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IN THE SUPREME COURT OF THE UNITED STATES

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LAMAR EVANS, :

Petitioner : No. 11-1327

v. :

MICHIGAN :

- - - - - x

Washington, D.C.

Tuesday, November 6, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

DAVID A. MORAN, ESQ., Ann Arbor, Michigan; on behalf of Petitioner.

TIMOTHY A. BAUGHMAN, ESQ., Detroit, Michigan; on behalf of Respondent.

CURTIS E. GANNON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 11-1327, Evans v. Michigan.

Mr. Moran.

ORAL ARGUMENT OF DAVID A. MORAN

ON BEHALF OF THE PETITIONER

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

A long and unbroken line of this Court's precedents stand for the principle that a judge's final determination that a defendant is not guilty is a final determination of an acquittal for -- for double jeopardy purposes, even if that determination is wrong as a matter of law or as a matter of fact. And even if --

JUSTICE SOTOMAYOR: Do we give credence to how the judge labels what the acquittal is?

MR. MORAN: No. No. This Court must determine -- whatever its label, what has the judge done. Has the judge made a determination that the government has failed to prove its case, as in Martin Linen, or has the government -- has the judge made a determination of something else, as in Scott, for example, pretrial delay.

Now, the Michigan Supreme Court --

1 JUSTICE KENNEDY: But once -- once the judge  
2 determines, quite erroneously, that it has to be a  
3 dwelling -- midway during the trial, I'm the judge, I  
4 consider this has to be a dwelling, is there any way I  
5 can make that point, make that ruling, without invoking  
6 double jeopardy?

7 MR. MORAN: Well, you could reserve that  
8 ruling to the end of the case. You could make a ruling  
9 as to the jury instructions without -- or what the jury  
10 instructions are going to be without applying them to  
11 the facts of the case; in other words, without making a  
12 determination of the defendant's guilt or innocence.

13 JUSTICE KENNEDY: But -- but if I persist in  
14 that view, there's nothing the government can do?

15 MR. MORAN: The government can try -- we  
16 learned from Smith -- try to get you to reconsider that  
17 view before the defendant puts on his case. But once  
18 the defendant -- once the judge has made a final  
19 determination that the defendant is not guilty, even on  
20 an erroneous view of the law, this Court has held  
21 multiple times that that is a final determination --  
22 that is an acquittal, for double jeopardy purposes.

23 JUSTICE SCALIA: Because, I suppose, the  
24 judge is the government, too.

25 MR. MORAN: Exactly. Once -- once the

1 government --

2 JUSTICE SCALIA: So whether the unfairness  
3 adheres in the prosecution or in the judge, the guy's  
4 been treated unfairly.

5 MR. MORAN: If a state chooses,  
6 Justice Scalia, to vest acquittal power in its judges,  
7 it must accept the double jeopardy consequences of that.

8 JUSTICE GINSBURG: Even when the defendant  
9 interjected this issue and the defendant urged the judge  
10 to make this incorrect notion that you have to negate  
11 the higher crime, in order to convict of the lesser  
12 crime, it was the defendant that led the -- the trial  
13 judge into error. The trial judge didn't come up with  
14 this on his own.

15 MR. MORAN: The judge came up with this,  
16 Your Honor, on defendant's motion, that's correct. But  
17 it was actually supported by the jury instructions that  
18 were in use. And actually, it was supported by the  
19 structure of the statute in question. The statute in  
20 question, under which Mr. Evans was charged, explicitly  
21 said that the building other than one specified in the  
22 preceding subsection --

23 JUSTICE GINSBURG: But you're not arguing  
24 that that was the correct charge that --

25 MR. MORAN: No. We're precluded now from

1 arguing that that's correct.

2 JUSTICE SOTOMAYOR: But you don't --

3 JUSTICE SCALIA: Counsel often encourage  
4 judges to do the wrong thing. In fact, in every case,  
5 there is one of the two counsel urging the court to do  
6 the wrong thing; right?

7 MR. MORAN: Yes, Justice Scalia. And --

8 JUSTICE SCALIA: That's what the adversary  
9 system consists of.

10 MR. MORAN: Yes. And in Sanabria, this  
11 Court noted that point exactly, that all acquittals,  
12 whether they're by the judge or by the jury -- or I  
13 should say almost all acquittals, some are sua sponte --  
14 almost all acquittals, whether by judge or by jury, are  
15 upon invitation of defense counsel.

16 JUSTICE KENNEDY: What -- could a state  
17 provide a procedure where, if a judge makes a critical  
18 ruling mid-trial, that at the request of the opposing  
19 counsel, jury proceedings are suspended for 48 hours,  
20 and the aggrieved party can run to the court of appeals  
21 to get a mandate?

22 MR. MORAN: I don't think the state could do  
23 that, Justice Kennedy, because of Smalis.

24 JUSTICE KENNEDY: Because of?

25 MR. MORAN: Because of Smalis. So that was

1 essentially the situation in Smalis. You had a bench  
2 trial. The judge grants a demurrer. He says the  
3 evidence is insufficient. And then the prosecution  
4 attempted to run to the Pennsylvania appellate court.  
5 And this Court said it couldn't do that because that was  
6 a final determination. I think --

7 JUSTICE KENNEDY: Well, in my hypothetical,  
8 the state said -- and this isn't a final determination;  
9 the ruling doesn't become final until you have 48 hours  
10 and go to the court of appeals.

11 MR. MORAN: Well, I think a state could  
12 make -- could -- investing acquittal power in judges  
13 could put limitations on that acquittal power.

14 JUSTICE SOTOMAYOR: How would they do that?  
15 I'd like to go back to Justice Kennedy's question. It's  
16 easy when you have a jury because what happens is a  
17 judge can decide whether, at the end of the  
18 prosecution's case, he's going to dismiss for  
19 insufficiency, or he can give it to the jury, and if the  
20 jury renders a verdict, set it aside.

21 Jeopardy attaches only if the judge  
22 dismisses the case after the prosecution's judgment, but  
23 not if he sets aside the verdict, correct?

24 MR. MORAN: Well, jeopardy attaches both  
25 ways, but a retry -- a reversal is possible in the -- in

1 the latter.

2 JUSTICE SOTOMAYOR: In the latter.

3 MR. MORAN: Yes.

4 JUSTICE SOTOMAYOR: So what can a state  
5 do -- some have done something -- to ensure that, even  
6 if jeopardy has attached, that there can be a valid  
7 reversal; if the judge is wrong on a legal theory.

8 MR. MORAN: Well, the easy --

9 JUSTICE SOTOMAYOR: So give us an example of  
10 what, in a judge trial, a state could do to ensure that  
11 a legally wrong judgment is still reversible.

12 MR. MORAN: In a bench trial, Your Honor?

13 JUSTICE SOTOMAYOR: In a bench trial. What  
14 could it do?

15 MR. MORAN: I think if -- if in a bench  
16 trial, if the judge has the power to acquit or convict  
17 and the judge acquits, I believe the Double Jeopardy  
18 Clause would preclude the state from coming up with a  
19 clever mechanism allowing -- for allowing appellate  
20 review. The Court, of course -- I mean, the state  
21 could, of course --

22 JUSTICE SOTOMAYOR: I thought there were, in  
23 your briefs, some examples -- in someone's brief, there  
24 were some examples --

25 MR. MORAN: In a jury trial with a judge --



1 JUSTICE SOTOMAYOR: No, forget about a jury  
2 trial. Let's go to the bench trial.

3 MR. MORAN: I don't know what --

4 JUSTICE SOTOMAYOR: You're not helping your  
5 argument by saying there's nothing a state could ever  
6 do.

7 MR. MORAN: Well, they could withdraw the  
8 power of judges to grant acquittals or convictions in  
9 the first place. In other words, they could abolish  
10 bench trials, which, as the Court noted --

11 JUSTICE SOTOMAYOR: Do you know something,  
12 Counselor? You're sinking your hole deeper. You're not  
13 helping yourself in this argument because how does that  
14 help the system?

