No. 11-1327

In The
Supreme Court of the United States

LAMAR EVANS,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Supreme Court

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Does the Double Jeopardy Clause bar retrial after the trial judge erroneously holds a particular fact to be an element of the offense and then grants a midtrial directed verdict of acquittal because the prosecution failed to prove that fact?

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The March 26, 2012, opinion of the Michigan Supreme Court is published as *People v. Evans*, 810 N.W.2d 535 (Mich. 2012). App. 1.[1] The May 13, 2010, opinion of the Michigan Court of Appeals is published as *People v. Evans*, 794 N.W.2d 848 (Mich. Ct. App. 2010). App. 45. The February 23, 2009, Wayne County Circuit Court order granting Petitioner's motion for a directed verdict of acquittal is unpublished. App. 72.

JURISDICTION

The Michigan Supreme Court's judgment was issued on March 26, 2012. Petitioner filed a timely petition for a writ of certiorari on May 2, 2012, and this Court granted the petition on June 11, 2012.

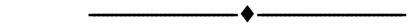
Because the Michigan Supreme Court's decision would subject Petitioner to a second trial over his Double Jeopardy Clause objection, that decision is a final judgment subject to review under 28 U.S.C. § 1257. *See Smalis v. Pennsylvania*, 476 U.S. 140, 143 n. 4 (1986); *Abney v. United States*, 431 U.S. 651, 661-62 (1977).

[1] "App." refers to the appendix to the Petition for Writ of Certiorari. The Court granted a motion to dispense with the printing of a joint appendix.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amend. V (Double Jeopardy Clause):

. . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .



STATEMENT

On September 22, 2008, two Detroit police officers observed a vacant house on fire and, a short time later, arrested Petitioner Lamar Evans nearby. App. 3. According to the officers, Mr. Evans was carrying a can of gasoline when they first spotted him, and he made an incriminating statement after he was detained. *Id.*

Petitioner was charged with "burning other real property" in violation of Mich. Comp. Laws § 750.73:

> Any person who wilfully or maliciously burns any building or other real property, or the contents thereof, other than those specified in the next preceding section of this chapter, the property of himself or another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 10 years.

The referenced "next preceding section," Mich. Comp. Laws § 750.72, prohibits wilfully or maliciously burning "any dwelling house, either occupied or unoccupied, or the contents thereof," and provides a maximum sentence of 20 years imprisonment.

Petitioner's jury trial took place in the Wayne County Circuit Court in February 2009. At the close of the prosecution's case, Petitioner's counsel moved for a directed verdict of acquittal. App. 63-67. Counsel observed that the standard jury instruction for "burning other real property," Mich. Crim. Jury Inst. 2d 31.3, included an element that the burned building not be a dwelling house. App. 63, 65, 67. Counsel then pointed out that two witnesses had testified for the prosecution that the house was inhabited. App. 63-64. Therefore, counsel continued, the burned house was excluded from the definition of "other real property" because "the only evidence in this case is that this was an occupied dwelling, or that it was capable of being lived in." App. 65. The prosecutor responded that she did not believe the statute required the prosecution to prove that the burned property was not a dwelling. App. 68.

After hearing argument from both sides, the trial judge reviewed the standard jury instruction and commented that all of the listed elements appeared to be mandatory. App. 68. The judge next quoted from the official commentary to the instruction: "This offense is similar to the one described in CJI 2d § 31.2, except that an essential element is that the structure burned is *not* a dwelling house." App. 69 (quoting commentary to Mich. Crim. Jury Inst. 2d § 31.3; emphasis in original). The trial judge then observed that the statutory definition of the offense also specifically excluded the kind of property "specified in the next preceding section," i.e., dwelling houses. App. 70.

Having determined that the statute required proof that the burned property was not a dwelling house, the judge turned to the prosecution's evidence: "The testimony was this was a dwelling house, paid for for forty-some-odd thousand dollars. That the folks had moved some stuff into it, even though it doesn't matter." App. 71. Accordingly, the judge granted Petitioner's motion for a directed verdict of acquittal. *Id.* the judge confirmed her oral decision with a written order granting "the Motion for Directed Verdict of Acquittal." App. 72.

