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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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<p style="text-align: center;">A</p> <p>abhorrent 28:24 able 13:25 50:12 53:1,3 abolish 9:9 above-entitled 1:11 57:15 abuses 28:16 abusive 36:16 accept 5:7 21:20 21:22 35:25 achieved 29:14 acknowledge 53:5 acquit 8:16 43:6 acquits 8:17 acquittal 3:13 3:17 4:22 5:6 7:12,13 11:17 12:2 13:14,16 13:24 14:6,17 14:19,22 15:9 16:2 17:13 21:21,21 22:12 22:12 28:13 29:24 32:19 33:10,24 34:3 35:8 36:5,11 42:7 46:12 48:3,21 49:17 51:16 53:7 56:7,15 acquittals 6:11 6:13,14 9:8 16:24 35:4 acquitted 19:9 22:6 34:8,19 34:22,23 acquitting 12:5 action 14:3 30:10 active 37:23 actors 21:22,23 actual 51:20 add 38:17 49:13 added 16:13 46:19</p>	<p>adding 40:7 addition 39:17 44:14 49:8 50:2 54:25 additional 31:4 40:7,19,21,23 51:6 54:12,17 address 46:3 addressed 43:12 addressing 35:23 adequate 28:9 33:6 adequately 52:24 adheres 5:3 administer 12:24 13:1 adopt 50:20,25 57:4 adopted 18:20 32:10,12 adopts 57:2 advance 23:15 adversaries 19:15 adversary 6:8 advisory 48:17 advocating 35:14 affirmative 14:20,23 15:5 aggravating 54:17 aggrieved 6:20 ago 27:22 48:15 51:24 55:14 agree 34:17 42:4 agreement 30:10 agrees 30:4 aimed 28:15 alerted 56:13 ALITO 11:15 11:22 12:7,13 13:11 14:1,12 38:15,20 39:10</p>	<p>allege 23:20 50:15 alleged 23:12 27:16 50:10 allegedly 25:12 alleging 27:9 52:24 allow 43:25 47:13 allowed 42:19 allowing 8:19,19 44:17 allows 15:14 amendment 48:16 amicus 1:21 2:10 44:8 52:11 55:6,8 analog 33:23 42:21 analogy 53:23 angels 13:8 Ann 1:15 announced 43:8 answer 13:13,13 14:7 15:7 35:1 35:2 anxiety 20:23 apparent 55:18 apparently 18:7 25:13,18 56:12 appeal 11:9 15:20 16:10 44:17 49:17 51:12 53:1,3 appealed 11:2 appeals 6:20 7:10 15:10,15 26:3 27:18 APPEARAN... 1:14 appearing 19:15 appellate 7:4 8:19 13:25 14:22 16:11 27:17 28:8 39:5</p>	<p>apple 18:23 applicable 20:8 39:8 applied 54:2 applies 26:1 apply 21:17 25:17 37:11 applying 4:10 approach 37:19 42:1,2 appropriate 28:10,11 45:13 49:22 approximate 33:24 approximately 48:25 52:1 arbiter 10:5 arbiters 36:9 Arbor 1:15 argue 16:19 21:1 argued 46:18 arguing 5:23 6:1 53:25 argument 1:12 2:2,5,8,12 3:3 3:6 9:5,13 11:24 14:2,13 21:9,14,19 22:25 24:21 26:11 27:3 44:7,19 49:7 50:13 54:8,11 arguments 16:23 22:16 arisen 47:18 arises 20:23 arson 26:9 aside 7:20,23 9:21 46:10 asked 29:8 31:2 36:23 asking 32:6 44:19 asks 49:25 54:2 assesses 42:8</p>	<p>Assistant 1:19 assume 39:14 assuming 14:12 18:23 attached 8:6 17:15 51:11 attaches 7:21,24 37:5 attaching 29:18 attempt 12:18 13:1 attempted 7:4 attorney 17:11 25:9,20 37:2 attributable 53:11 AUSA 17:24 aware 10:12,13 49:3 56:4 a.m 1:13 3:2</p> <hr/> <p style="text-align: center;">B</p> <p>B 43:5,6 back 7:15 13:12 13:18 14:1 17:2 20:13,19 29:14 30:24 32:6,8,11 34:7 36:23 55:4,11 55:12 bad 13:4 30:5 35:2 56:16 balance 26:25 banc 43:2,7 bar 28:13,24 33:17 barred 28:25 barrel 45:15 based 13:14 42:14 49:5,7 basic 46:8 basically 37:8 basis 37:5 Baughman 1:17 2:6 27:2,3,5 29:19,23 30:9 30:16,23 31:1</p>
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