15 MR. MORAN: Well, with all respect, Your  
16 Honor, the Double Jeopardy Clause here transcends the  
17 state's --

18 JUSTICE SOTOMAYOR: I don't disagree. You  
19 mean no state could ever say to a judge, given --  
20 given -- render a verdict on the prosecution's theory,  
21 and then set it aside? If you think the theory is not  
22 legally --

23 MR. MORAN: After Smith, it's clear that  
24 immediate reconsideration is a possibility. And if a  
25 state set up a system, as in Lydon v. Municipal Court,

1 where you have essentially a magistrate making a  
2 preliminary determination, and then it goes to a higher  
3 judge who goes trial de novo, that, of course, is  
4 permissible.

5 But if the judge is the final arbiter -- in  
6 other words, if the judge sits in the place of the jury,  
7 this Court has said, over and over again, that a judge  
8 verdict is equivalent to a jury verdict, for purposes of  
9 Double Jeopardy.

10 So, yes, courts -- a state could set up  
11 systems, in which judges have less power than a jury  
12 does. I'm not aware of any state that's done that. I  
13 am aware of what Nevada has done, which has said that  
14 judges can't grant mid-trial directed verdicts. And  
15 that's the way in a jury trial.

16 JUSTICE SOTOMAYOR: You keep saying,  
17 "mid-trial."

18 MR. MORAN: Yes.

19 JUSTICE SOTOMAYOR: What -- what is not  
20 mid-trial? Some states require a judge to wait.

21 MR. MORAN: Yes. Yes. Nevada.

22 JUSTICE SOTOMAYOR: Well, what happens in  
23 those states?

24 MR. MORAN: Well, in that case, then there  
25 is no problem because, if the judge makes a

1 determination after the jury verdict, then the -- then  
2 that can be appealed under Wilson.

3 JUSTICE SOTOMAYOR: I keep talking, not  
4 about jury verdicts, but about bench trials. I want to  
5 focus on the bench trial process.

6 MR. MORAN: If -- but if the judge at the  
7 end of a trial renders a solemn, formal, final verdict,  
8 "I find the defendant not guilty," in a bench trial, I  
9 don't see a mechanism for -- for the state to appeal  
10 that determination, consistent with the Double Jeopardy  
11 guarantee, unless the state has set up a system as in  
12 Lydon -- as Massachusetts did in Lydon. But short of  
13 that, a judge's determination is entitled to the same  
14 respect.

15 JUSTICE ALITO: If, in the middle of a  
16 trial, a judge grants a mistrial and says -- I'm sorry,  
17 grants an acquittal and says, I think that prompt  
18 prosecution is an element of the offense, and there  
19 wasn't prompt prosecution here. Now, could there be a  
20 re-prosecution in that situation?

21 MR. MORAN: Yes, Your Honor.

22 JUSTICE ALITO: Even though the judge says  
23 he thinks that that's an element of the offense?

24 MR. MORAN: Because no part of my argument  
25 depends upon the judge's labeling. What the judge has

1 done in that case is -- is a mid-trial dismissal that he  
2 called an acquittal, but it was actually a dismissal for  
3 another purpose. That's exactly what Scott was talking  
4 about. And that is like Scott, where the judge may have  
5 characterized what he had done as acquitting the  
6 defendant, but he --

7 JUSTICE ALITO: Well, he saw a phantom  
8 element, and -- and that's what happened here, too,  
9 isn't it?

10 MR. MORAN: Well, pretrial delay is not an  
11 element of the offense. Pretrial delay is another part  
12 of criminal procedure in this state.

13 JUSTICE ALITO: And this -- and the fact  
14 that this was not a dwelling wasn't an element of the  
15 offense, either.

16 MR. MORAN: But it is clearly related to the  
17 offense. And then Scott clarified what Martin Linen  
18 meant. Martin Linen was an attempt to distinguish  
19 between cases in which the judge makes a ruling relating  
20 to guilt or innocence and a ruling designed to serve  
21 some other purpose.

22 The problem with the line the Michigan  
23 Supreme Court drew here is that it is completely  
24 impossible to administer. And if I can give a couple of  
25 examples, the Lynch case, from the Second Circuit, was

1 an effort by one circuit to attempt to administer -- to  
2 follow the Maker line, and you get questions that are  
3 completely unanswerable in that case.

4 Is bad intent simply a gloss on the  
5 willfulness element? In which case, all you've done is  
6 misconstrue an existing element. Or is it, as the  
7 dissent claimed in Lynch, a -- a new element? And these  
8 are questions like how many angels can dance on the head  
9 of a pin. They're simply semantics. It's all labeling.  
10 There is no -- there is no substance there.

11 JUSTICE ALITO: Well, there -- that's a  
12 problem. But you're -- to come back to my earlier  
13 question, your -- what is your answer? Your answer is  
14 that, if the judge grants an acquittal based on the  
15 failure to prove anything that the judge thinks the  
16 prosecution has to prove, that's an acquittal. Is that  
17 fair?

18 MR. MORAN: Yes. And -- and I fall back to  
19 this Court's footnote in Scott, that courts are  
20 perfectly capable of distinguishing between rulings  
21 relating to guilt and innocence and rulings designed to  
22 serve other purposes. So if you have a devious judge  
23 who's determined to package a prosecutorial misconduct  
24 ruling as an acquittal, I have no doubt that an  
25 appellate court would be able to -- to smoke that out.

1 JUSTICE ALITO: Well, to come back to the  
2 argument we just heard, so suppose the judge grants a  
3 mistrial for failure to prove an action within the  
4 statute of limitations, even though no statute of  
5 limitations defense was raised. Would that be -- would  
6 that be an acquittal?

7 MR. MORAN: Only -- I think my answer to  
8 that would depend on how you rule in the prior case,  
9 depending on whether the statute of limitations is -- is  
10 something the prosecution has to prove in order to  
11 establish guilt.

12 JUSTICE ALITO: All right. Assuming, for  
13 the sake of argument, that it's not an element -- it's  
14 not really an element, but the judge thinks it's an  
15 element.

16 MR. MORAN: Well, if it -- if it's something  
17 that could result in an acquittal, if it is -- if the  
18 defendant raising the statute of limitations is  
19 something that could result in an acquittal -- because I  
20 come to Burks, where Burks says an affirmative insanity  
21 defense, the prosecution fails to disprove that, that is  
22 an acquittal -- when the appellate court concluded that  
23 there was failure to disprove the affirmative insanity  
24 defense.

25 That shows that that language in Martin

1 Linen can't be taken as if it was construing the terms  
2 of an easement. You have to look at what was Martin  
3 Linen getting at. And Martin Linen is trying to  
4 identify those rulings relating to guilt or innocence,  
5 which include affirmative defenses or --

6 JUSTICE KENNEDY: I'm not sure I understand  
7 the rationale for your answer to your own hypothetical.  
8 The judge characterizes a prosecutorial -- or a  
9 misconduct incident as a grounds for acquittal; it  
10 really isn't. Then you said the court of appeals could  
11 straighten that out?

12 MR. MORAN: Yes. That's Scott.

13 JUSTICE KENNEDY: On what rationale -- so  
14 what's the general principle that allows the court of  
15 appeals to do this sometimes and not others?

16 MR. MORAN: If the judge has made a ruling  
17 going to the defendant's guilt or innocence and finding  
18 that, as in Martin, examining the government's evidence  
19 and finding that they have failed to prove the  
20 defendant's guilt, final. There can be no appeal. But  
21 if the judge has made a ruling that is designed to serve  
22 some other purpose, so if the judge, in my hypothetical,  
23 were to say --

24 JUSTICE KENNEDY: Oh, I thought -- I thought  
25 it was the judge just subjectively does this, but he

1 doesn't say any -- he just characterizes it as an  
2 acquittal?

3 MR. MORAN: That's -- that's a case,  
4 actually, quite a bit like some of the cases, and it  
5 demonstrates the problem of -- of the Michigan Supreme  
6 Court's line. So example, in Martin Linen, all the  
7 judge said is, this is one of the weakest cases I've  
8 ever seen.

