20 gets to retry.

21 JUSTICE GORSUCH: Counsel, I want to  
22 go back to your discussion with Justice Alito  
23 about Arundel's Case and some of the original  
24 materials. I understand your -- your position  
25 is that those cases allowing retrial for

1 improper venue were challenges essentially to  
2 the sufficiency of the indictment.

3 But I would have thought that we'd  
4 still have some cases where, as in this case, a  
5 jury found venue improperly, and there would  
6 have been an appeal taken afterwards by the  
7 defendant, as you have, and there would be some  
8 evidence that -- that an acquittal would have  
9 been the remedy given on appeal. But I didn't  
10 see that in your briefs.

11 So what's your -- what's your  
12 understanding as to why that -- that evidence  
13 doesn't exist?

14 MR. DEGER-SEN: I mean, the criminal  
15 appellate right has only existed, you know,  
16 since 1891, so the early case, the common law  
17 and the founding, there was no criminal right of  
18 appeal. So this is sort of all a little bit sui  
19 generis. And the way that this Court has  
20 aligned that fact is it said, as in Burks, when  
21 you have an appellate reversal for insufficiency  
22 of the evidence, that functions like a jury  
23 acquittal would at the founding.

24 And what we do have is, you know,  
25 evidence that jury acquittals at the founding,

1 you know, on the basis of venue, had all the  
2 same --

3 JUSTICE GORSUCH: No, I -- I -- I  
4 understand that, but your -- your -- your --  
5 your -- your answer, I think, is there is no  
6 right to appeal until 1891 in this country.

7 MR. DEGER-SEN: Right. I mean,  
8 there's no cases --

9 JUSTICE GORSUCH: How about at common  
10 law?

11 MR. DEGER-SEN: -- either way  
12 basically for that reason.

13 JUSTICE GORSUCH: Yeah. Right. How  
14 about -- how about at common law?

15 MR. DEGER-SEN: Right. There wasn't.

16 JUSTICE GORSUCH: The same thing?

17 MR. DEGER-SEN: Exactly.

18 JUSTICE GORSUCH: Okay. All right.

19 MR. DEGER-SEN: Exactly.

20 JUSTICE SOTOMAYOR: Counsel, your  
21 argument today is a bit different than your  
22 brief. I think you're right the two are  
23 interwound, but this is really not a venue  
24 clause, Article III, or a vintage clause of the  
25 Sixth Amendment. This is really a double

1 jeopardy argument. Justice Jackson asked that,  
2 and you keep saying, well, no, I'm not making an  
3 independent one. But it's totally that.

4 A judge can -- on the sufficiency of  
5 the element, there could be a motion to dismiss  
6 before trial, and if it's denied, we don't  
7 require an acquittal then. Or, if the judge  
8 grants it, it goes up on appeal and we reverse  
9 it and it goes back because there wasn't a trial  
10 before the jury, correct?

11 MR. DEGER-SEN: Correct. Right.

12 JUSTICE SOTOMAYOR: So, if there's a  
13 motion to dismiss for lack of venue and the  
14 judge grants it and there's an appeal by the  
15 government and it's not a judgment of acquittal,  
16 the government can then retry -- can try the  
17 case, correct?

18 MR. DEGER-SEN: Right. It's -- it's  
19 when --

20 JUSTICE SOTOMAYOR: So, really, the  
21 issue is what happens after a jury finds that  
22 the government has not met its burden of proof.  
23 That's the point you're trying to make, correct?

24 MR. DEGER-SEN: Yes. And that's how  
25 we framed it in the petition and in --

1 throughout our briefs.

2 JUSTICE SOTOMAYOR: So what you're  
3 saying is, if for -- the only thing that's  
4 generally submitted to the jury is either  
5 elements or affirmative defenses or venue. If  
6 the jury has acquitted or if the jury has  
7 convicted and an appellate court says the  
8 evidence was insufficient, we don't permit the  
9 government to retry the case.

10 MR. DEGER-SEN: Correct.

11 JUSTICE SOTOMAYOR: And so you're  
12 saying this is no different than an affirmative  
13 defense that sometimes is proven by a  
14 preponderance of the evidence. If the court  
15 says the judge was wrong on an affirmative  
16 defense because the evidence was in -- was  
17 sufficient -- or insufficient to -- to disprove  
18 it, then they can't try it again.

19 MR. DEGER-SEN: That's Burks.

20 JUSTICE SOTOMAYOR: And you're saying  
21 we should apply the same principle, any issue  
22 that has to be submitted to the jury, that the  
23 jury finds and then an appellate court says it  
24 was insufficient, that should be end -- the end  
25 of the case. I think that's your argument.

1 MR. DEGER-SEN: Exactly.

2 JUSTICE SOTOMAYOR: So what do we do  
3 with all the statements in the common law, among  
4 jurists here, including Justice Story, that do  
5 say that if an issue is about insufficient venue  
6 or that venue is not right, that retrial is the  
7 norm?

8 MR. DEGER-SEN: That -- that's not  
9 what the historical sources say. I mean, the  
10 government does a sort of crafty job of piecing  
11 together, like, a variety -- two different kinds  
12 of cases, and, you know, it sort of makes it  
13 seem like there is this line --

14 JUSTICE SOTOMAYOR: All right.

15 MR. DEGER-SEN: -- of separation.

16 JUSTICE SOTOMAYOR: Break that down  
17 for me because --

18 MR. DEGER-SEN: Right. It --

19 JUSTICE SOTOMAYOR: -- it was more  
20 convincing to me than you're let -- letting me  
21 believe right now. But go ahead. Break it  
22 down.

23 MR. DEGER-SEN: Well -- well -- so --  
24 so -- so, first of all, the government starts by  
25 talking about the -- the sort of case like

1 Arundel's Case, the Coke treatise, and Tharbeau,  
2 which are the motion -- which are the motion-to-  
3 arrest-judgment cases. And motion to arrest  
4 judgment, as this Court said in -- in United  
5 States versus Sisson -- this is what it said:  
6 "For the purpose of this case, the critical  
7 requirement is the judgment can be arrested only  
8 on the basis of an error appearing on the 'face  
9 of the record' and not on the base of proof  
10 offered at trial." And then, at Footnote 10, it  
11 explains "face of the record" basically means  
12 the indictment and the official documents.

13 So motion-to-arrest-judgment cases  
14 necessarily are not insufficiency cases. So the  
15 Coke treatise, Arundel's Case, all of those  
16 things are totally consistent with our rule,  
17 which is the rule you were just describing  
18 earlier. If it's at the indictment stage, it's  
19 a mistrial. Those are not sufficiency cases.

20 Then the government slips into talking  
21 about this rule which says -- which is the rule  
22 rejected in Ball, which is that a -- a -- a  
23 prosecutor in a second prosecution is always  
24 entitled to basically challenge the sufficiency  
25 of the indictment not just on venue grounds but

1 on other kinds of grounds too. And even if you  
2 have a general verdict of acquittal that goes to  
3 culpability, you know, the guy didn't do it, you  
4 still get to reprosecute him based on  
5 challenging the sufficiency of the indictment.

6 Their own sources, like the Holmes  
7 case, describe that rule as monstrous, and Ball  
8 squarely rejects it. So their idea is that that  
9 somehow now needs to be imported into thinking  
10 about the venue clause, even though we know that  
11 the framers thought the venue clause was  
12 fundamentally important and required additional  
13 protection. So I don't think that makes sense.

14 But even on its own terms, it doesn't  
15 make sense because the government doesn't  
16 believe in that rule even now. The government  
17 doesn't think that when the -- that the second  
18 prosecution can be initiated on the basis of  
19 challenging a venue in the first prosecution  
20 when there's a general verdict of acquittal.

21 So it doesn't think that rule applies  
22 generally. It somehow thinks it applies just  
23 for trying to understand what happens when  
24 you're on appeal and you get a reversal on  
25 insufficient evidence of venue. And I just



1 don't even see how that follows.

2           And all of that leads to the big thing  
3 that's lacking, I think, in the government's  
4 case, which is anything which says -- you know,  
5 they had lots of cases that said venue  
6 conventionally went to special verdicts, and  
7 when you got an acquittal just on venue,  
8 everyone just reprosecuted.

9           But they don't have anything like  
10 that. And, in fact, special verdicts were not  
11 that typical at the founding, and a court  
12 couldn't even require a jury to enter a special  
13 verdict. So there just wasn't any distinction  
14 being made between venue and other kinds of  
15 elements. They had equal status at the common  
16 law and at the founding. And the rule that the  
17 government pieces together just isn't accurate  
18 when you really dig into those sources.

19           JUSTICE SOTOMAYOR: Thank you.

20           JUSTICE ALITO: Other than the speedy  
21 trial right and the double jeopardy right, can  
22 you think of any example where a retrial is not  
23 sufficient to cure the violation of a criminal  
24 right?

25           MR. DEGER-SEN: No, Your Honor, but

1     there is no other --you know, we're already in  
2     such different terrain with the venue right  
3     because there is no other right where the  
4     violation is defined by the government's failure  
5     of proof before a jury. And so I think we're  
6     already in sort of a strange place. That makes  
7     it, I think, similar to double jeopardy  
8     principles.