Respondent filed an appeal to the Michigan Court of Appeals. That court reversed the directed verdict and ordered a new trial. App. 45.

The appellate court first concluded that the trial judge erred in holding that the prosecution was required to prove that the building burned was not a dwelling house. App. 51-52 & n. 2.[2] The appellate court then rejected Petitioner's argument that the Double Jeopardy Clause barred a retrial. App. 53-62.

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[2] As the appellate court observed, the trial judge had apparently missed the "use note" accompanying the standard jury instruction directing that the fourth element should only be read to the jury when burning other real property is charged as a lesser included offense. App. 48 n. 1. The fourth element was removed from the standard jury instruction in September 2009, after Petitioner's trial. App. 52 n. 3. The commentary to the jury instruction on which the trial judge relied ("that an essential element [of burning other real property] is that the structure burned is *not* a dwelling house") was also removed at the same time.

Petitioner filed an application for leave to appeal to the Michigan Supreme Court in which he argued that the Double Jeopardy Clause barred a retrial. That court granted review and affirmed in a four-to-three decision. App. 1.

The Michigan Supreme Court majority held "that when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred." App. 2.

The majority found support for this holding from the definition of a directed verdict of acquittal set forth in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), as a "ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." App. 12. According to the majority, "the United States Supreme Court has not directly considered the related question at issue here regarding whether a trial court's acquittal on a criminal charge based on insufficient evidence bars retrial if the trial court erroneously added an extraneous element to the charge." App. 13.

The majority acknowledged that this Court had held in *Arizona v. Rumsey*, 467 U.S. 203 (1984); *Smalis v. Pennsylvania*, 476 U.S. 140 (1986); and *Smith v. Massachusetts*, 543 U.S. 462 (2005), that directed verdicts of acquittal were final for purposes of the Double Jeopardy Clause even though those

acquittals "were based on the prosecution's failure to prove something that the law did not actually require it to prove." App. 17 n. 39. But, according to the majority, all of those cases are distinguishable because "the trial courts in *Rumsey*, *Smalis*, and *Smith* resolved one of the factual elements of the crime charged, while the trial court in this case added an element and then found it unsupported by evidence in the record." *Id.*

The majority found support for this distinction in the Third Circuit's decision in *United States v. Maker*, 751 F.2d 614 (3d Cir. 1984), cert. denied, 472 U.S. 1017 (1985). According to the majority, *Maker* stands for the proposition that a retrial may be ordered if the trial judge granted a directed verdict of acquittal after erroneously adding an element to the offense (as opposed to erroneously construing an element of the offense). App. 25, n. 58; 29 n. 67.

Three justices dissented. Justice Cavanagh, joined by Justice Kelly, concluded that *Rumsey*, *Smalis*, and *Smith* foreclosed the argument that an acquittal may be reviewed if the judge erroneously required the prosecution to prove additional facts. App. 31-40. Justice Hathaway dissented separately to "disagree with the distinction that the majority draws between a trial court's erroneous ruling related to a required element of an offense and a trial court's erroneous ruling related to a mistakenly added element of an offense." App. 44.

SUMMARY OF ARGUMENT

The trial judge acquitted Petitioner when she granted a midtrial directed verdict after finding that the prosecution had failed to establish Petitioner's guilt on the charged offense. Therefore, the Double Jeopardy Clause barred both Respondent's appeal and the retrial that the Michigan Supreme Court has ordered.

This Court's precedents teach that it makes no difference to the analysis that it was the judge who ordered the acquittal, that it was Petitioner who moved for the acquittal, or that the acquittal was based on the judge's erroneous construction of the charged offense. For more than a century this Court has held, without exception, that a legal error leading to an acquittal has no effect on the decision's finality.

The Michigan Supreme Court recognized that this Court's cases establish that a directed verdict of acquittal is final even if it results from a trial judge's misconstruction of the charged offense so as to require the prosecution to prove more than the statute demands. The Michigan Supreme Court held, however, that a defendant is not truly "acquitted" if the judge's error effectively adds an element to the charged offense.