9 Presumably, if the Respondent were to win,  
10 they would be entitled to appeal a determination like  
11 that to at least try to convince the appellate court  
12 that the reason the case seems so weak to the trial  
13 judge was that the trial judge had added an extra  
14 element.

15 Same thing in Smalis, where the judge simply  
16 said -- he granted a demurrer by looking at the  
17 prosecution's case and saying that, I find the evidence  
18 insufficient. And, in fact, in Smalis, the --  
19 Pennsylvania tried to argue that the judge had actually  
20 heightened the burden for mens rea for third-degree  
21 murder.

22 And -- and so -- you know, they would be  
23 entitled to make these arguments. And so then we get  
24 into questions of, in granting acquittals, would judges  
25 have to explain all of the elements --



1 JUSTICE BREYER: I see the problem, but I am  
2 still back to where Justice Kennedy was -- and that is  
3 my own failing here. I didn't quite understand. I  
4 thought, when you grant a dismissal and you dismiss the  
5 case in the middle of the trial because the prosecution  
6 was brought too late, all you're doing is, in the middle  
7 of the trial, granting something you should have granted  
8 in the first place before you impaneled the jury.

9 But I thought that, in Fong Foo, Judge  
10 Wyzanski had dismissed the case after empanelment  
11 because he wrongly thought that the U.S. attorney had  
12 been talking to a witness or a juror or something at  
13 lunch time and that he had -- and that's an acquittal.  
14 And I thought Justice Harlan, for the Court, wrote  
15 Double Jeopardy, Jeopardy attached, you can't try him  
16 again. And I didn't think the Court ever overruled  
17 that. That -- what -- in where?

18 MR. MORAN: Fong -- Fong Foo has not been  
19 explicitly overruled, but I think it has been limited by  
20 Scott.

21 JUSTICE BREYER: So Scott says that even in  
22 judge-wise -- Scott says Fong Foo was wrong, that that  
23 -- because the reason that Charlie Wyzanski dismissed it  
24 is he has this idea of a -- the AUSA doing something  
25 improper at lunch. And -- and that's -- that's -- now,

1 on your theory -- on the theory you just enunciated,  
2 there would -- there would -- Double Jeopardy wouldn't  
3 protect against the second indictment, right?

4 MR. MORAN: Well, Justice Breyer, Fong Foo  
5 actually listed two reasons why the trial judge granted  
6 the directed verdict. One was prosecutorial misconduct.  
7 The judge apparently thought that the prosecutor had  
8 been speaking with a witness.

9 JUSTICE BREYER: Yes.

10 MR. MORAN: But the second one was the total  
11 lack of credibility of the prosecution's witnesses.  
12 And -- and when the case came --

13 JUSTICE BREYER: Yes. Yes. That's --

14 MR. MORAN: When the case came to this  
15 Court, the concurring Justice said, the second one is  
16 good for Double Jeopardy purposes, but I would make  
17 clear that the prosecutorial misconduct rationale is  
18 not.

19 That part -- I think that concurring opinion  
20 has been effectively adopted in Scott, so that a finding  
21 of prosecutorial misconduct on dumping this case  
22 mid-trial, yes, the prosecution gets another bite at the  
23 apple, assuming that it's done on -- on the defendant's  
24 motion.

25 CHIEF JUSTICE ROBERTS: One -- one of the

1 reasons we've said that underlies Double Jeopardy clause  
2 is to prevent overbearing conduct by the government.  
3 That's not an issue here, is it? You said the  
4 government gets one fair shot at conviction. And if  
5 there has been a legal error below, they haven't had a  
6 fair shot.

7 MR. MORAN: Mr. Chief Justice, I would  
8 respectfully disagree. Mr. Evans was hauled into court  
9 by the state. He was acquitted, in our view, by the  
10 judge who is representative of the state, who was  
11 relying on the standard jury instructions --

12 CHIEF JUSTICE ROBERTS: Well, this business  
13 about the judge being a representative of the state, I'm  
14 not sure how far that gets you. The government is one  
15 of the adversaries appearing before the judge, and the  
16 judge is not supposed to take the government's side. So  
17 he is not really a part of the government. And it does  
18 seem to me that, if they had been thrown out of court  
19 because of a legal error, that's not a fair shot.

20 MR. MORAN: Well, I understand that view,  
21 Mr. Chief Justice, but it's contrary to a lot of this  
22 Court's cases. I think this Court would have to review  
23 a lot of its cases, most recently, Smith and Smalis and  
24 Martin Linen, all of which said that a legal error  
25 affects the quality of a judgment -- and Scott also

1 specifically said this, a legal error affects the  
2 quality of the judgment, but not it's finality for  
3 Double Jeopardy purposes.

4 JUSTICE KAGAN: Well, I suppose the  
5 question --

6 CHIEF JUSTICE ROBERTS: No, I know that --  
7 I'm just saying that that particular rationale for the  
8 Double Jeopardy Clause is not applicable in this case.

9 MR. MORAN: Well, I think it is because a  
10 citizen has been brought into court, expects to go  
11 through one trial, and they are told, sir, I am finding  
12 you not guilty. And then to find out later -- for the  
13 state to come back later --

14 CHIEF JUSTICE ROBERTS: That's looking at it  
15 from the defendant's perspective. We have said that the  
16 government should have one fair shot at conviction. And  
17 it seems to me that, if they lose because of an error,  
18 that's not a fair shot.

19 MR. MORAN: Your Honor, I come back to the  
20 language in Martin Linen, which talks about what the  
21 purpose of the Double Jeopardy Clause is, is to protect  
22 defendants against continuing government oppression.  
23 And that oppression arises from the anxiety of having to  
24 go through it again and again.

25 JUSTICE KAGAN: But isn't it -- isn't it

1 hard to argue with a notion that your client has gotten  
2 a windfall here? I mean, this is not continuing  
3 government oppression and -- and -- you know, that's --  
4 that -- that suggests a real harm on the part of your  
5 client. I mean, here because of a legal error, your  
6 client walks away the winner when he shouldn't have.

7 MR. MORAN: Well, Your Honor, without the  
8 error, the trial would have -- would have continued.  
9 But I think that argument, respectfully, proves too much  
10 because there are lots of these cases in which legal  
11 error was made. And so -- in Rumsey, you could say  
12 exactly the same thing about Mr. Rumsey.

13 JUSTICE KAGAN: Yes, I think that's right.  
14 This is -- this is an argument against this whole line  
15 of cases, that this whole line of cases essentially has  
16 set up a system where the real purposes of the Double  
17 Jeopardy Clause do not apply and where defendants walk  
18 away with windfalls. And I guess what's your best  
19 argument against that proposition?

20 MR. MORAN: Well, once you accept the  
21 equivalency of a judicial acquittal to a jury acquittal,  
22 you have to accept that both actors are capable of  
23 error. Both actors are human. Juries are incapable --  
24 are capable of making legal errors, as well as factual  
25 errors. They are capable of misunderstanding the

1 instructions. In fact, they are capable of being  
2 misinstructed.

3 Had the judge not granted the directed  
4 verdict here, she presumably would have instructed the  
5 jury the same way, and the jury would have also  
6 acquitted Mr. Evans for the same reason.

7 And so to try and tease out legal and  
8 factual errors, especially when -- and often, there are  
9 mixed questions of fact or law that are at stake here --  
10 I think, is a losing proposition. I think it -- I think  
11 the Court has decided to draw a firm line, recognizing  
12 that an acquittal is special. An acquittal is the most  
13 fundamental thing that can happen.

14 JUSTICE GINSBURG: Could a system say, if  
15 you have Double Jeopardy looming in -- in -- in the  
16 case, then arguments like the one that the defendant  
17 made and the judge bought have to be made pretrial, and  
18 if they are not made pretrial, they are waived. I mean,  
19 here, the -- the -- the case was ongoing when the  
20 defendant made this suggestion, as opposed the system  
21 had built into it a requirement that defendants that are  
22 going to make this kind of plea do it pretrial.