9             And I think there are some, you know,  
10    significant analogies to the speedy trial right  
11    because, you know, the -- you know, the right  
12    here was -- is grounded in trying to avoid the  
13    hardship of being -- you know, of having the  
14    trial in an alien place. And, to some degree,  
15    once that trial in an alien place has occurred,  
16    it's not remediable. It's not like the next  
17    trial necessarily puts you back to where you  
18    were before. You've already had the experience.

19            And we know there's mountains of  
20    evidence at the founding that it was the  
21    experience of that trial that was the  
22    constitutional hardship or constitutional wrong.

23            CHIEF JUSTICE ROBERTS: Thank you,  
24    counsel.

25            Justice Thomas?

1 Justice Alito?

2 JUSTICE ALITO: Well, you can make the  
3 -- the argument that you just made about the  
4 violation of many other trial rights.

5 MR. DEGER-SEN: I -- I think that  
6 every -- every trial is --

7 JUSTICE ALITO: Practically every  
8 trial right, you can make that.

9 MR. DEGER-SEN: Right. Absolutely.  
10 Every trial is a hardship, but not every  
11 constitutional right is concerned with avoid --  
12 specifically concerned with avoiding the  
13 hardship of trial. And when you have a  
14 constitutional right that's based on you don't  
15 want that trial -- that -- that hardship to  
16 occur in the first place, you need, as with the  
17 speedy trial right, something that has some  
18 front-end deterrence.

19 So that's our argument on that. You  
20 know, you piece it together with the fact that  
21 the government does have a lot of unfettered  
22 discretion here, you know, as -- as William  
23 Grayson described it, an absolute uncontrollable  
24 power over venue. I think that requires some  
25 more front-end deterrence.

1                   But you -- and then you add in the  
2 fact that, of course, the venue right is already  
3 fundamentally different. And when you put all  
4 those things together, I think acquittal is the  
5 appropriate remedy.

6                   JUSTICE ALITO: Are the modern  
7 standards for venue in criminal cases the same  
8 as the standards for venue that existed at the  
9 time of the founding?

10                  MR. DEGER-SEN: I mean, I think,  
11 broadly speaking, yes. We still look to try and  
12 find what the locus delicti is and we look to  
13 the -- where the conduct occurred. And that's  
14 basically what happened in this case.

15                  Obviously, the types of cases that  
16 occur, you know, the government now has far more  
17 ability to select different kinds of venues.  
18 Congress has expanded the power of the  
19 government to do that. So you have -- this  
20 issue arises more and more. But, ultimately,  
21 you still look to -- to the locus delicti.

22                  CHIEF JUSTICE ROBERTS: Justice  
23 Sotomayor?

24                  Justice Kagan?

25                  JUSTICE KAGAN: Was the right really

1 about the burden of a faraway trial? I thought  
2 it was much more about having a jury that knew  
3 the details of your crime and was of your  
4 community.

5 MR. DEGER-SEN: It was -- it was about  
6 both. And -- and the -- the -- the -- the --  
7 the founding documents describe a lot of the  
8 time the hardship of trial in an alien place.  
9 That's how this Court described it in  
10 United States versus Johnson. But they also  
11 describe it as the unfairness -- potential  
12 unfairness of the conviction because you can't  
13 get your witnesses, because there's all sorts of  
14 hardships that come there.

15 And I think, as to both of those, we  
16 think that acquittal aligns with the purpose.  
17 Acquittal is the only thing that has that  
18 front-end deterrence, and acquittal is the only  
19 thing that prevents the kind of forum shopping  
20 that the framers were acutely aware of. I mean,  
21 this is the rare area where we just know that  
22 there was egregious governmental abuse,  
23 egregious governmental practice that was  
24 happening in the founding era.

25 So the idea they would have just

1 thought, well, venue, that's just a thing of  
2 lower status that we leave at the government's  
3 grace, just seems highly implausible.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Gorsuch?

6 JUSTICE GORSUCH: What do you  
7 understand the proper burden of proof of the  
8 government to be in -- in venue cases?

9 MR. DEGER-SEN: I'm -- I'm -- I'm  
10 not -- I -- I think that there is -- there is --  
11 that the historical evidence on that is  
12 extremely muddled. I think it would be great  
13 fodder maybe for --

14 JUSTICE GORSUCH: That's why I'm  
15 asking you.

16 MR. DEGER-SEN: I -- I -- I -- I think  
17 it would be great fodder for another cert  
18 petition, Your Honor, but I don't think anything  
19 turns on it in this case because, as we've been  
20 discussing, there are things like affirmative  
21 defenses where the burden of proof is not  
22 necessarily beyond a reasonable doubt and it's  
23 still the key thing is that it goes to the --

24 JUSTICE GORSUCH: Sufficiency.

25 MR. DEGER-SEN: Exactly.

1 JUSTICE GORSUCH: I got it. Okay.  
2 And then what about -- the Chief Justice asked  
3 you about transferring the case. As I  
4 understand it under the criminal rules of  
5 procedure at least currently, that's hard to do  
6 without the defendant's consent. What do we do  
7 about that?

8 MR. DEGER-SEN: I -- I think that a  
9 defendant -- so a defendant has -- has to  
10 basically put venue in issue, and the way it  
11 typically does that is by doing it at the  
12 indictment stage. And at the indictment stage,  
13 if the government says, oh, you know, you're  
14 absolutely right, this is in the wrong venue,  
15 the government can withdraw the powers and --

16 JUSTICE GORSUCH: Can it -- can it do  
17 it unilaterally, or does it require the  
18 defendant's consent?

19 MR. DEGER-SEN: I think, at the  
20 indictment stage, it can just withdraw the  
21 indictment and refile somewhere else.

22 JUSTICE GORSUCH: All right. Okay.  
23 Thank you.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Kavanaugh?

1 Justice Barrett?

2 Justice Jackson?

3 JUSTICE JACKSON: Yeah. I just think  
4 there's something conceptually strange about  
5 going from being tried in an improper venue to  
6 being fully acquitted, and so can I just go back  
7 to -- to Justice Kagan's point, which is, if we  
8 assume that the point of venue or at least a  
9 point of venue was to ensure that the community  
10 in which this crime occurred had some say in  
11 how -- how these facts were tried, then why  
12 would it be that the only permissible remedy for  
13 having tried a person in the wrong venue would  
14 be to acquit them entirely and not let the  
15 community that is the right venue exercise that  
16 prerogative?

17 MR. DEGER-SEN: And -- and -- but I  
18 think that's a natural consequence of how it's  
19 always been because, at -- at the common law --

20 JUSTICE JACKSON: But, I mean, if --  
21 if we assume that part, at least part, is to  
22 make sure that the people who were victimized,  
23 victimized by the crime, are participating in  
24 the trial, it seems to me that your remedy robs  
25 them in some sense of the ability to speak to



1 the crime and the issue, because you say the  
2 person who may have done this can't be retried  
3 if he's tried in a -- in -- in the wrong place.

4 So what do we do about -- about that?

5 MR. DEGER-SEN: I mean, the -- the law  
6 has always sort of placed the -- it has --  
7 has -- has sort of balanced that and basically  
8 said that the defendant's right to venue is more  
9 significant. That's the only -- that's the  
10 natural --

11 JUSTICE JACKSON: And the community's  
12 right to participate in the trial?

13 MR. DEGER-SEN: Well, because that's  
14 what would happen. I mean, you would in at --  
15 at the common law and at the founding, if the  
16 government initiates the prosecution in the  
17 wrong venue, takes it to the jury and there's an  
18 acquittal, that's the end. If there's an  
19 acquittal and -- you know, the government  
20 doesn't then go and get to say, well, now --

21 JUSTICE JACKSON: Isn't that the --

22 MR. DEGER-SEN: -- those in the  
23 community get to try.

24 JUSTICE JACKSON: -- but isn't that  
25 the balancing scenario? If he's acquitted in

1 the wrong venue, then we say his right to not be  
2 tried takes precedent. But, if he's convicted  
3 in the wrong venue, I guess I wonder why that  
4 means that the jury that actually has the  
5 greatest stake in this situation doesn't get the  
6 opportunity.

7 MR. DEGER-SEN: Because, under this  
8 Court's precedent, he has been acquitted. A  
9 jury acquittal over --

10 JUSTICE JACKSON: All right. So let  
11 me -- let me talk to you about that because  
12 that's another part that I'm struggling with.

13 You -- you admit that venue doesn't  
14 have to be submitted to a jury. I mean, even  
15 when you raise it, is it -- does -- is it the  
16 kind of thing that has to go to the jury or not?

17 MR. DEGER-SEN: It -- it -- it  
18 basically is. I mean, the -- the circuits are a  
19 little --

20 JUSTICE JACKSON: Well, no, not  
21 basically. I'm saying, okay, we're at trial,  
22 pretrial, and the defendant raises a venue  
23 objection. Is that something that the judge can  
24 resolve, or must it be submitted to the jury?