The Michigan Supreme Court's claimed distinction between a judge erroneously construing an element of the offense and a judge erroneously adding an element to the offense is based on a misreading of

the definition of "acquittal" found in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). *Martin Linen* explicitly recognized that a midtrial ruling that the prosecution has failed to prove its case is an acquittal even if it is incorrect. One year later, *United States v. Scott*, 437 U.S. 82 (1978), made it clear that *Martin Linen* drew a line between a ruling on a defendant's guilt or innocence and a ruling designed to serve another purpose. The trial judge's ruling in Petitioner's case was unquestionably about his innocence of the charged offense.

The "extra element" exception crafted by the Michigan Supreme Court is impossible to reconcile with this Court's post-*Martin Linen* cases holding that defendants were "acquitted" even when those acquittals resulted from trial judges' erroneous rulings requiring prosecutors to prove facts not found in the charged offenses. These cases demonstrate that the Michigan Supreme Court's attempt to distinguish between "extra element" cases and cases in which judges misconstrued the existing elements is arbitrary and illusory. Since any such case, including Petitioner's, can be characterized either way, the Double Jeopardy Clause bar on retrial cannot turn on such a meaningless distinction.

The "extra element" exception would lead to widespread prosecutorial appeals not only from directed verdicts but also from jury acquittals. Recognizing this exception, therefore, would seriously undermine the core protection against continuing expense and

anxiety the Double Jeopardy Clause affords to defendants who have been acquitted.

ARGUMENT

I. The Double Jeopardy Clause Precludes Retrial Following a Judgment of Acquittal Even If the Acquittal Was Based On a Legal Error As to the Elements of the Offense.

A. The Core Function of the Double Jeopardy Clause Is to Bar Further Trial Proceedings After a Finding, Correct or Not, That the Defendant Is Not Culpable.

As this Court explained in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that 'a verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.'" (quoting *Ball v. United States*, 163 U.S. 662, 671 (1896)) (brackets omitted). "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957). "Thus, it is one of the elemental principles of our criminal law that the Government cannot

secure a new trial by means of an appeal even though an acquittal may appear to be erroneous." *Id.* at 188.

Therefore, once an acquittal has been rendered, "subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986). An acquitted defendant cannot be retried for the same offense, *see*, *e.g.*, *Ball*, *supra*, nor can he be subjected to a continuation of the same trial on that offense, *Smalis*, 476 U.S. at 146; *see also Smith v. Massachusetts*, 543 U.S. 462 (holding midtrial directed verdict of acquittal on one count precluded judge from reinstating that count later in same trial).

The Clause bars not only further trial proceedings following an acquittal but also any appeal that could result in such proceedings: "When a successful postacquittal appeal by the prosecution would lead to proceedings that would violate the Double Jeopardy Clause, the appeal itself has no proper purpose." *Smalis*, 476 U.S. at 145.[3]

A directed verdict of acquittal rendered by a judge during a trial is fully equivalent to a jury acquittal for

[3] The one exception to the rule against further proceedings following an acquittal is that the prosecution may appeal from a post-trial judgment of acquittal entered after a guilty verdict because a successful appeal would simply reinstate the guilty verdict without further trial proceedings going to guilt or innocence. *See United States v. Wilson*, 420 U.S. 332, 352-53 (1975).

double jeopardy purposes. As this Court put it in *Smith*, "we have long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict." 543 U.S. at 467 (citations omitted).

The absolute bar against further proceedings following an acquittal only applies if, of course, the defendant has actually been acquitted. In *Martin Linen* and *United States v. Scott*, 437 U.S. 82 (1978), this Court established a bright line between acquittals and other judicial decisions terminating a criminal proceeding.

In *Martin Linen*, this Court defined a judicial acquittal as "a ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 571. *Scott*, decided one year after *Martin Linen*, made plain the difference between an acquittal and other midtrial rulings terminating a prosecution that do not raise the Double Jeopardy Clause bar. In *Scott*, the Court held that the Government could appeal from a midtrial ruling granting a defendant's motion to dismiss the charges because of preindictment delay:

> We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him *on a basis unrelated to factual guilt or innocence of the offense with which he is accused*, suffers

> no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant.

Scott, 437 U.S. at 98-99 (emphasis added).