23 MR. MORAN: Justice Ginsburg, I don't think  
24 it would have been right for Mr. Evans to make this  
25 argument pretrial because it was only with the

1 prosecution's proof that it became clear that what the  
2 prosecution was proving was that the building burned  
3 was, in fact, a dwelling house and, therefore, seemed to  
4 be excluded by the statutory language and especially the  
5 commentary to the jury instructions from the definition  
6 of the offense.

7 Michigan is an information state. Michigan  
8 does not require an indictment that lists every -- every  
9 little bit of the crime and all of the details. All  
10 Michigan requires is a very simple statement of the  
11 crime and the statutory citation and, of course, who the  
12 defendant is and the date and venue of the alleged  
13 crime.

14 And so here, Mr. Evans would have had no way  
15 of knowing in advance what the prosecution was going to  
16 prove. That's why this case is unlike Lee. This is --  
17 Lee is an effective indictment. Nobody claims that Mr.  
18 Lee was innocent and that the prosecution couldn't prove  
19 the elements of the crime against Mr. Lee. The problem  
20 was just that the indictment failed to allege a specific  
21 fact. And that --

22 JUSTICE SOTOMAYOR: I'm sorry. I'm a little  
23 confused. It was charged with the crime of burning down  
24 a dwelling, correct?

25 MR. MORAN: Mr. Evans, no. He was charged

1 with burning other real property.

2 JUSTICE SOTOMAYOR: Of?

3 MR. MORAN: Burning other real property.

4 JUSTICE SOTOMAYOR: And no specific statute  
5 was cited?

6 MR. MORAN: Yes.

7 JUSTICE SOTOMAYOR: Which one?

8 MR. MORAN: The -- that -- that statute, I  
9 have --

10 JUSTICE SOTOMAYOR: The dwelling statute,  
11 not the -- not the exception to the dwelling.

12 MR. MORAN: It's the exception to the  
13 dwelling statute. It's -- it's 750.73, which is on page  
14 2 of the top side brief.

15 JUSTICE SOTOMAYOR: That's what he was  
16 charged with?

17 MR. MORAN: Yes.

18 JUSTICE SOTOMAYOR: So why did the court  
19 dismiss, if he was charged with burning down a house? I  
20 thought he was charged with burning down a dwelling, and  
21 the argument was he should have been --

22 MR. MORAN: No.

23 JUSTICE SOTOMAYOR: -- charged with burning  
24 down a house.

25 MR. MORAN: No, he was charged with the



1 crime in 750.7 -- 750.73, which reads, in relevant part,  
2 that, "a person who willfully or maliciously burns any  
3 building or other real property, or the contents  
4 thereof, other than those specified in the next  
5 proceeding subsection" -- "subsection of this chapter."  
6 And the next proceeding section of the chapter is about  
7 burning down dwelling houses.

8 JUSTICE SOTOMAYOR: My only quibble is you  
9 have no doubt -- the defense attorney had no doubt that  
10 he burnt down a house -- that someone burnt down a  
11 house, correct?

12 MR. MORAN: It was -- it was allegedly a  
13 vacant house. And apparently, that's why the  
14 prosecution charged it this way.

15 JUSTICE SOTOMAYOR: Got it.

16 MR. MORAN: So they charged it. They're the  
17 ones who made the choice of which statute to apply.  
18 They, apparently, thought that they couldn't prove that  
19 it was a dwelling house, so they proved the other crime.  
20 And the thinking -- the thinking of the defense attorney  
21 and the thinking of the judge was that these two crimes  
22 were complementary to each other; in other words, that  
23 they did not overlap.

24 It was either a dwelling house or not a  
25 dwelling house, and then one statute or the other

1 applies.

2 As a result of the ruling of the Michigan  
3 Court of Appeals in this case, which is now not  
4 contested, in fact, the burning -- the -- the statute  
5 under which Mr. Evans was charged totally encompasses  
6 the greater crime because any building is covered in the  
7 crime with which Mr. Evans is charged, while only  
8 specific buildings, dwelling houses, are charged in the  
9 arson --

10 JUSTICE SOTOMAYOR: It's a sentencing  
11 enhancement, is really what the argument is -- the  
12 decision was.

13 MR. MORAN: Well, there --

14 JUSTICE SOTOMAYOR: That every -- you can be  
15 charged with burning down a dwelling and you can only  
16 get the enhancement if they prove it's a house.

17 MR. MORAN: You can only get the greater  
18 offense.

19 JUSTICE SOTOMAYOR: Exactly.

20 MR. MORAN: Yes. But the -- a jury would  
21 have to make that determination -- or the judge in a  
22 bench trial would have to make that determination beyond  
23 a reasonable doubt.

24 If there are no further questions, I will  
25 reserve the balance of my time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Mr. Baughman.

3 ORAL ARGUMENT OF TIMOTHY A. BAUGHMAN  
4 ON BEHALF OF THE RESPONDENT

5 MR. BAUGHMAN: Mr. Chief Justice, and may it  
6 please the Court:

7 This trial here was ended before verdict  
8 from a jury on the motion of the defendant, opposed  
9 vigorously by the prosecution, alleging, essentially,  
10 that the crime charged contained an uncharged element on  
11 which insufficient proof had been presented for a  
12 rational factfinder to find guilt beyond a reasonable  
13 doubt; that uncharged element being that the offense be,  
14 for want of a better term, of a -- excuse me -- the  
15 structure be, for want of a better term, a non-dwelling.

16 We had -- that had not been alleged. But it  
17 has been conceded throughout the appellate history of  
18 this case, from the Michigan Court of Appeals on, that  
19 there is no such element in -- in the -- in the crime.

20 The statute that Mr. Moran mentioned, that  
21 refers to the next preceding section, over three decades  
22 ago, was held to be words of limitation; in other words,  
23 you don't have to prove it's a dwelling, to prove that  
24 other real property -- a building or other real property  
25 has been burned.

1           So in the 1970s, it was held the difference  
2 between the two statutes is the greater requires proof  
3 of a dwelling or a habitation; the lesser does not. The  
4 judge held that you have to prove the negative of the  
5 element that enhances the offense, in order to prove the  
6 lesser offense; you have to prove it's a non-dwelling.  
7 And, again, that's been conceded to be error throughout  
8 the entire appellate history here.

9           And so the proofs were adequate -- were  
10 appropriate here, and the charging document was  
11 appropriate here. And the question becomes, on these  
12 facts, does termination of the trial by the judge  
13 constitute an acquittal, so that jeopardy should bar a  
14 second trial?

15           The Jeopardy Clause is aimed at prohibiting  
16 certain governmental abuses that occurred historically.  
17 One of them is when the government would terminate a  
18 trial that was not going well, without the consent of  
19 the defendant, in order to take another shot at it -- to  
20 build a better case or perhaps get a better factfinder.

21           And the Double Jeopardy Clause prohibits  
22 that kind of conduct by establishing, through this  
23 Court's cases, that mistrials without the consent of the  
24 defendant bar retrial, that abhorrent practice is  
25 barred, unless a manifest necessity is shown.

1           And we've even extended that to the  
2     circumstance that, if the judge is intending to help the  
3     defendant, if he is doing something that he believes is  
4     in defendant's favor, if defendant has not consented,  
5     then that valued right to a verdict from the tribunal  
6     that he is before trumps everything.

7           But if there is consent, as there was in  
8     this case -- the defendant asked the judge to terminate  
9     the trial without going to this jury, so he gave up his  
10    valued right to a decision by this tribunal -- if he  
11    does that, then that -- the other side of that coin is,  
12    that is ordinarily outcome-determinative the other way.

13           A retrial is permissible, unless the  
14    government has achieved the first harm by the back door;  
15    that is, by goading the defendant into the mistrial.

16           JUSTICE SCALIA:   So if -- if the judge did  
17    this on her own, that would have been okay?   And there  
18    would be Double Jeopardy attaching?

19           MR. BAUGHMAN:   That's correct.

20           JUSTICE SCALIA:   So we have to decide in  
21    each case whether the defendant was the initiating  
22    source of the error?

23           MR. BAUGHMAN:   In terms of the -- whether or  
24    not a judgment of acquittal was granted, yes, both the  
25    Federal rule and the Michigan rule provide that, on the

1 defendant's motion or on the court's own motion, the  
2 court may grant a directed verdict.