25 MR. DEGER-SEN: It basically must be

1 submitted to the jury. The circuits are a  
2 little divided on how much a defendant has to  
3 put it in issue, but everyone agrees that once  
4 it's put in issue -- and the threshold is low --

5 JUSTICE JACKSON: Okay. But I thought  
6 you said earlier that we had a scenario in which  
7 a judge could be ruling on this as a matter of  
8 Rule 29, where the judge could be deciding, all  
9 right, so you're --

10 MR. DEGER-SEN: On -- on sufficiency  
11 grounds, yes.

12 JUSTICE JACKSON: All right. So let's  
13 say it was put to the jury and then there's a  
14 Rule 29 and the judge resolves it. In that  
15 situation, if the judge says no venue, is it  
16 your position that the government can't appeal,  
17 that's tantamount to an acquittal verdict?

18 MR. DEGER-SEN: Yeah. If -- if --  
19 if -- if the government said -- if the -- if  
20 the -- if the judge rules that there's a Rule 29  
21 motion for judgment of acquittal on venue  
22 grounds, absolutely. That's basically Evans.

23 JUSTICE JACKSON: It's -- it's not  
24 going to -- I'm saying it's -- do we have cases  
25 that say that, or are you just making this

1 analogy? I guess I'm wondering, would I ever  
2 find --

3 MR. DEGER-SEN: I mean, it's -- it's  
4 the natural --

5 JUSTICE JACKSON: -- an appellate --

6 MR. DEGER-SEN: -- consequence of our  
7 rule. It's -- it's a consequence --

8 JUSTICE JACKSON: It's a natural  
9 consequence of your rule, but I'm asking you  
10 about the law exactly in this -- in the  
11 following sense: Would an appellate court ever  
12 be called upon to decide whether the judge was  
13 correct on a JNOV Rule 29 motion in the  
14 defendant's favor on venue grounds?

15 MR. DEGER-SEN: They shouldn't be. I  
16 mean, the circuits are divided on what you can  
17 hear.

18 JUSTICE JACKSON: So, if I find those  
19 cases, you lose?

20 MR. DEGER-SEN: No. I mean, the  
21 circuits currently are divided. I mean, there's  
22 lots of circuits that have a retrial rule on  
23 appeal, just like the Eleventh Circuit, and so  
24 I'm sure there will be lots of examples where  
25 judges in those circuits do exactly that, and

1 the result is that it doesn't, you know, qualify  
2 as an -- as an acquittal in the same way because  
3 that's --

4 JUSTICE JACKSON: No, but I guess -- I  
5 guess, doesn't that -- why doesn't that  
6 undermine your argument? I mean, my -- if it is  
7 an acquittal, then it seems to me that the --  
8 that there shouldn't be an appellate right for  
9 the government to go and ask for a review of the  
10 judge's determination that there's no venue on  
11 --

12 MR. DEGER-SEN: Right. I mean, I --

13 JUSTICE JACKSON: -- a post-trial  
14 motion. So, if we find those, then it would  
15 seem as though the law does not treat the venue  
16 question as tantamount to --

17 MR. DEGER-SEN: I -- I -- I --

18 JUSTICE JACKSON: -- a judgment of  
19 acquittal.

20 MR. DEGER-SEN: -- I think those cases  
21 would be wrong just like the circuits that  
22 disagree with us would be wrong.

23 JUSTICE JACKSON: So, in ruling in  
24 your favor, we'd have to also rule about that, I  
25 guess --

1 MR. DEGER-SEN: I -- I -- I -- I --

2 JUSTICE JACKSON: -- because the  
3 implication would be --

4 MR. DEGER-SEN: Yeah, I -- I -- I  
5 mean, I think, basically, as this Court said in  
6 Burks and reaffirmed in Evans, a jury acquittal,  
7 a judge acquittal under Rule 29, and an -- an  
8 appellate reversal of a Rule 29 motion for  
9 insufficiency, those are all insufficiency  
10 determinations, and it's a purely arbitrary  
11 distinction to say that, you know, because the  
12 jury made a mistake, the government now suddenly  
13 gets to re prosecute. The -- it's -- it's not  
14 fair to say that that is what it all turns on.

15 And that's this Court's holding in  
16 Burks. And the government in this case at JA  
17 113, 114, said to the jury: Acquit. If you  
18 find -- if you find we didn't, you know, bear  
19 our burden of proof here, you should acquit.  
20 They agreed that bars re prosecution.

21 And they're saying there should be  
22 exactly the arbitrary distinction that this  
23 Court rejected in Burks for venue, and it  
24 doesn't -- there's no basis for thinking venue  
25 should be treated differently because venue has

1 never been treated differently historically at  
2 the common law. It's always had the --

3 JUSTICE JACKSON: Except insofar as  
4 our law might allow the government to raise  
5 venue questions on appeal if ruled on by a  
6 judge.

7 MR. DEGER-SEN: I don't think I  
8 understand.

9 JUSTICE JACKSON: In other words, you  
10 say venue has never been treated differently.  
11 But I've identified a situation in which it has  
12 perhaps. I don't know because I haven't  
13 researched it. That's why I'm asking you. It  
14 would be treated differently or it has been  
15 treated differently if the government could  
16 actually bring an appeal on a judicial  
17 determination of venue and have that --

18 MR. DEGER-SEN: I mean, I -- I -- I --

19 JUSTICE JACKSON: -- addressed,  
20 because of motions of acquittal --

21 MR. DEGER-SEN: Right. I -- I --

22 JUSTICE JACKSON: -- or -- or -- or  
23 judgments of acquittal would not be appealable.

24 MR. DEGER-SEN: -- I haven't seen a  
25 case like that. I don't know if they exist,

1 Your Honor, but, if they do, I would think that  
2 they're just basically another instance of the  
3 rule that we're challenging in this case, as the  
4 court of appeals have, and that rule is itself  
5 the thing which violates Burks.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Mr. Joshi?

10 ORAL ARGUMENT OF SOPAN JOSHI  
11 ON BEHALF OF THE RESPONDENT

12 MR. JOSHI: Mr. Chief Justice, and may  
13 it please the Court:

14 The remedy for a defendant convicted  
15 in a wrong venue is, one, reversal of his  
16 conviction; two, dismissal of the count in the  
17 indictment. Petitioner got both of those  
18 remedies here.

19 His contention here is that the  
20 Constitution requires an additional third  
21 remedy, which is immunity from reprosecution.  
22 But he hasn't identified a single word of the  
23 actual text of the Constitution that mandates  
24 that remedy. And we think centuries of  
25 prefounding history and precedent belie that



1 contention.

2 Now Petitioner mentioned this morning  
3 and in his briefing that juries are instructed  
4 to acquit a defendant if the government fails to  
5 prove venue, and he says that we haven't shown a  
6 founding era federal case in which a jury  
7 acquittal was followed by a retrial.

8 I think that's a little bit of a  
9 strawman. A general verdict of acquittal always  
10 precludes retrial under double jeopardy  
11 principles. We have never contested that.

12 But that's not this case. He was not  
13 acquitted by the jury. He was convicted. The  
14 question is what happens when a reviewing court  
15 determines that a conviction was obtained in the  
16 wrong venue.

17 Of course, there's no founding era  
18 precedent on that because, as my friend  
19 mentioned, there was no right of appeal in  
20 federal criminal cases until 1889 for defendants  
21 and 1907 for the government.

22 But Petitioner's case basically boils  
23 down to, from start to finish, a conflation of a  
24 jury's general verdict of acquittal and a  
25 reviewing Court's determination that a

1 conviction was improper or the result of  
2 constitutional error.

3           This Court has squarely rejected that  
4 conflation, including in Scott, which was one of  
5 the trilogy of double jeopardy cases decided the  
6 same day as Burks. And what the Court said in  
7 Scott was that, look, a general verdict of  
8 acquittal doesn't give reasons, and so we adopt  
9 a defendant-friendly categorical rule that a  
10 general verdict of acquittal is final and  
11 preclusive.

12           That's not true when a court decides  
13 something. When a court decides something, the  
14 dividing line for whether retrial is or is not  
15 permissible is whether the legal basis for the  
16 ruling goes to factual guilt or innocence or  
17 criminal culpability, as Evans against Michigan  
18 said.

19           Venue does not go to factual guilt or  
20 innocence. It does not go to criminal  
21 culpability. And, therefore, retrial is not  
22 forbidden.

23           I welcome the Court's questions.

24           If there aren't any, let me --

25           CHIEF JUSTICE ROBERTS: Well, how many

1 times does the government, for example, get to  
2 either mistake or deliberately sue in the wrong  
3 venue?

4 MR. JOSHI: If on --

5 CHIEF JUSTICE ROBERTS: You can  
6 imagine a situation, perhaps a rare one, but you  
7 can imagine it, where what's involved is an  
8 abuse of their right to charge wherever they  
9 want, not out of the blue, but in any case --  
10 many cases, like, take internet crimes and  
11 things like that, there must be dozens of places  
12 where the government could charge, and why don't  
13 they just start with one and go through and wear  
14 down the defendant?