As *Scott* explained the holding in *Martin Linen*, "Where the court, before the jury returned a verdict, enters a judgment of acquittal . . . , appeal will be barred only when 'it is plain that the [trial court] . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction.'" *Scott*, 437 U.S. at 97 (quoting *Martin Linen*, 430 U.S. at 572). *Scott* continued:

> Such a factual finding *does* 'necessarily establish the criminal defendant's lack of culpability' under the existing law; the fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles,' affects the accuracy of that determination, but it does not alter its essential character. By contrast, the dismissal of an indictment for preindictment delay represents a legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation.

Scott, 437 U.S. at 98 (quoting *id.* at 106 (Brennan, J., dissenting); footnote omitted; emphasis in original).

Throughout *Scott*, the Court repeatedly explained that the distinguishing feature of a ruling that is not an "acquittal" within the meaning of *Martin Linen* is

that it is *unrelated to the defendant's guilt or innocence*. *See id.* at 98 n. 11 ("a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word"); *id.* at 99 ("respondent . . . persuad[ed] the trial court to dismiss [the indictment] on a basis which did not depend on guilt or innocence. He was thus neither acquitted nor convicted"); *id.* at 100 (the Double Jeopardy Clause bar does not apply when defendant "obtains the termination of the proceedings against him in the trial court without any finding by a court or jury as to his guilt or innocence."); *id.* at 101 ("We now conclude that where the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the government from his successful effort to do so is not barred").

Martin Linen and *Scott* thus drew a clear distinction between: (1) a trial court ruling, whatever its label, correct or not, finding that the prosecution had failed to prove the defendant's guilt; and (2) a trial court ruling terminating the proceedings for reasons "unrelated to factual guilt or innocence." *Scott*, 437 U.S. at 98. The former is an acquittal subject to the Double Jeopardy Clause bar on further proceedings, while the latter is not.

Scott stressed that this Double Jeopardy Clause line is bright: "In other circumstances, this Court has had no difficulty distinguishing between those rulings

which relate to 'the ultimate question of guilt or innocence' and those which serve other purposes." 437 U.S. at 98 n. 11 (quoting *Stone v. Powell*, 428 U.S. 465, 490 (1976)). Indeed, lower courts since *Martin Linen* and *Scott* generally have had no difficulty identifying the line. *See*, *e.g.*, *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 225 (4th Cir. 1988) (permitting prosecutorial appeal of dismissal of allegedly duplicitous count because "the district court disposed of count II on a basis unrelated to the factual guilt or innocence of the defendants"), cert. denied, 490 U.S. 1035 (1989); *Wilkett v. United States*, 655 F.2d 1007, 1012 (10th Cir. 1981) (permitting retrial following dismissal for improper venue because "the workings of the jeopardy doctrine revolve around guilt or innocence").

The trial judge's ruling in Petitioner's case was manifestly on the "guilt or innocence" side of the line drawn in *Scott* and *Martin Linen*. In response to Petitioner's motion for a directed verdict of acquittal, the judge examined the statute, the standard jury instruction, and the commentary to that instruction, which stated at the time of Petitioner's trial that "an essential element is that the structure burned is *not* a dwelling house." App. 69 (quoting former commentary to Mich. Crim. Jury Inst. 2d § 31.3; emphasis in original). The judge then reviewed the prosecution's evidence: "The testimony was this was a dwelling house, paid for for forty-some-odd thousand dollars. That the folks had moved some stuff into it, even though it doesn't matter." App. 71. The judge

accordingly granted the motion to acquit and issued a written order confirming the grant. App. 71, 72.

As in *Martin Linen*, "it is plain that the [trial court] . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." 430 U.S. at 572. Unlike *Scott*, it is equally plain that this ruling was not "unrelated to guilt or innocence." On the contrary, the ruling, correct or not, was entirely about Petitioner's innocence of the charged offense.