3 JUSTICE SCALIA: What -- what if the  
4 defendant just agrees with the judge? The judge says --  
5 you know, I think this indictment is bad because you --  
6 you have to show that it wasn't a dwelling place, and  
7 the counsel for the Defendant says, yes, that seems like  
8 a good -- a good idea. Is -- is that enough to --

9 MR. BAUGHMAN: I think that would be enough.  
10 I think agreement with the judge's course of action  
11 would be the judge -- would be, as in the mistrial  
12 situation, would be the defendant's --

13 JUSTICE SCALIA: Well, my goodness,  
14 disagreement would be malpractice, wouldn't it?

15 (Laughter.)

16 MR. BAUGHMAN: Well, it -- it depends on  
17 whether you really wish to get a verdict from this jury  
18 or whether you risk having a -- risk -- risk wanting to  
19 have a retrial before a different factfinder. You may  
20 be very happy with --

21 JUSTICE SCALIA: A bird in the hand,  
22 counsel. I -- I --

23 MR. BAUGHMAN: Sometimes, that bird in the  
24 hand can come back and bite you, when you have a second  
25 trial.

1 JUSTICE KAGAN: Mr. Baughman, what would  
2 happen if the defendant asked for improper instructions,  
3 really saying exactly something like this -- you know,  
4 that the jury has to find this additional element that,  
5 in fact, it doesn't have to find? But your theory, I  
6 would think, would say that too, the government could  
7 try the defendant again. After all, the government  
8 didn't get its one fair shot.

9 MR. BAUGHMAN: That -- that's correct. And  
10 that -- that's the logic of Justice Holmes' position in  
11 *Kepner*, and we don't go that far, essentially because  
12 this isn't a jury case. There is a logic to that  
13 position, but it is -- there's --

14 JUSTICE KAGAN: You don't go that far, in  
15 other words, just because it doesn't happen to be this  
16 case.

17 MR. BAUGHMAN: That's correct.

18 JUSTICE KAGAN: But do you concede that the  
19 logic of your position would extend to improperly  
20 instructed juries?

21 MR. BAUGHMAN: It would, to a certain  
22 extent, but it is -- it is cut off by two facts. One is  
23 simply, as -- as Justice Holmes often said, the -- the  
24 life -- an ounce of -- I'm -- excuse me -- an ounce of  
25 logic is often trumped by a pound of history. We have

1 historically said that a verdict by the factfinder, by  
2 the jury, terminates jeopardy, and there is no inquiry  
3 into --

4 JUSTICE KAGAN: Well, we've historically  
5 said it in this context, too. I mean, the cases that  
6 you are asking us to overrule go back 50 years.

7 MR. BAUGHMAN: Well, when I say  
8 historically, I mean back to the time of the founding,  
9 in terms of when the Double Jeopardy Clause was  
10 promulgated and adopted into the Constitution.  
11 Fifty years is not back to when we were determining what  
12 it is we were protecting against when we adopted the  
13 clause.

14 And as I think most of the commentators have  
15 noted, there is very little explanation in Fong Foo as  
16 to how the Court came out where it came out, and there  
17 has been very little explanation since as to how we got  
18 from the common law prohibition of a retrial after  
19 acquittal on the merits by a jury, to a ruling of law by  
20 the judge that no jury could find guilt beyond a  
21 reasonable doubt being the same thing, which is where we  
22 are today.

23 JUSTICE GINSBURG: You cannot necessarily --

24 JUSTICE SCALIA: Well, we didn't have it, at  
25 the time of the founding, any mechanism for a judge to



1 do that. I mean, this -- this is a new procedure, and  
2 how it fit into the prohibition of Double Jeopardy was  
3 certainly a -- an open question.

4           It's not as though this procedure existed at  
5 the time of the founding or in English law before then  
6 and was never adequate to -- to constitute Double  
7 Jeopardy. It's a new procedure introduced, so the  
8 question for the Court was, well -- you know, if it's  
9 the judge rather than the jury that pronounces the  
10 acquittal, does -- does that constitute Double Jeopardy?

11           MR. BAUGHMAN: Well, I think you are exactly  
12 right. It, of course, is a new procedure. It didn't  
13 exist at the time of the founding. So our question then  
14 becomes is this new procedure sufficiently equivalent to  
15 that procedure that is historically protected, that  
16 it's -- that the protections that it is designed to  
17 guard against are served when we bar retrial in these  
18 circumstances?

19           And I think, as Justice Kagan has indicated,  
20 there are many circumstances where what -- what we are  
21 doing is giving the defendant a windfall while serving  
22 no interest that was protected by the Jeopardy Clause.  
23 So if it's to be an analog, then we need to see does it  
24 really closely approximate a retrial after acquittal on  
25 the merits by a jury --

1 JUSTICE KAGAN: But the point I was making  
2 was that the same windfall is received by the defendant  
3 that gets an acquittal from an improperly instructed  
4 jury.

5 MR. BAUGHMAN: But -- that is true, except  
6 we -- we could speculate that's -- that's true, but we  
7 don't know why the jury came back the way it did. The  
8 jury may have acquitted for an entirely different  
9 reason. We don't know. We don't have special verdicts,  
10 and we don't have any mechanism for inquiring, so we  
11 treat -- you have to have a line somewhere. Jeopardy  
12 terminates with the jury verdict, which may have been  
13 misinstructed, but we don't know why they came out the  
14 way they did.

15 If they --

16 JUSTICE BREYER: Now -- now, I take it  
17 you -- you -- you agree that sometimes the  
18 prosecution -- I'm not saying anyone would -- but  
19 they -- the defendant's acquitted by the jury so --  
20 because he doesn't find -- they don't find enough  
21 evidence, and so the prosecutor thinks, I think I'd like  
22 to try him again, and then he's acquitted again. I'd  
23 like to try him again, and he's acquitted again.

24 Now, substitute judge for jury, the same  
25 thing could happen. I mean, I don't see why not. And

1 there's no answer to that, is there? And if there's no  
2 answer to that, the same bad thing could happen. Well,  
3 then you're going to have to start distinguishing among  
4 which judge or jury acquittals do or do not invoke the  
5 problem of the Double Jeopardy Clause.

6 And where I'm driving is that -- that there  
7 is a principle, and the principle was -- it seems the  
8 simplest way to put it, is where in fact the acquittal  
9 rests upon a judgment that there isn't enough evidence,  
10 that's it. That's what we're after. And where it's  
11 some procedural thing or not, maybe we aren't. Okay.

12 Now, the virtue of that is it's simple, it's  
13 consistent with the cases, it's been clear. And you're  
14 advocating, let's go into that and change it or at least  
15 interpret the cases that's consistent with it. And  
16 we're saying there wasn't enough evidence, is because  
17 the judge had in mind a legal point that he was wrong  
18 about, then Double Jeopardy Clause doesn't work. But if  
19 the judge was right, it does work. Well, except for the  
20 matter of substantive evidence. Now, that way, as your  
21 opponent, lies a mess.

22 I just went through that long thing because  
23 I don't want you to get -- sit down without addressing  
24 what I see as a central problem, namely, if we don't  
25 accept his view, it's going to be a terrible mess.

1           MR. BAUGHMAN: Well, let me say two things.  
2 One is we don't -- we don't have the circumstance that  
3 existed at the common law that the Jeopardy Clause was  
4 designed to protect against of the executive simply  
5 saying, after an acquittal by the factfinder, let's try  
6 him again, let's try him again, let's try him again.

7           Something has to happen in-between there,  
8 and that is that a court has to determine -- neutral and  
9 detached arbiters have to determine that what happened  
10 when the judge granted the directed verdict of  
11 acquittal, as it's known in Michigan, was not that at  
12 all.