15 MR. JOSHI: So let me address a couple  
16 of things there.

17 First of all, if your suggestion is  
18 that the government is -- is prosecuting in a  
19 correct venue, well, then that should be fine,  
20 and, you're right, there are sometimes many,  
21 many venues under continuing crime statute that  
22 -- that Congress has passed that defines crimes  
23 as taking place in many venues. So, you're  
24 right, the government can pick one of those  
25 venues, but those would be proper venues.

1                   I take the thrust of your question to  
2     be, well, what if the government serially tries  
3     to retry someone in the wrong venue? I -- I  
4     don't think that's realistic, and I'm going to  
5     give you a few answers here, and I -- I  
6     understand some may be more satisfactory than  
7     others.

8                   The first is that we think our rule  
9     has been the dominant rule in the circuits and  
10    in this country for hundreds of years. I think  
11    Petitioner identified at the cert stage, I  
12    think, just two cases, neither of which we think  
13    actually stand -- adopts his principle. But I  
14    don't think we've seen any suggestion that the  
15    government has ever engaged in that kind of  
16    practice. Petitioner had all the incentive in  
17    the world, as amici did, to identify such a  
18    case. They haven't been able to.

19                  CHIEF JUSTICE ROBERTS: No, but, I  
20    mean --

21                  MR. JOSHI: Now I understand that --

22                  CHIEF JUSTICE ROBERTS: -- you -- you  
23    say that they're all going to be correct venues,  
24    but often you don't know that until after  
25    there's extensive pleading practice and

1 everything else and the government, you know,  
2 it's -- is an imposition on the defendant to  
3 have to litigate with the government, whether or  
4 not his, you know, vacation trip to wherever was  
5 enough to establish venue there.

6 MR. JOSHI: Yeah, that -- that's a  
7 fair point. Sometimes it's going to be  
8 difficult. This is, I think, one of those  
9 difficult cases. And I -- I -- but I took your  
10 question to be asking about bad faith. I think,  
11 if it's a difficult case and the government  
12 believes sincerely that venue is appropriate,  
13 the jury agrees unanimously that venue is  
14 appropriate, and the trial court agrees that  
15 venue is appropriate, it seems -- I don't think  
16 you could call that bad faith, you know, in  
17 addition to the fact that --

18 JUSTICE GORSUCH: Why was this brought  
19 in the Middle District of Florida, which -- I  
20 mean, everyone seemed to -- you were alerted  
21 pretty early on that that wasn't the right  
22 venue. Are -- are they just not that busy in  
23 the Middle District?

24 (Laughter.)

25 MR. JOSHI: So -- so this was brought

1 in the Northern District.

2 JUSTICE GORSUCH: Sorry, the Northern  
3 District. It should have brought in the Middle  
4 District or in Alabama.

5 MR. JOSHI: Yeah.

6 JUSTICE GORSUCH: I apologize. I got  
7 the wrong district. So apologies to the Middle  
8 District of Florida.

9 (Laughter.)

10 JUSTICE GORSUCH: They're obviously  
11 very busy. Maybe the Northern District isn't.

12 MR. JOSHI: So I believe -- so I don't  
13 know --

14 JUSTICE GORSUCH: We don't know?

15 MR. JOSHI: -- everything that went  
16 into the prosecution decision, but I think the  
17 Northern District of Florida was the natural  
18 home for this because that's where all the harm  
19 was felt, that's where the victim was, that's  
20 where --

21 JUSTICE GORSUCH: Yeah, but none of  
22 the -- none of the "crime" occurred there?

23 MR. JOSHI: I -- I don't think that's  
24 right.

25 JUSTICE GORSUCH: All right.

1 MR. JOSHI: We -- we -- we didn't  
2 cross-petition for cert on it --

3 JUSTICE GORSUCH: Yeah.

4 MR. JOSHI: -- because it was  
5 fact-bound, and remember the --

6 JUSTICE GORSUCH: The Eleventh  
7 Circuit's wrong about that too? Go ahead.

8 MR. JOSHI: -- the -- the jury agreed  
9 and the appellate court agreed, and Petitioner  
10 hasn't sought review of the other finding, which  
11 is that the extortion count was proper --

12 JUSTICE GORSUCH: Okay.

13 MR. JOSHI: -- in the Northern  
14 District. And so you --

15 JUSTICE GORSUCH: Let me ask you a  
16 more fundamental question.

17 MR. JOSHI: Yeah.

18 JUSTICE GORSUCH: I'm sorry. I just  
19 wondered if -- if you happened to know, and you  
20 don't know why it was brought in the Northern  
21 District. That's fair.

22 Your colleague on the other side makes  
23 an interesting point about Arundel's Case and  
24 the other authorities you cite, that those had  
25 -- had to do with challenging the indictment,

1     arresting the indictment, and not after a  
2     sufficiency-of-the-evidence determination by the  
3     fact-finder.

4                   What say you?

5                   MR. JOSHI:  So I'm -- I'm not sure  
6     that's right for a couple of reasons.  One is  
7     that -- and I admit this is -- I -- I -- I  
8     couldn't find the author.  It might be Lord  
9     Hill, it might be someone else, but it's an  
10    annotation to Coke's -- Coke on Littleton.  It's  
11    -- it's -- it's in a footnote clearly added by  
12    the editor, so at a later time, but in the early  
13    1800s or even earlier.  It's undated.  But it  
14    makes the point that arrests of judgment and  
15    appeal are essentially treated the same for  
16    these purposes.  And, on that point, my second  
17    point is --

18                   JUSTICE GORSUCH:  Well, how could that  
19    be if there were no -- if there was no appeal?  
20    Maybe you can explain that to me.

21                   MR. JOSHI:  Oh.  Oh, so there -- there  
22    -- there -- there -- there was a limited right  
23    of appeal in England long before there was one  
24    in -- in the -- in the federal system here.  And  
25    so that's going to lead me to my second point,



1     which is Rex against Welsh, which we cite in our  
2     brief. That's from 1827, so it's post-founding.  
3     But there's been no suggestion that that case  
4     somehow represented a break in the English law.

5             There, the jury was directed to acquit  
6     the defendant in Southwark because it became  
7     apparent that the crime took place in London.  
8     And then he was reindicted in London and -- at  
9     the Old Bailey, and the judges gathered together  
10    and they decided unanimously that his plea of  
11    autrefois acquit was no good in London because  
12    it was -- his acquittal was on venue grounds.

13            So I think that disposes of  
14    Petitioner's objection here that there is  
15    somehow this big difference between them.

16            I also think our modern case law  
17    disposes of that objection. Again, he -- he  
18    discusses Burks a lot, but Scott was decided the  
19    same day, and both Burks and Scott overruled  
20    several of the Court's earlier double jeopardy  
21    cases, which they had just begun to have  
22    experience with, and -- and -- and they -- they  
23    decided -- of course, Burks I take no issue  
24    with. What Burks did was overrule Brian. Brian  
25    said that, if an appellate court reverses for

1 insufficient evidence, you could have a retrial.  
2 And Burks said, no, we're not going to do that  
3 because it's a -- it's a verdict of acquittal,  
4 it ought to be final, we don't always know why  
5 the jury acquitted someone, and so benefit of  
6 the doubt to the defendant.

7 That's not true when an appellate  
8 court weighs in or a reviewing court, even if  
9 it's the trial court, weighs in on an issue.

10 Now --

11 JUSTICE KAGAN: Can I -- can I take  
12 you back to the Chief Justice's question? At  
13 your brief at some point, you say, in  
14 extraordinary circumstances where appropriate, a  
15 court can dismiss with prejudice.

16 So what did you mean there? Is that  
17 supposed to respond to the possibility of bad  
18 faith? What -- what's appropriate? What are  
19 extraordinary circumstances?

20 MR. JOSHI: Yeah, I -- I think that's  
21 right. The question presented in this case is  
22 whether the Constitution compels a forbidding of  
23 retrial. Our answer is no. But we don't think  
24 the Constitution forbids that either. Congress,  
25 for example, could pass a statute and say the

1 government gets one shot and that's it. That  
2 would be perfectly constitutional.

3 And we think that if there is actually  
4 an allegation of bad faith conduct on the part  
5 of the government, like any litigant engaging in  
6 bad faith conduct, courts have inherent powers  
7 to discipline the litigants, and if a court  
8 thinks that the government is walking in and  
9 serially retrying someone just for the purpose  
10 of harassing them in bad faith, it can issue a  
11 preclusive order like that.

12 And we think that there's nothing in  
13 the Constitution that forbids it. There may be  
14 some other statutory law or something, but  
15 nothing in the Constitution forbids it, and  
16 that's what we were trying to say.

17 But, as I -- as I was saying to the  
18 Chief Justice, I -- I really don't think this is  
19 a likely possibility, and this is not an  
20 argument that says, you know, trust us. This is  
21 more an argument about trust human nature.  
22 Like, prosecutors like convictions, and they  
23 don't like reversals of convictions.