Finally, it makes no difference for Double Jeopardy Clause purposes that the trial judge's decision in this case turned out to be based on a legal error as to the elements of the offense. This Court has long held that an acquittal by judge or jury cannot be appealed even if the proceedings leading to the acquittal, or the acquittal itself, are infected with legal error. More than a century ago, this Court held in *Ball*, *supra*, that the Double Jeopardy Clause prohibited the prosecution from retrying a defendant who had been acquitted by a jury after a trial under a fatally defective indictment, so long as the court that tried the case had jurisdiction to hear it. 163 U.S. at 669-70. In *Fong Foo v. United States*, 369 U.S. 141 (1962), the Court relied on *Ball* to hold that the Double Jeopardy Clause precluded a retrial after the district judge had granted a midtrial directed verdict of acquittal due to prosecutorial misconduct and the lack of credibility of the prosecution's witnesses. The Court stressed that the trial had "terminated with the entry of a final judgment of acquittal as to each petitioner[,]" even

though "[t]he Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation." *Id*. at 143.

Since *Martin Linen* and *Scott*, this Court has repeatedly reaffirmed that the Double Jeopardy Clause precludes an appeal from a trial judge's decision to grant an acquittal no matter how legally erroneous a reviewing court might find that decision to be. In *Sanabria v. United States*, 437 U.S. 54 (1978), the district judge had erroneously excluded certain evidence, and that error that led directly to his decision to grant a midtrial directed verdict on a particular count of an indictment, but the Court held that the "judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." *Id.* at 68-69. The Court summarized its holding:

> The trial court's rulings here led to an erroneous resolution in the defendant's favor on the merits of the charge. As *Fong Foo v. United States* makes clear, the Double Jeopardy Clause absolutely bars a second trial in such circumstances.

Id. at 78.

In *Arizona v. Rumsey*, 467 U.S. 203 (1984), the Court again held that the Double Jeopardy Clause barred review of a legally erroneous acquittal. During the penalty phase of a capital trial, the judge "acquitted" Rumsey of the death penalty after concluding, erroneously, that Arizona's "pecuniary value" aggravating circumstance applied only to contract

killings. *Id.* at 206. In holding that the Double Jeopardy Clause precluded a retrial of the penalty phase, the Court observed:

> In making its findings, the trial court relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance. Reliance on an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. "[T]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . affects the accuracy of that determination, but it does not alter its essential character." Thus, *the Court's cases hold that an acquittal on the merits bars retrial even if based on legal error*.

Id. at 211 (emphasis added; quoting *Scott*, 437 U.S. at 98; internal quotation marks and citation omitted).

Two years later in *Smalis*, *supra*, the Court once again rejected a prosecution argument that a trial judge's grant of acquittal is reviewable if legally erroneous. The trial judge in *Smalis* granted the defendants' motion for a demurrer at the close of the prosecution's case because the evidence was insufficient to establish guilt. 476 U.S. at 141-42. This Court held that this decision was an acquittal for Double Jeopardy Clause purposes and therefore was not subject to review. *Id.* at 144. The Court further observed that "The status of the trial court's judgment as an acquittal is not affected by the Commonwealth's

allegation that the court erred in deciding what degree of recklessness was required to be shown under Pennsylvania's definition of third-degree murder." *Id.* at 144 n. 7 (internal quotation marks, citation, and brackets omitted).

Most recently in *Smith*, this Court reaffirmed yet again that the Double Jeopardy Clause does not contain an exception allowing prosecutorial appeals and retrials when trial courts have committed legal errors in acquitting defendants. The trial judge in *Smith* granted a directed verdict on a firearms possession count at the close of the prosecution's case on the ground that the victim's testimony describing the gun as a .32 or .38 caliber pistol was insufficient to establish that the gun barrel was less than 16 inches long. 543 U.S. at 465. After Smith presented his case on the remaining counts, the prosecutor moved to reinstate the firearms count, claiming that he had found precedent holding that witness testimony as to the type of gun was sufficient to establish the barrel length. *Id.*

In holding that the Double Jeopardy Clause barred the judge from reinstating the firearms count later in the same trial, the Court explicitly acknowledged the prosecution's argument that the judge's initial ruling "was wrong because the Commonwealth's evidence was, as a matter of law, sufficient[.]" *Id.* at 473. But, the Court continued, "any contention that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a

preverdict acquittal that is patently wrong in law." *Id.* (citing *Smalis*, *Sanabria*, *Martin Linen*, and *Fong Foo*, *supra*).