13           The judge actually did something different.  
14 And if the court doesn't interpose on the prosecution's  
15 request, there will be no retrial. So it's not the  
16 harassment and abusive practice of simply starting a new  
17 prosecution, we're trying to get what happened in  
18 that --

19           JUSTICE BREYER: Now, you're beginning to  
20 make distinctions.

21           MR. BAUGHMAN: Yes.

22           JUSTICE BREYER: And once you make those  
23 distinctions, I go back to the question I asked, which  
24 was there is a distinction. The distinction is whether  
25 it's a procedural ground or -- and Justice Harlan's --

1 it's whether there was -- "Just talk to the U.S.  
2 attorney, I didn't like it," or "Talk to the witness,"  
3 or "The prosecution brought too late."

4 The other side of it, where the clause  
5 attaches, is where it was done on a substantive basis,  
6 not enough evidence. I said -- I don't want to repeat  
7 myself, but I'm saying what he's coming up with is a  
8 simple, clear rule, basically consistent with the cases,  
9 and why shouldn't we follow it?

10 MR. BAUGHMAN: Well, I think -- I think  
11 consistent with the cases, and also clear, is to apply  
12 Martin Linen Supply by the very terms that it uses; that  
13 is, the resolution that we're talking about the judge  
14 making is moored to something. It's moored to the  
15 elements of the crime. We're talking about somebody  
16 being twice tried for the same offense. How do we  
17 define offense in the law?

18 In other Double Jeopardy cases, this Court  
19 has taken an elements approach. Two -- two offenses  
20 are -- are different if one requires proof of an  
21 element, the other does not. We look to the elements.  
22 And to direct a jury trial, this Court has been very  
23 active very recently in determining how is it that we  
24 determine when somebody has a right to a jury trial on  
25 some fact before punishment can be imposed? We look to

1 what are the elements that have to be proven beyond a  
2 reasonable doubt.

3           If a fact is necessary to -- to -- in order  
4 for punishment to be imposed, if that has to be proven,  
5 then it is a matter for jury trial and it has to be  
6 proven beyond a reasonable doubt. So when this Court  
7 said one or more of the factual elements of the offense  
8 in *Martin Linen Supply*, I took it to mean -- and I have  
9 always taken it to mean -- one or more of the factual  
10 elements. And we can identify what those are. We have  
11 to identify them in every case.

12           This is not a -- a strange process you have  
13 to instruct on them, determine what they are and use  
14 those --

15           JUSTICE ALITO: If the judge -- if the judge  
16 simply misinterprets one of the elements, but doesn't  
17 add a new element, you say that there would be Double  
18 Jeopardy there, right?

19           MR. BAUGHMAN: Yes.

20           JUSTICE ALITO: Isn't that going to be a  
21 very difficult line to draw?

22           MR. BAUGHMAN: It can be a very difficult  
23 line to draw, but all tests can sometimes involve  
24 difficult lines to draw. We used to have a no evidence  
25 test for whether evidence was sufficient and we -- that

1 was changed in Jackson v. Virginia, to whether a  
2 reasonable juror could find guilt beyond a reasonable  
3 doubt.

4 And you will find a great many dissents in  
5 cases between appellate judges on whether or not this  
6 case itself involved sufficient proof for a jury to find  
7 guilt beyond a reasonable doubt. The test is not always  
8 easily -- easily applicable. And neither was the no  
9 evidence test. So there might be some --

10 JUSTICE ALITO: Let me give you an example.  
11 Suppose the -- a statute makes it a crime to burn down a  
12 dwelling, and the judge interprets dwelling to mean a  
13 building that is currently lived in and, therefore, not  
14 including a vacation home. And let's assume that's an  
15 incorrect interpretation.

16 Now, is that an incorrect interpretation?  
17 Or is that the addition of a new element to the statute,  
18 namely, that it is a building in which people -- that's  
19 one element, and the other is people are currently  
20 living there?

21 MR. BAUGHMAN: I -- I would define -- I  
22 would draw the line at any time the court requires the  
23 prosecution to prove a fact that, under the law passed  
24 by the legislature, the prosecution never has to prove  
25 in order to make out the case.

1 JUSTICE SCALIA: Well, that's every  
2 misinterpretation. I mean, I don't know why this case  
3 doesn't involve simply a misinterpretation of what the  
4 elements of the crime are. I mean, any  
5 misinterpretation, you can -- which goes beyond the  
6 minimum that the -- that the statute requires, can be  
7 recharacterized as adding an additional element.

8 MR. BAUGHMAN: Well, it does involve a -- a  
9 mischaracterization of what the elements were, but not  
10 of an element. The judge didn't here say, you can't  
11 prove that this is a building, unless it was a dwelling,  
12 you can't prove it was real property unless it was a  
13 dwelling.

14 The judge said, you have -- you can prove  
15 those things, and it's not enough, you also have to  
16 prove that it was a non-dwelling in this case.

17 JUSTICE KAGAN: But in several of our cases,  
18 what the court has done wrong is to make the prosecution  
19 prove additional facts in order to prove an element. So  
20 the distinction that you're drawing is one between  
21 incorrectly making the prosecution prove additional  
22 facts and incorrectly saying that the prosecution has to  
23 show an additional element. And I guess I just don't  
24 understand that distinction.

25 MR. BAUGHMAN: Well, I would suggest that



1 this is an opportunity for this Court to draw the line  
2 at does -- does the judge require -- has the judge  
3 required the prosecution to prove something the statute  
4 doesn't require to be proven, it's not one of the  
5 factual elements of the offense.

6 Or has the judge -- the error the judge can  
7 make under Martin Linen Supply -- has the judge simply  
8 misassessed the evidence? The judge has looked at it  
9 and said -- you know, I -- I understand all your proofs,  
10 I'm looking at them, and they're just not enough for a  
11 reasonable juror to find guilt --

12 JUSTICE KAGAN: Well, if I understand your  
13 test correctly, under your test, Rumsey, Smalis, and  
14 Smith would all have come out differently.

15 MR. BAUGHMAN: No, I don't think so. Rumsey  
16 is -- is a difficult case, but Rumsey is a verdict case.  
17 Rumsey is not a directed verdict case. The judge in  
18 Rumsey was the factfinder. Rumsey is your bench trial.  
19 It's -- it's -- it's complicated because it was a  
20 sentencing case -- a death penalty sentencing case that  
21 this Court treats the hearing the same as the trial for  
22 Double Jeopardy purposes.

23 But the judge was the factfinder, and it was  
24 more like a misinstructed jury. The judge himself --

25 JUSTICE SCALIA: So you're saying that

1 your -- your approach doesn't solve the bench trial  
2 problem any more than your friend's approach, right?

3 MR. BAUGHMAN: A verdict is a verdict, I  
4 agree with Mr. Moran. When the judge on the merits  
5 returns a verdict, what the judge does or the jury does  
6 in returning a verdict on the merits is very different  
7 when what the judge does on a judgment of acquittal.

8 The jury weighs credibility and assesses the  
9 weight of evidence, and the judge is prohibited from  
10 doing those things -- is supposed to be by the law, in  
11 making his decision. His is the ruling of law as  
12 gatekeeper, that -- that we won't even reach this  
13 decision.

14 The jury is expressing its opinion based on  
15 the evidence. And although it can be proven that  
16 they've reached a result contrary to reality, they can't  
17 be right or wrong. Legally, their opinion is their  
18 opinion of those 12 collective people after doing  
19 something the judge isn't allowed to do.

20 So the directed verdict isn't, I don't  
21 think, a perfect analog to the jury trial. But the  
22 bench trial issue gets very complicated because it is  
23 possible to do something with a bench trial that we  
24 don't do with jury trials, and that is have specific  
25 factfinding as to the elements. Many jurisdictions do.

1           There is, in fact, a case -- the Lynch case  
2   that Mr. Moran cited, where, on rehearing en banc, the  
3   court split evenly as to whether or not the judge's  
4   verdict, where the judge had actually specifically found  
5   all of the elements -- the crime is elements A, B, and  
6   C, I find them; I don't find element B, so I acquit --  
7   the court split five to five on rehearing en banc and  
8   whether or not that judge had really announced two  
9   verdicts and it could be reformed -- be reformed to a  
10  conviction.

11           And Justice Sotomayor was one of the members  
12  of the five who would have addressed the question of, is  
13  that not different? The form of the language doesn't  
14  control. Has not the judge actually entered a guilty  
15  verdict in that circumstance?