24 And so it wouldn't really make sense  
25 for a prosecutor to deliberately try a defendant

1 in the wrong venue knowing that there's a risk  
2 the jury might acquit, and then that's going to  
3 be final, and then, even if the jury convicts,  
4 knowing that the appellate court might reverse  
5 the conviction --

6 JUSTICE JACKSON: But why does it all  
7 have to come down to bad faith? I mean, you can  
8 imagine a world in which there are -- there's a  
9 nonfrivolous possibility that this crime was  
10 committed, it's a complicated fraud crime, and  
11 there are nine different places, you know, actus  
12 reus is a part of it. And I -- I guess I don't  
13 understand why it matters that the government is  
14 deliberately trying to do something to the  
15 defendants.

16 Isn't there something to your friend  
17 on the other side's point that the government  
18 should not be allowed to in seriatim try this  
19 defendant if it turns out that one after the  
20 other after the other, a determination is made  
21 that that's the wrong venue?

22 MR. JOSHI: No. I mean, you can  
23 imagine a trial in which there's an uncounseled  
24 -- uncounseled statement is introduced against  
25 him. It gets reversed. Then he goes up, and

1 then an un-Mirandized confession gets introduced  
2 against him. That's reversed. Then there's --  
3 evidence in violation of the exclusionary rule  
4 is introduced. That's reversed. But --

5 JUSTICE JACKSON: Right. But, at the  
6 heart of it, I guess, is this question of  
7 whether a venue determination is more like the  
8 ones that you just articulated or like an  
9 insufficiency determination. And your friend on  
10 the other side says that when you present it to  
11 a jury, as was done here, and when the  
12 government, in my view, a little puzzle --  
13 puzzlingly says, we are okay with a jury  
14 instruction that says you can acquit if the  
15 government hasn't proven by clear and convincing  
16 evidence that this is the right venue, why isn't  
17 that, like, you know, tantamount to an  
18 insufficiency such that if the government -- if  
19 the jury gets it wrong, says the appellate  
20 court, then it's over, the government doesn't  
21 get to come back and marshal new evidence and --  
22 and do it again?

23 MR. JOSHI: Because I think this Court  
24 has rejected that principle, and I'll explain  
25 why, but I just want to observe at the outset

1 that just because, you know, two things are  
2 alike in one sense doesn't mean they're alike in  
3 all senses. And I don't think -- just because  
4 venue might be -- go to the jury and the jury  
5 might decide a question of venue doesn't make it  
6 like an element or like an affirmative defense.  
7 You know, juries decide statute of limitations  
8 as well. Like, that's got nothing to do with --  
9 with acquittal, but --

10 JUSTICE KAGAN: What do you think  
11 would happen may -- did -- did I interrupt you?  
12 Sorry.

13 MR. JOSHI: If I -- if I could just  
14 fully answer. I'm sorry, Justice Kagan.

15 Just the -- the -- I -- I said this  
16 Court has rejected that principle, and what I  
17 was going to say there is illustrated by Evans  
18 against Michigan on the one hand and Musacchio  
19 against United States on the other.

20 In both cases, the courts were under  
21 the misimpression that there was an extra  
22 element of the crime that wasn't actually there.  
23 In Evans, the defendant was acquitted for  
24 insufficiency of the evidence with respect to  
25 that element that wasn't actually an element.

1 And this Court said, sorry, acquittal is final.  
2 That -- you know, that's the end of the story  
3 because it goes to criminal culpability.

4 But, in Musacchio, exactly the same  
5 thing happened. The jury was instructed to find  
6 an extra element that wasn't actually an element  
7 of the crime. The jury nevertheless convicted.

8 And on appeal, the defendant said,  
9 hey, insufficient evidence for this element  
10 that's not actually an element, and this Court  
11 said, we don't care, it's not actually an  
12 element. You're on appeal now. And, as a legal  
13 ground, like, because it's not actually an  
14 element, you're not going to get your conviction  
15 overruled.

16 JUSTICE SOTOMAYOR: You're missing the  
17 point there. If the jury convicts and convicts  
18 wrong, you can get a new trial. But, if it  
19 acquits, that's the whole purpose of the Double  
20 Jeopardy Clause, and we did repeatedly, in Burks  
21 and other cases, we have said the Double  
22 Jeopardy Clause forbids a second trial for the  
23 purpose of affording the prosecution another  
24 opportunity to supply evidence which it failed  
25 to muster in the first proceeding.

1 MR. JOSHI: Agree --

2 JUSTICE SOTOMAYOR: If a jury acquits,  
3 it's saying you fail to muster.

4 MR. JOSHI: Yes.

5 JUSTICE SOTOMAYOR: If it convicts, it  
6 says you did muster the evidence. But why  
7 should we permit you the opportunity to retry  
8 the case again for insufficient evidence?

9 MR. JOSHI: Because Scott tells us  
10 that when a jury convicts and then a court  
11 decides that the conviction was obtained on the  
12 basis of some constitutional error, a retrial is  
13 permissible if that error does not relate to  
14 factual guilt or innocence.

15 Burks and Scott were decided the same  
16 day. Every Justice in the majority in Scott was  
17 in the majority in Burks, other than one who was  
18 recused, I think, or didn't participate. I  
19 don't -- I'm guessing he was recused.

20 So Burks and Scott, you have to read  
21 them together, and the dividing line is whether  
22 the legal basis for setting aside the conviction  
23 goes to factual guilt or innocence. Venue does  
24 not go to factual guilt --

25 JUSTICE KAGAN: What would --



1 MR. JOSHI: -- or innocence.

2 JUSTICE KAGAN: -- happen if -- if  
3 there were a special verdict form and the jury  
4 said, we're finding this defendant not guilty  
5 and the reason we're doing it is because there  
6 was no venue here? Could you retry?

7 MR. JOSHI: I -- I think we could, and  
8 let me -- let me just break it down. I mean,  
9 just to be super-analytic about it, suppose  
10 there are two questions. One, did the  
11 government prove guilt beyond a reasonable doubt  
12 on all the elements of the crime? Question two,  
13 did the government prove venue by a  
14 preponderance or whatever the standard of proof  
15 might be?

16 And in that case, I think, you know,  
17 if -- if the jury answers yes and yes, that's  
18 this case, we think retrial is permissible.

19 JUSTICE KAGAN: Yeah, that wasn't my  
20 question.

21 MR. JOSHI: Yeah, no, but I just want  
22 to make sure we're on the same page. If the  
23 jury answers yes and no, which I think was your  
24 question, we -- we do think that -- we do think  
25 that you could be retried in that -- in that

1 circumstance.

2           And just to round out the four  
3 permutations, if the jury answers no and yes, so  
4 guilty -- not guilty but right venue, obviously,  
5 that's just like a regular old acquittal.

6           And if the jury answers no and no,  
7 that's actually a tough question because venue  
8 was wrong, so maybe they shouldn't have opined  
9 on anything. But we think, under Ash against  
10 Swanson and Yeager and that line of cases, we  
11 could not retry a defendant in that scenario.  
12 So that's my complete answer to -- to the  
13 special verdict.

14           JUSTICE SOTOMAYOR: Does that apply --

15           JUSTICE KAGAN: That's all the boxes  
16 in the matrix checked off.

17           MR. JOSHI: That's right. And -- and,  
18 you know, speaking of special verdicts, you  
19 know, Petitioner mentioned them when -- or, I'm  
20 sorry, my friend mentioned them when he was up  
21 here that, you know, special verdicts were never  
22 used.

23           That's actually not correct. One of  
24 the very cases he cites had a special verdict.  
25 So this is Wright that he cites in his brief.

1 And in Wright, there was a special verdict, and  
2 the jury, you know, found facts and said, well,  
3 look, like, here are the facts we found, and,  
4 you know, if -- if it -- if the Court determines  
5 then, you know, that these facts took place in I  
6 think it was Washington, D.C., then --

7 JUSTICE GORSUCH: Your -- your answer  
8 to Justice Kagan, though --

9 MR. JOSHI: Yeah?

10 JUSTICE GORSUCH: -- seems to suggest  
11 guilt on -- on elements, going to guilt or  
12 innocence, but wrong venue, special verdict,  
13 retrial permissible, I believe, is your answer.

14 What's left of the notion that the  
15 wrong venue leads to an acquittal? I would  
16 think that the government would have every  
17 incentive in the world to have special verdict  
18 forms with respect to venue in every case or at  
19 least try very hard to get them.

20 MR. JOSHI: You know, I would have  
21 thought the same thing, and somehow that doesn't  
22 play out in practice.

23 JUSTICE GORSUCH: Well, it hasn't yet.

24 MR. JOSHI: Yeah.

25 JUSTICE GORSUCH: But, after today,

1       why wouldn't it?

2                   MR. JOSHI:  Maybe I think courts -- my  
3       understanding from those who -- who practice in  
4       the courts is that district courts are hesitant  
5       to give --

6                   JUSTICE GORSUCH:  Oh, they won't do  
7       it.  They won't do it.  Okay.  I -- I -- I got  
8       the practical argument.  But, if we take  
9       seriously the founding evidence that does  
10      suggest that a jury's verdict on -- of acquittal  
11      on venue means something, then why would it be  
12      different if it comes in the form of a special  
13      verdict rather than a general one?