From this unbroken line of precedent, it follows immediately that the Double Jeopardy Clause should have barred Respondent's appeal from the trial judge's decision to acquit him on February 23, 2009. After hearing argument from the parties at the close of the prosecution's case, the trial judge made a final and formal decision, both orally and in writing, finding that the prosecution had failed to prove Petitioner's guilt. App. 63-72. This Court's precedent makes it unmistakably clear that it does not matter for Double Jeopardy Clause purposes that it was the judge, not the jury, that found the prosecution's evidence insufficient, nor does it matter that the judge's decision was based on legal error. Petitioner was acquitted, and his jeopardy should have terminated on that day.[4]

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[4] Respondent claims that the acquittal should be reviewable because Petitioner was able to persuade the judge to grant it. *See* Respondent's Brief Opp. Cert. 3 (arguing Double Jeopardy Clause inapplicable because Petitioner was able to "*avoid* a jury resolution of the case by having the trial judge take it away from the jury.") (emphasis in original). This Court squarely rejected the exact same argument in *Sanabria*. After observing that most acquittals stem from defense motions, the Court concluded: "To hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a midtrial motion leads to an acquittal would undercut the adversary assumption on which our system of criminal justice rests and would vitiate one of the fundamental rights established by the Fifth Amendment." 437 U.S. at 77-78 (citations omitted).

B. The Michigan Supreme Court's Attempt to Carve Out an "Extra Element" Exception to the Definition of "Acquittal" Is Unfaithful to This Court's Precedent and Unworkable in Application, and Such an Exception Would Result in Frequent and Unpredictable Appeals of Both Directed Verdicts and Jury Acquittals.

Despite the precedent discussed above, the Michigan Supreme Court held that Petitioner was not "acquitted" within the meaning of the Double Jeopardy Clause because the trial court committed a legal error by finding that the prosecution had failed to introduce sufficient evidence on an element not actually found in the offense with which Petitioner was charged. To reach this conclusion, the Michigan Supreme Court parsed the definition of a judicial "acquittal" found in *Martin Linen*: "a ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 571. Because that definition turns on "the factual elements of the offense charged," the Michigan Supreme Court reasoned that a trial judge's ruling that the prosecution has failed to prove its case is not actually an "acquittal" if it is based on the prosecution's failure to prove an *extra* element. App. 2, 17, 26-27.[5]

[5] The Michigan Supreme Court found support for this "extra element" exception in *United States v. Maker*, 751 F.2d 614, 624

(Continued on following page)

The Michigan Supreme Court acknowledged that this Court had repeatedly held that an acquittal is final for Double Jeopardy Clause purposes even if based on "erroneous interpretations of governing legal principles." App. 27 n. 64 (quoting *Scott*, 437 U.S. at 98). However, the Michigan Supreme Court concluded that there is a constitutionally significant distinction between a directed verdict based on a misconstruction of an element of the governing law and a directed verdict based on the addition of an element to the governing law. App. 27-28 n. 64.

That conclusion was error. First, the Michigan Supreme Court's decision turns on an unsustainable reading of the distinction drawn in *Martin Linen* and *Scott* between acquittals and other types of rulings in a defendant's favor. Second, the "extra element" exception the Michigan Supreme Court adopted is arbitrary and unworkable in practice and is impossible to reconcile with this Court's post-*Martin Linen* cases barring review after trial courts granted acquittals based on erroneous constructions of the charged offenses. Finally, the Michigan Supreme Court's holding would frustrate the core purpose of the Double Jeopardy Clause by encouraging prosecutorial appeals after many, if not most, midtrial directed verdict grants and after even some jury acquittals.

(3d Cir. 1984), cert. denied, 472 U.S. 1017 (1985). App. 25, n. 58; 29, n. 67 (citing *Maker*).

The Michigan Supreme Court effectively rewrote the *Martin Linen* definition of a judicial acquittal to be "a ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the *correct* factual elements of the offense charged." The second "correct" is not found in the actual definition, and this Court's cases make clear that it does not belong there.

As discussed above, the Double Jeopardy Clause line that this Court has actually drawn is between a ruling in which the trial court "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction," *Martin Linen*, 430 U.S. at 572, and a ruling "on a basis which did not depend on guilt or innocence." *Scott*, 437 U.S. at 99. The Michigan Supreme Court's holding that Petitioner was not acquitted is thus based on a myopic reading of the *Martin Linen* definition of "acquittal" and it ignores the distinction established in *Scott*. Under any fair reading of *Martin Linen* and *Scott*, Petitioner was acquitted on February 23, 2009.