16           That's a very -- you know, kind of  
17  off-the-beaten-track kind of a situation. In a jury  
18  trial, where a judge simply takes the case from the jury  
19  on the motion of the defendant and resolves the fact  
20  that the legislature has not said that one needs to be  
21  proven, that is not one of the constituent parts of the  
22  crime, that is not something that need be proven to  
23  impose punishment under the law, then he's done  
24  something very different than what the jury has done.

25           And to reverse that and allow the

1 prosecution to have one full and fair opportunity, we  
2 believe imposes no cruelty or oppression upon the  
3 defendant.

4 Thank you very much.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Gannon.

7 ORAL ARGUMENT OF CURTIS F. GANNON,

8 FOR UNITED STATES, AS AMICUS CURIAE,

9 SUPPORTING THE RESPONDENT

10 MR. GANNON: Mr. Chief Justice, and may it  
11 please the Court:

12 We believe the Court can resolve this case  
13 by distinguishing between the misconstruction of an  
14 element and the erroneous addition of an element to the  
15 case. But if the Court's unwilling to draw that  
16 particular distinction, it could also resolve the case  
17 by allowing the government to appeal in both of those  
18 instances. This goes to the question that Justice Kagan  
19 was asking near the end of my friend's argument.

20 We don't think that that would require  
21 overruling any of the Court's cases. We think it would  
22 require narrowing Smalis and Rumsey to their facts,  
23 and -- and -- but Smith would not be a problem in that  
24 context.

25 Rumsey is distinct for the reason that my

1 friend suggested. It was actually a case involving  
2 factfindings by the judge. The Court characterized it  
3 as a special verdict made by the sole decisionmaker  
4 there. It was not an instance like this, where the  
5 judge had taken the case away, as a matter of law, from  
6 the jury because there wouldn't be any sufficient  
7 evidence. It has been cited later on in this cases, in  
8 particular, in Smalis, as being about something like a  
9 sufficiency decision, but on its facts, that's not what  
10 it was.

11           Smith is about a completely separate  
12 question because there is no dispute there about the  
13 appropriate construction of the element. The firearms  
14 offense there, the element in question was whether the  
15 barrel length was less than 13 inches. There was a  
16 question about whether certain evidence that the firearm  
17 in question was a pistol was sufficient to satisfy that  
18 burden, but there was no doubt about what the -- what  
19 the element was. It was 13 inches or less. And so it  
20 wasn't about misconstruing the element.

21           Smalis is probably the hardest case in this  
22 context, but if you look at what actually happened in  
23 Smalis and what was at issue in the demurrer there, the  
24 decision that the Court was reviewing was one that was  
25 principally about whether there was sufficient evidence

1 of causation, which was an undisputed element of each of  
2 the counts at issue there, and only in footnote 7 of the  
3 Court's opinion did it address potential misconstruction  
4 of the element.

5 And it was a different element. This was  
6 what my -- my friend Mr. Moran mentioned --

7 JUSTICE BREYER: Let's go through this. My  
8 basic question: Normally, a judge will wait till the  
9 jury comes in and then decide, if the jury convicts him,  
10 whether to set it aside. So there's no problem. So  
11 now, we have the judge -- for some reason or other, this  
12 judge has decided to grant the motion of acquittal in  
13 the middle of the case.

14 Now, this is unusual, I think -- I hope.  
15 And if so, though, the judge might not think of writing  
16 down his reasons. So he might just say there isn't  
17 enough evidence. And now, it happens that, just before  
18 he did that, the defense lawyer argued to him an  
19 erroneous theory. All right. An added element or  
20 something or other, some kind of misconstruction of  
21 this. What happens then?

22 MR. GANNON: Well, I think that we -- we  
23 normally expect judges to give reasons for their  
24 decisions.

25 JUSTICE BREYER: Yes. But this a judge,

1 after all, who for some reason -- we don't know what --  
2 decided, instead of waiting, as they normally would do,  
3 grant it in the middle of the case.

4 MR. GANNON: Well, in the -- in the State of  
5 Michigan, the rule does not permit the judge to reserve  
6 the ruling on this motion.

7 JUSTICE BREYER: Oh, I see. So there are a  
8 lot more places --

9 MS. GANNON: So -- and actually, in the vast  
10 majority of states --

11 JUSTICE BREYER: They do. They --

12 MR. GANNON: -- that's the rule. The  
13 Federal rule was only changed in 1994, to allow this  
14 type of --

15 JUSTICE BREYER: And then this is a --

16 MS. GANNON: -- decision to be reserved  
17 after trial.

18 JUSTICE BREYER: This has arisen a lot more  
19 than -- than I think.

20 All right. Fine. Thank you.

21 MS. GANNON: And in fact, in the Federal  
22 context --

23 JUSTICE BREYER: And in that case, do they  
24 have to write it down?

25 MR. GANNON: Well, I -- I think that the

1 rule in Michigan, and in the Federal Rule 29, does  
2 require the judge to make a determination of -- to  
3 satisfy that -- that there's an acquittal, which would  
4 mean that there is no -- no sufficient evidence to -- to  
5 support a guilty --

6 JUSTICE SOTOMAYOR: But many states have a  
7 different rule.

8 MR. GANNON: Many -- many states --

9 JUSTICE SOTOMAYOR: And many states permit  
10 the judge to reserve it till after the jury verdict.

11 MR. GANNON: My -- my understanding is that  
12 most states do not permit that. The Federal government  
13 only started permitting that in 1994, and even the last  
14 time the Justice Department studied this, about ten  
15 years ago, it concluded that, notwithstanding the 1994  
16 rule amendment in the Federal rules, which came with  
17 advisory committee notes, strongly encouraging judges to  
18 reserve these sorts of decisions precisely to preserve  
19 the public's interest. So notwithstanding --

20 JUSTICE BREYER: So then, in other words,  
21 when an acquittal --

22 JUSTICE SCALIA: Finish the sentence.  
23 Notwithstanding that, what?

24 MR. GANNON: Notwithstanding that, in  
25 approximately 70 percent of the cases in which there are



1 Rule 29 verdicts, they are done mid-trial, even in the  
2 Federal system, at least in the early 2000s, is the only  
3 data collection that I'm aware of.

4           And so this -- this still is a problem. I  
5 think that if -- if it looks like the decision is based  
6 on classic insufficiency of the evidence and there is no  
7 argument about whether it was -- it's based on a  
8 misconstruction or an erroneous addition of the  
9 elements, then we -- we would have to be -- we would  
10 lose, unless the Court's willing to overturn the broader  
11 line of cases in *Martin Linens*, *Sanabria*, *Scott*, and the  
12 other cases that were --

13           JUSTICE BREYER: Can you add to that -- your  
14 -- just your idea of what the empirical situation is in  
15 the last 30 or 40 years? Have most U.S. prosecutors or  
16 prosecutors in these states thought that they could  
17 appeal an acquittal on the -- in the middle of the trial  
18 on the ground that the judge made a mistake of law?

19           MR. GANNON: I don't think that they -- they  
20 have mostly thought that, but the Federal government  
21 certainly has maintained that that -- that that is  
22 appropriate. In -- we think that in the *Maker* decision  
23 in the Third Circuit in 1984 recognized this.

24           We do think that there is -- my -- my friend  
25 Mr. Moran asks the Court to conclude that any decision

1 like this, that is predicated upon a supposed erroneous  
2 addition of an element, could easily be recharacterized  
3 as a misconstruction of another element.

4           And I think that -- that while, at some  
5 formal level, that -- that that might be theoretically  
6 true, in an egregious case like this, there is a  
7 distinction, which is that if -- if this were an element  
8 of the offense that needed to be charged in the  
9 indictment -- at least in the Federal system, then the  
10 failure to have alleged that the structure here was a  
11 non-dwelling would have made the indictment invalid.