14                  MR. JOSHI:  Oh, I think -- I think I  
15      was making maybe the opposite point.  I think  
16      Rex against Welsh shows that a jury's verdict of  
17      acquittal when we can definitively say it is on  
18      venue grounds but not --

19                  JUSTICE GORSUCH:  You've got that one  
20      case, I've got that.  Okay.  All right.

21                  MR. JOSHI:  It's -- it's cited -- I  
22      mean, look like --

23                  JUSTICE GORSUCH:  It's a good case.

24                  MR. JOSHI:  It's a good case, and I --  
25      I will also point out --

1 JUSTICE KAVANAUGH: It's an English  
2 case after the founding. I'm not sure --

3 MR. JOSHI: That -- that's true.

4 JUSTICE KAVANAUGH: Yeah.

5 MR. JOSHI: That's true. But there's  
6 no suggestion --

7 JUSTICE KAVANAUGH: I'm not sure why  
8 we rely on that.

9 MR. JOSHI: There is no suggestion  
10 that it represented a break from the law, and we  
11 know that later additions of Coke and Hale and  
12 Hawkins' treatises all cite Welsh as being in  
13 line with all the other cases, including  
14 Arundel's Case.

15 And I guess my point here is that the  
16 framers were familiar with all of these sources,  
17 and I admit they're sparse. I know you can poke  
18 holes and say, well, it's not quite exactly the  
19 same. But here's the thing: A hundred percent  
20 of them support our rule. Not a single one  
21 supports Petitioner.

22 JUSTICE GORSUCH: But a hundred  
23 percent of them also support the rule that a  
24 jury's verdict of acquittal on venue meant  
25 something and that was enough and that was the

1 end of the case.

2 MR. JOSHI: No, no --

3 JUSTICE GORSUCH: And there's a lot --  
4 we've got a lot of evidence on that too.

5 MR. JOSHI: No, no, Justice --

6 JUSTICE GORSUCH: At least with this  
7 in a general verdict, you -- you would -- a  
8 general verdict, good to go.

9 MR. JOSHI: Yes.

10 JUSTICE GORSUCH: A special verdict,  
11 the rule somehow flips.

12 MR. JOSHI: Yes, that's right.

13 JUSTICE GORSUCH: What's -- yeah.  
14 What's left of the general rule?

15 MR. JOSHI: Because the -- well, I --

16 JUSTICE GORSUCH: Other than district  
17 courts won't let you do it.

18 MR. JOSHI: -- I -- I -- I think -- I  
19 think you've got the general rule wrong.

20 JUSTICE GORSUCH: Okay.

21 MR. JOSHI: We think the general rule  
22 was that an acquittal, if it was on venue  
23 grounds, as in Welsh, did not preclude retrial.  
24 But a general verdict of acquittal categorically  
25 precludes retrial under the Double Jeopardy

1 Clause.

2           This Court in Scott, I think it's  
3 Footnote 5, it might be Footnote 4, I can't  
4 remember, specifically said that that is an  
5 American rule that postdates the founding and is  
6 a deviation from the original meaning of the  
7 Constitution, but well settled and we'll just  
8 keep it.

9           So that rule is very  
10 defendant-protective. It's the rule that was  
11 announced in Ball. But it's strange that  
12 Petitioner relies on Ball, because Ball actually  
13 involved three defendants. One was acquitted  
14 initially. The other two were convicted. It  
15 comes up to this Court in 1891, when appeal is  
16 allowed finally, and this Court says venue was  
17 bad. It wasn't adequately alleged. Reverses  
18 the convictions.

19           It goes back down. Venue is now  
20 adequately alleged, proved to be in the same  
21 venue, so not quite the issue here. All three  
22 are convicted again, as -- as Petitioner notes.

23           It comes back up to this Court, and  
24 this Court says, all right, the defendant who  
25 was originally acquitted, his is bad. You can't

1     retry him.  Once he was acquitted, that was it,  
2     that's the end of the story.  But the other two  
3     whose convictions we reversed because of failure  
4     to prove venue, those new convictions can stand.

5             So I don't think Ball helps him all  
6     that much.  All Ball does is establish the rule  
7     I just mentioned, the rule I mentioned in my  
8     introduction, which is that a general verdict of  
9     acquittal, yes, preclusive, final.  It's  
10    different when the jury convicts and then a  
11    reviewing court is determining that the  
12    conviction was obtained by constitutional error.

13            JUSTICE SOTOMAYOR:  Counsel --

14            MR. JOSHI:  In that case --

15            JUSTICE SOTOMAYOR:  -- I had the same  
16    thought that Justice Gorsuch did and you did.  I  
17    did a little research.  We have a case that  
18    dissuades district court justices from --  
19    judges from doing special interrogatories,  
20    because I too as a district court judge never  
21    had someone ask me and I wondered why.

22            So there is a Supreme Court case that  
23    discourages special interrogatories in criminal  
24    cases, and I think that's the reason why.

25            But you're now going much further,



1 because you're suggesting to me that a whole  
2 bunch of special issues, like a dispute about  
3 the date a crime occurred and whether it's in  
4 the statute of limitations, you're suggesting  
5 that if a reviewing court found the government  
6 failed to supply sufficient evidence to negate a  
7 statute of limitations defense, that the  
8 government could try that case again and collect  
9 more evidence.

10 Why not?

11 MR. JOSHI: I'm -- I'm not --

12 JUSTICE SOTOMAYOR: Because you're  
13 saying there's now a conviction, the court --  
14 reviewing court says no, this didn't happen  
15 within the statute of limitations, that you  
16 could collect more evidence and have another go  
17 at it because that wasn't a decision on the  
18 sufficiency of the evidence.

19 It's an affirmative defense, just like  
20 you're saying, treat it like venue, it goes --  
21 doesn't go to the culpability. The guy did  
22 commit the crime, just on a different date. And  
23 you're suggesting that you can, after a  
24 conviction, retry.

25 MR. JOSHI: No, that wouldn't work for

1 a different reason, which is that it would be  
2 preclusive that the crime is outside the statute  
3 of limitations. I don't think the government  
4 could then under law-of-the-case principles  
5 prove that it actually, in fact, is in the  
6 statute of limitations.

7 Venue is different because venue --

8 JUSTICE SOTOMAYOR: Why?

9 MR. JOSHI: -- you go and -- because  
10 --

11 JUSTICE SOTOMAYOR: You got -- you got  
12 new evidence.

13 MR. JOSHI: Because you'd be going to  
14 a different venue, which is -- which would not  
15 be precluded under the -- the -- the -- the  
16 findings that have been made in the earlier  
17 case.

18 JUSTICE SOTOMAYOR: Isn't the -- isn't  
19 the issue, though, always why are we giving the  
20 government another chance at an apple it already  
21 took a bite at? And isn't that the center of  
22 our entire double jeopardy ruling? If the jury  
23 is going to determine whether you have  
24 sufficient evidence or not to prove either an  
25 element, a defense, a material I don't know

1 what, because our case law is very confusing as  
2 to what "venue" is, we seem all to -- to agree  
3 or people assume it's not an element of the  
4 crime, yet we submit it to the jury, and yet we  
5 do put the government to a burden of proof, and  
6 yet we don't want to call it an element. It's a  
7 little bit like that platypus, this mixed-up  
8 animal, isn't it?

9 MR. JOSHI: It -- it is a little mixed  
10 up. And I -- I admit, reading the historical  
11 sources, I'm not entirely sure why it gets  
12 submitted to the jury. All I can rest on here  
13 is this Court's trilogy of double jeopardy cases  
14 decided on the same day, including --

15 JUSTICE SOTOMAYOR: Well --

16 MR. JOSHI: -- Burks and Scott.

17 JUSTICE SOTOMAYOR: -- that's my  
18 problem with the historical record, because the  
19 historical record thought about it as a court  
20 who tried a person without venue had no  
21 jurisdiction, and -- and we have destroyed that  
22 concept here because we say the district court  
23 has jurisdiction; it's just not this particular  
24 venue.

25 MR. JOSHI: Look, this -- this Court,

1     until -- all of its early cases addressing venue  
2     did treat it as jurisdictional.  You're  
3     absolutely right.  It's only in the middle of  
4     the 20th Century that it moved away from that  
5     understanding of it.

6             So, if you want the original  
7     understanding, then -- of -- of what the framers  
8     would have expected to be the result of a  
9     violation of the venue or vicinage clauses, I  
10    think that's pretty straightforward.

11            But, if you're having trouble with the  
12    historical sources, I guess I would say just  
13    look at Burks and Scott together, look at those  
14    double jeopardy principles, and the -- the  
15    bright line, the one that was then applied in  
16    Evans, one that was applied in Smith against  
17    Massachusetts has been, does it go to factual  
18    guilt or innocence?  Does it go to criminal  
19    culpability?

20            JUSTICE JACKSON:  Can I --

21            JUSTICE KAGAN:  Does Mr. Smith have a  
22    live double jeopardy claim?

23            MR. JOSHI:  What do you -- oh, are you  
24    asking whether the Eleventh Circuit's decision  
25    forecloses it?  No, I don't think so.  I think,

1 if we attempted to re prosecute him, he would be  
2 entitled to raise a double jeopardy defense if  
3 he want -- you know, if -- if that came to pass.

4 JUSTICE KAGAN: But there would have  
5 to be some steps taken to -- by -- by the  
6 government?

7 MR. JOSHI: Yeah, that's right.

8 JUSTICE KAGAN: I mean --

9 MR. JOSHI: That's right. Yeah, we  
10 would have to actually reindict him. It would  
11 actually have to be within the statute of  
12 limitations. His -- his offense conduct, I  
13 believe, took place in, like, May and June of  
14 2018, so we're coming up on five years. So it's  
15 -- it's not at all clear that that would be --  
16 that would be possible.

17 I do want to address --

18 JUSTICE JACKSON: Can I -- I'm sorry.  
19 Before we leave too far Justice Sotomayor's  
20 point, so you've been saying that the test is  
21 does it go to factual guilt or innocence as to  
22 whether or not a person can be retried, but then  
23 you also admitted, I thought, in response to her  
24 that a jury finding related to the timing of the  
25 crime vis-à-vis a defendant claiming outside the

1 statute of limit -- limitations would be  
2 preclusive.

3 Did you say that? Did you say that if  
4 a jury were to find based on evidence presented  
5 that this crime took place on X date and that  
6 date is outside the statute of limitations, then  
7 the government could not retry the person?

8 MR. JOSHI: Correct, because the jury  
9 would have found it's outside the statute of  
10 limitations.

11 JUSTICE JACKSON: So you couldn't go  
12 to another jury to -- to have that fact --

13 MR. JOSHI: Correct.

14 JUSTICE JACKSON: -- redone. So what  
15 -- what about a scenario in which there's a  
16 special verdict form that asks the jury to  
17 determine where this crime took place? So  
18 similar to her what -- you know, when did it  
19 happen. Now the question is where. And the  
20 jury has a line, and they write Los Angeles or  
21 Detroit or wherever. If they pick the wrong  
22 place, sufficiency of the evidence, is that  
23 going to be a problem in terms of the government  
24 venue issue?

25 MR. JOSHI: So, if -- if I understand

1 the question correctly, the jury picks a place  
2 and that place is the correct venue?

3 JUSTICE JACKSON: No, incorrect --

4 MR. JOSHI: Oh.

5 JUSTICE JACKSON: -- venue.

6 MR. JOSHI: It's incorrect venue.

7 JUSTICE JACKSON: The jury picks a  
8 place --

9 MR. JOSHI: Oh. Well, then -- then  
10 that finding is preclusive, right?

11 JUSTICE JACKSON: Well, that's --

12 MR. JOSHI: Like, the jury has found  
13 that it took place in a particular location.

14 JUSTICE JACKSON: Right.

15 MR. JOSHI: Then that's the finding of  
16 the jury. I -- I -- I think our -- our  
17 submission here --

18 JUSTICE JACKSON: But wait, why  
19 doesn't that totally undermine the government's  
20 position in this case?

21 MR. JOSHI: Oh, no. Perhaps I  
22 misunderstood the question. Our -- our -- our  
23 submission here is that where the jury finds  
24 venue is appropriate and then a reviewing court  
25 determines that, in fact, as a matter of law,

1 venue is inappropriate, in those circumstances,  
2 a retrial is permissible just --

3 JUSTICE JACKSON: So it's not really a  
4 special verdict versus a general verdict issue?  
5 I was sort of responding to Justice Gorsuch's  
6 point too.

7 MR. JOSHI: The -- the --

8 JUSTICE JACKSON: If we have a special  
9 verdict where it's clear that the jury is  
10 picking a place that is -- turns out on appeal  
11 is the wrong venue, what result?

12 MR. JOSHI: Oh. So, again, I just  
13 want to make sure --

14 JUSTICE JACKSON: Yes.

15 MR. JOSHI: -- I understand your  
16 question.

17 JUSTICE JACKSON: Yes. Yes.

18 MR. JOSHI: So the jury, on a special  
19 verdict, says we find all the elements of the  
20 crime --

21 JUSTICE JACKSON: Yes.

22 MR. JOSHI: -- have been proved beyond  
23 a reasonable doubt, and we find that this crime  
24 takes place in -- every single element of this  
25 crime took place in Washington, D.C., and all of



1 these things happened in Washington, D.C., but  
2 trial is in the District of Maryland.

3 JUSTICE JACKSON: Correct.

4 MR. JOSHI: What then?

5 JUSTICE JACKSON: Correct.

6 MR. JOSHI: Then, in that case,  
7 retrial would be permissible.

8 JUSTICE JACKSON: Would be?

9 MR. JOSHI: Would be. Would be, yeah.  
10 That's our -- that's the natural result of our  
11 position.

12 JUSTICE JACKSON: All right.

13 MR. JOSHI: Right. Now, again, this  
14 basically never happens, and venue errors are  
15 also, you know, quite rare, but -- but I do want  
16 to address the point that -- that --

17 JUSTICE KAVANAUGH: Why should venue  
18 go to the jury?

19 MR. JOSHI: I'm not entirely sure. I  
20 think Petitioner is right that as a matter of  
21 historical practice, it often did go to the  
22 jury. Of course --

23 JUSTICE KAVANAUGH: But just today.

24 MR. JOSHI: Today? I -- I'm not sure  
25 it has to, except for this Court's decision in

1 Jackalow, which is from 1862. That -- that  
2 decision said that there were it -- it came up  
3 to the Court, not on appeal, because there was  
4 no appeal; it was on a division of the circuit  
5 judges this Court could review discrete issues  
6 of law in the pre-appeal era. And it came up to  
7 the Court because the circuit judges disagreed  
8 on whether a particular crime took place within  
9 the boundary of New York or not, or outside of  
10 New York, in which case the defendant could be  
11 tried in New Jersey.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Justice Thomas?

15 Justice Alito?

16 JUSTICE ALITO: I had two questions I  
17 hope are quick questions. The first is I'm not  
18 quite sure I understand what you're saying about  
19 the double -- double jeopardy question, because  
20 the Eleventh Circuit said, on 15a of the  
21 petition to the -- the appendix to the cert  
22 petition, "The Double Jeopardy Clause is not  
23 implicated by a retrial in a" -- "in a proper  
24 venue after we vacate a conviction for improper  
25 venue."

1                   So didn't the Eleventh Circuit decide  
2                   that question, and having held against  
3                   Petitioner on that question, would not an  
4                   affirmance by this Court preclude the assertion  
5                   later of a double jeopardy claim?

6                   MR. JOSHI: I don't think so, and  
7                   maybe --

8                   JUSTICE ALITO: Why? Why?

9                   MR. JOSHI: Yeah.

10                  JUSTICE ALITO: Why?

11                  MR. JOSHI: Maybe -- maybe I'm slicing  
12                  the baloney a little thin here, but I viewed  
13                  Petitioner's claim as being that he wanted a  
14                  judgment of acquittal that would be preclusive,  
15                  and the court denied him that relief.

16                  The reason it denied him the relief  
17                  was because it thought that double jeopardy  
18                  didn't compel it to give him that relief. But I  
19                  don't think that would preclude a bona fide  
20                  double jeopardy challenge if there were actually  
21                  to be another prosecution. All that he would  
22                  have is a nonpreclusive judgment from the  
23                  Northern District of Florida by virtue of the  
24                  Eleventh Circuit's judgment.

25                  But even though the reason for it was

1 double jeopardy, I don't think that alone would  
2 be preclusive. That's just the reasoning of the  
3 court. The court could have just denied him  
4 that relief for any reason.

5 JUSTICE ALITO: Okay. Second  
6 question. Do you think that Burks or Brian is  
7 more consistent with the original understanding  
8 of the meaning of the Double Jeopardy Clause?

9 MR. JOSHI: So we -- we take Burks as  
10 it comes. Scott suggested that Brian might have  
11 been more consistent with the original meaning,  
12 but we don't take an issue on that. I think  
13 even Scott accepted that the times have moved on  
14 and that a general verdict of acquittal, just  
15 full stop, is -- is always preclusive.

16 JUSTICE ALITO: So, if that's  
17 correct -- I guess I'm going to add a third  
18 question. If that is -- if that is correct,  
19 would we not have to extend our double jeopardy  
20 precedents even further beyond the original  
21 meaning of the Double Jeopardy Clause in order  
22 to find that double jeopardy precludes retrial  
23 in a case like this where, on appeal, it is  
24 decided that the -- that venue was improper?

25 MR. JOSHI: You would. You would have

1 to stray further and create an exception to  
2 Scott's otherwise quite categorical rule.