12           And the Defendant would have been able to  
13 make exactly the same legal argument he made to the  
14 judge here, which is to say that the prosecution has  
15 failed to prove -- has failed even to allege one of the  
16 necessary elements of the offense, which is that this  
17 structure is not a dwelling. We know that that  
18 particular --

19           JUSTICE GINSBURG: Mr. Gannon, if we -- if  
20 we adopt your rule, it -- it can't be for this case  
21 only. And I -- I think this characterization,  
22 nonexistent element -- or a court's misconstruction of  
23 an element, I think, in many cases, you could do -- call  
24 it one or call it the other, so that -- that's a  
25 difficult line to -- to adopt.

1           MR. GANNON: Well, I don't think it's  
2 difficult, in the sense that most -- most of the cases  
3 that we are talking about don't involve this type of  
4 error. The cases that this Court has decided, Rumsey,  
5 Smalis, and Smith, even the Petitioner doesn't  
6 characterize this case as involving additional elements.

7           And this Court has recognized, in Lee, that  
8 when the error is one that kept the indictment from  
9 being valid because it failed to charge a relevant  
10 element and the judge did not rule on that until after  
11 jeopardy attached, the government was still entitled to  
12 appeal that decision, and if it were erroneous -- the  
13 government's only going to get a chance at retrial if  
14 the judge's decision was legally erroneous, then,  
15 therefore, it demonstrates that there was no so-called  
16 acquittal on the -- on the offense charged --

17           JUSTICE SOTOMAYOR: Counsel, you gave us  
18 earlier the statistics of how many judges grant Rule 29  
19 motions in trial. I think you said 76 percent. What's  
20 the gross number, relative to the number of actual  
21 verdict decisions by juries or the judge himself?

22           MR. GANNON: The only data that I have seen  
23 about this is data that the Justice Department collected  
24 about ten years ago. It was from the early 2000s.  
25 And -- and the conclusion there was that there were

1 approximately 73 pretrial Rule 29 dismissals per year --

2 JUSTICE SOTOMAYOR: Out of what number?

3 MS. GANNON: -- which actually is a larger  
4 number than you -- than you might at first think,  
5 because that represents about ten percent of the number  
6 of cases that were actually resolved by jury verdicts.  
7 And so it -- it is not uncommon.

8 I mean, this particular type of error that  
9 we have in this case, we think, is the most egregious  
10 kind, the non-existent element error, which -- which the  
11 government had also pointed out in its amicus brief in  
12 Smalis, we think is the most egregious kind of error.  
13 It's one that demonstrates that the court is engaging  
14 in -- it's usurping the province of the legislature in  
15 redefining the scope of the offense.

16 And we think, under the terms of the Double  
17 Jeopardy Clause itself, which talks about whether  
18 there's been -- somebody's been subject to being twice  
19 in jeopardy for the same offense -- then it -- it  
20 matters what the offense was.

21 And when the judge has redefined the -- the  
22 crime so extensively that the indictment literally would  
23 have been invalid and could have been dismissed as not  
24 adequately alleging the elements of the offense, and we  
25 know that that is something that the government would

1 have been able to appeal.

2 We also know that the government would be  
3 able to appeal if the judge had reserved decision until  
4 after the jury had returned a jury -- a guilty verdict.

5 We acknowledge, as the state does, that jury  
6 verdicts are different. If a jury is misinstructed and  
7 a jury returns an acquittal, that we are not quarrelling  
8 with that in any way. We don't think there's any  
9 purchase in the Court's case law to do that. And I  
10 think one of the reasons is because the jury verdict  
11 might be attributable, not just to mistake or error, but  
12 also to lenity or compromise.

13 There -- there are lots of reasons why we  
14 don't exactly know why a jury did what it did, and why  
15 juries generally enter general verdicts. And that makes  
16 it different from what we have here. We have here an  
17 instance where the court, as a matter of law, at the  
18 defendant's behest, took the case away from the jury.  
19 We think the fact that the defendants chose --

20 JUSTICE SCALIA: Is that important, "at  
21 defendant's behest"?

22 MR. GANNON: We do think that that's  
23 important by analogy to the Court's mistrial cases in  
24 the Double Jeopardy Clause context.

25 JUSTICE SCALIA: So you -- you're arguing

1 that this should only -- only be -- this rule should  
2 only be applied when the defendant asks for it?

3 MR. GANNON: Or if the defendant consents to  
4 it, as is the case in the mistrial cases in the Double  
5 Jeopardy context.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
7 Mr. Moran, you have five minutes.

8 REBUTTAL ARGUMENT OF DAVID A. MORAN

9 ON BEHALF OF THE PETITIONER

10 MR. MORAN: Thank you, Mr. Chief Justice.

11 Responding to Mr. Gannon's argument first, I  
12 do characterize Rumsey as an additional element case.  
13 And I also characterize it as a misconstrued element  
14 case. It's a perfect example of how these cases can be  
15 construed either way.

16 The judge required a contract. You can call  
17 that an additional element to the aggravating  
18 circumstance, or you can call it as a misconstruction of  
19 what pecuniary gain means in the first place.

20 The same here, the error here can be  
21 construed as a misconstruction of the element that the  
22 property burned has to be a building, and the judge  
23 says, looking at the statute, I construe that to mean a  
24 particular type of building. Or it can be, as the  
25 prosecution construed it, as the addition of an element.

1 There is no difference between the two  
2 characterizations.

3           Turning to the -- the broader question about  
4 this whole line of cases and should this Court go back  
5 and revisit this whole line of cases, is there really a  
6 problem here? We have no amicus briefs from any states  
7 indicating that there's a problem. We have only the  
8 amicus from the United States saying that there's a  
9 problem.

10           Is there a problem here that justifies going  
11 back and revisiting 50 years -- or possibly 108 years,  
12 all the way back to Kepner -- all of this case law? We  
13 submit not, especially since, as this Court noted just  
14 six years ago in Smith, there is an easy solution if  
15 there really is a problem.

16           If there really is a problem with judges  
17 going wild and granting directed verdicts mid-trial for  
18 no apparent reason, all that has to be done is the  
19 states can fall into that, as we can say, judges can't  
20 do that, or judges as an intermediate -- states as an  
21 intermediate step could at least give judges the power  
22 to reserve that decision --

23           JUSTICE KENNEDY: Have any states done that?  
24 I -- I'm somewhat concerned about telling a judge that,  
25 if the judge's best judgment says there's insufficient

1 evidence, that then it has to proceed with a trial.

2 MR. MORAN: I would be, too,  
3 Justice Kennedy. I think it would be a mistake.

4 I'm not aware of any state, since this  
5 decision -- since this Court's decision in Smith -- that  
6 have followed Nevada's lead. There are good reasons to  
7 give judges this acquittal power, namely, preserve the  
8 state's resources, preserve the jury's time, and  
9 present -- and prevent the defendant from having to go  
10 through a trial that is going nowhere.

11 And so there are good reasons why states  
12 don't do this. States have apparently made the  
13 decision, even after being alerted in Smith, that  
14 there's something they can do about it, that the good of  
15 giving judges this mid-trial directed verdict acquittal  
16 power outweighs the bad.

17 Finally, I'd just like to respond to  
18 Mr. Baughman's point, and it was also raised by  
19 Mr. Gannon, about how jury verdicts are different.  
20 There's something special about jury verdicts because we  
21 don't always know why they granted the verdict.

22 But we have the same problem with judicial  
23 directed verdicts. And we have Martin Linen, where the  
24 judge just says, this is the weakest case I -- I have  
25 ever seen. We have Smalis, where he just says, it's



1     legally insufficient.

2                     If the Court adopts the line that the  
3     prosecution and -- and the Solicitor General would have  
4     you adopt, you're going to have to require judges to  
5     give very specific findings as to what the elements of  
6     the offense are and which ones that they -- they don't  
7     find. And that, itself, would require a radical  
8     reworking of this Court's jurisprudence.

9                     If there are no further questions?

10                    CHIEF JUSTICE ROBERTS: Thank you, counsel.

11                    MR. MORAN: Thank you, Mr. Chief Justice.

12                    CHIEF JUSTICE ROBERTS: The case is  
13     submitted.

14                    (Whereupon, at 12:00 p.m., the case in the  
15     above-entitled matter was submitted.)

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