3 CHIEF JUSTICE ROBERTS: Anything  
4 further, Justice Sotomayor? No?

5 Justice Kagan?

6 Justice Gorsuch?

7 JUSTICE KAVANAUGH: Can you just  
8 finish your answer to my question --

9 MR. JOSHI: Yes.

10 JUSTICE KAVANAUGH: -- about -- about  
11 why venue should go to the jury? You were in  
12 1860, I think.

13 (Laughter.)

14 MR. JOSHI: Yes. So -- so Jack -- so  
15 Jack -- so Jackalow was a division of -- of  
16 authority on whether -- like, all the facts were  
17 found by the jury, like it took place on this  
18 ship which was docked here, it was an assault,  
19 but the question was whether it was within  
20 New York's territorial waters or without.

21 And this Court, on reviewing it, said,  
22 well, we actually don't know because we need to  
23 know where New York's boundary is in waters, and  
24 that's going to require some maps and facts that  
25 we don't have, so send it back for a new trial

1 so that the jury can, like, get those facts in  
2 evidence.

3 But Jackalow was very clear that the  
4 ultimate determination of venue was for the  
5 court, not the jury. So, it -- given Jackalow,  
6 it's puzzling to me why we -- we continue to  
7 just send it to the jury, but, like, that's what  
8 we do. That's what prosecutors do. That's what  
9 we all do.

10 Certainly, nothing forbids sending it  
11 to a jury. And just like the extra element  
12 thing, we can send all sorts of things to the  
13 jury.

14 JUSTICE KAVANAUGH: And nothing  
15 forbids not sending it to a jury. You're just  
16 saying --

17 MR. JOSHI: Right.

18 JUSTICE KAVANAUGH: -- it's just the  
19 way it's developed.

20 MR. JOSHI: It's the way it's  
21 developed.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Barrett?

25 Justice Jackson?

1 JUSTICE JACKSON: So I did not  
2 understand this to be a double jeopardy case,  
3 and I'm trying to understand, could we enter a  
4 judgment on the QP in this case on these facts  
5 that does not speak to this defendant's double  
6 jeopardy rights?

7 MR. JOSHI: I -- it's a difficult  
8 question because the -- at the petition stage, I  
9 think, as you observed in -- in talking to my  
10 friend, his argument was all about double  
11 jeopardy. He claimed that venue was an element  
12 of the crime and, therefore, forbidden by double  
13 jeopardy.

14 On the merits, he's totally abandoned  
15 that argument, and so I -- I'm not entirely  
16 sure.

17 JUSTICE JACKSON: What if -- what  
18 if -- would the government object to looking at  
19 this as homing in on the particular request that  
20 he is making?

21 So you said it in response to Justice  
22 Alito, which is he's requesting per the vicinage  
23 and venue clauses of the Constitution a judgment  
24 preclusive of the government's ability to --  
25 to -- to retry him, and I guess one could say

1 that the Constitution, those clauses don't give  
2 rise to that remedy without speaking to, if the  
3 government were to eventually or in the future  
4 seek to retry him, what the Double Jeopardy  
5 Clause would say about it.

6 MR. JOSHI: Yeah, I think that would  
7 be fine. So you could write a -- an opinion  
8 that says -- I mean, this would be possible.  
9 You could write an opinion that says, look, the  
10 framers codified the venue and vicinage rights  
11 in the Constitution, they tweaked them a little  
12 bit, you know, they changed county to state and  
13 vicinage to district, but they didn't touch the  
14 remedial principles that accompany that right,  
15 that old soil remains intact.

16 When the framers wanted to address  
17 retrial, they did so in the specific clause of  
18 double jeopardy, so we're not going to go  
19 hunting for a retrial remedy in the silence of  
20 the venue and vicinage clauses, and Petitioner  
21 doesn't claim --you know, doesn't raise or has  
22 abandoned his double jeopardy argument. Full  
23 stop. Affirm.

24 JUSTICE JACKSON: And, really, that  
25 argument isn't ripe because the government



1 hasn't sought to retry him, or has it at this  
2 point?

3 MR. JOSHI: No, we -- we have not.  
4 And, you're right, we think the argument wasn't  
5 ripe, but we made that point in our brief in  
6 opposition, obviously, unconvincingly, and so --

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Rebuttal, Mr. Deger-Sen?

11 REBUTTAL ARGUMENT OF SAMIR DEGER-SEN

12 ON BEHALF OF THE PETITIONER

13 MR. DEGER-SEN: Thank you, Mr. Chief  
14 Justice. Four quick points.

15 On the historical evidence, I -- I  
16 think it was telling just how remarkably thin it  
17 was, the -- the -- the -- the -- the  
18 government's answer was on that. They cited a  
19 treatise that I don't know what they're  
20 referring to and I've never heard of. If -- if  
21 the Court wants supplementary briefing on that  
22 treatise, we're happy to do it, but I don't know  
23 what they're referring to.

24 And then *Rex v. Welsh*, a post-founding  
25 English case, and that case was the -- the

1 indictment was in the general Quarter Sessions  
2 in Southwark, which was a court of limited  
3 jurisdiction, and the ruling was very much about  
4 the fact that because of its jurisdictional  
5 limitations, it was not a court of general  
6 jurisdiction, that the judgment there wouldn't  
7 be preclusive.

8           But that has no implications here.  
9 The government agrees it's not jurisdictional.  
10 The framers clearly didn't incorporate the  
11 jurisdictional principles of English common law,  
12 certainly not jurisdictional principles of later  
13 English common law into the Constitution.

14           So I just -- if that's the best  
15 historical evidence, I think it underscores that  
16 the dominant practice here was the venue was  
17 respected and treated just the same as anything  
18 else that went to a general verdict of  
19 acquittal.

20           On the case law, I don't -- again, you  
21 know, they cite Musacchio. That's an  
22 instructional error case. And Scott was a  
23 dismissal for preindictment delay.

24           Now it happened after jeopardy  
25 attached, but it was not a sufficiency-of-the-

1 evidence case. The sufficiency-of-the-evidence  
2 case is Burks, and in Burks, the -- this Court  
3 said an -- an appellate sufficiency ruling is  
4 the same thing as a jury sufficiency ruling.

5 Those other cases the government cites  
6 did not involve sufficiency evidence. And the  
7 same thing was true for the people who were  
8 convicted in Ball. Those -- those individuals  
9 didn't have a sufficiency-of-the-evidence  
10 ruling. The government never took its evidence  
11 to venue and failed. And that's what happened  
12 here. The appellate -- the Eleventh Circuit  
13 said the government's evidence failed. That  
14 leads to acquittal under this Court's settled  
15 precedent.

16 On the idea of no risk -- further, on  
17 the idea of no risk for zero prosecution, the  
18 government's answer is just trust us. And I  
19 think Justice Story's statement here is very  
20 telling. He said, there is little danger indeed  
21 that Congress would ever exert their power in  
22 such an oppressive and unjustifiable manner, but  
23 upon a subject so vital to the security of the  
24 citizen, it was fit to leave as little as  
25 possible to mere discretion.

1           If that's true, how could it possibly  
2     be the case the framers would have contemplated  
3     a remedy that did allow just at the government's  
4     discretion being shipped to London and then to  
5     Manchester or maybe even being retried in London  
6     multiple times. The government doesn't even  
7     disclaim the Ninth Circuit's rule, where you can  
8     just keep being prosecuted in the same  
9     jurisdiction.

10           And then -- and I -- I think, Justice  
11    Gorsuch, you're absolutely right to say the  
12    government is going to request special verdicts  
13    in every case, and you can't imagine a rule  
14    that's more antithetical to the rule at the  
15    founding when not only were special verdicts not  
16    used in situations like this, a court couldn't  
17    even require a jury to come back with special  
18    verdicts and they'll be required in every case.  
19    That is completely contrary to the original  
20    intent here.

21           And, finally, on the question of  
22    remedy, I mean, as Justice Alito said, the --  
23    the -- the double jeopardy question was  
24    adjudicated against us in what under any  
25    ordinary principle is not dicta, it's something

1 that would be preclusive as exactly the kind of  
2 judgment people challenge all the time, and the  
3 Court then said the remedy for improper venue is  
4 vacatur of the conviction, not acquittal or  
5 dismissal with prejudice.

6 So, I mean, I think that's absolutely  
7 -- you know, we -- we have the opposite of what  
8 we're asking for. Our question presented asked  
9 for an acquittal barring reprosecution of the  
10 offense. What we have is a judgment that says  
11 you absolutely do not get that. You have the  
12 opposite of it. And it absolutely would bar us  
13 from -- from raising a double jeopardy case in  
14 another instance.

15 And to Justice Jackson's question  
16 about ripeness, this is exactly the same  
17 procedural posture as *Burks*, which was a double  
18 jeopardy case.

19 In *Burks*, you had an order from the  
20 court of appeals basically saying the  
21 government's case fails on insufficiency of the  
22 evidence, but a retrial is permissible. That's  
23 exactly what the Eleventh Circuit did here.  
24 This Court reviewed that on certiorari and  
25 reviewed -- and -- and reversed on double

1 jeopardy grounds. That is on all fours with  
2 what we have in this case.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel. The case is submitted.

5 (Whereupon, at 11:25 a.m., the case  
6 was submitted.)

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