The Michigan Supreme Court acknowledged that no precedent of this Court actually supported the "extra element" exception it engrafted onto *Martin Linen*. Instead, the Michigan Supreme Court maintained that the existence of such an exception was an open question because this Court "has not directly considered" it. App. 13.

Having concluded the question is open, the Michigan Supreme Court attempted to create a

constitutional distinction between two scenarios, both of which feature a trial judge granting a directed verdict "based on the prosecution's failure to prove something that the law did not actually require it to prove." App. 17 n. 39. In the first scenario, the trial judge granted a directed verdict after he erroneously "resolved one of the factual elements charged;" in the second scenario, he granted a directed verdict after he erroneously "added an element and then found it unsupported by the evidence in the record." *Id*. According to the Michigan Supreme Court, the judge in the first scenario has acquitted the defendant, but the judge in the second scenario has not. *Id.*

The Michigan Supreme Court expressly drew this line in an effort to distinguish *Rumsey*, *Smalis*, and *Smith*. *Id.* But these three cases, and Petitioner's case, demonstrate that the claimed distinction is illusory and arbitrary.

In *Rumsey*, the trial judge acquitted the defendant of the death penalty after holding erroneously that a pecuniary value aggravating circumstance applied only to "a contract-type killing situation and not to a robbery, burglary, etc." 467 U.S. at 206. This Court concluded that the Double Jeopardy Clause precluded retrial of the penalty phase despite the trial court's erroneous construction of the statute. *Id.* at 211.

According to the Michigan Supreme Court, there was an "acquittal" in *Rumsey* because the trial court's error was to misconstrue the pecuniary value

aggravating circumstance so as to require a contract killing. But the error in *Rumsey* can just as easily be regarded as adding an extra element – that the defendant committed the killing pursuant to a contract.

There is absolutely no substantive difference between the two characterizations of the trial court's error in *Rumsey*. But, according to the Michigan Supreme Court, the first characterization means that the Double Jeopardy Clause bars an appeal of the judge's ruling while the second characterization permits an appeal and a retrial.

In *Smalis*, the trial court granted a demurrer at the close of the prosecution's case, concluding that the prosecution failed to prove several of the charged offenses, including third-degree murder. 476 U.S. at 141-42. The prosecution argued that the judge had mistakenly increased the case the prosecution was required to prove when it "erred in deciding what degree of recklessness was . . . required to be shown under Pennsylvania's definition of [third-degree] murder." *Id.* at 144 n. 7. This Court rejected the contention that the error mattered: "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles' . . . affects the accuracy of that determination but it does not alter its essential character." *Id.* (quoting *Scott*, 437 U.S. at 98) (internal quotation marks and citation omitted).

According to the Michigan Supreme Court, retrial was barred in *Smalis* because the trial court erroneously construed an actual element of the offense. But just as in *Rumsey*, it is equally plausible to characterize the claimed error in *Smalis* as the erroneous addition of an element, in this case one requiring a heightened degree of recklessness. Once again, the choice of characterization is arbitrary.

In *Smith*, the trial judge granted a midtrial directed verdict because she concluded, apparently contrary to binding precedent, that witness testimony describing the kind of gun defendant used was legally insufficient to prove that the barrel length was less than 16 inches. 543 U.S. at 465. This Court held that this ruling acquitted Smith of the firearms count even if it was legally erroneous. *Id.* at 473.

As with *Rumsey* and *Smalis*, this conclusion is difficult, if not impossible, to defend if the Michigan Supreme Court's view is correct. The trial court's ruling in *Smith* can easily be recast as requiring the prosecution to prove an "extra element," that is, not only must the barrel length by less than 16 inches but there must also be direct evidence supporting that conclusion. If the Michigan Supreme Court is correct, *Smith* should come out the other way so long as a reviewing court is able to characterize the trial judge's error as effectively adding an element.

Because the "extra element" exception applied below finds no support in this Court's precedents and is unworkable in application, there are only a very

few lower court decisions that have even attempted to apply it. *See United States v. Maker*, 751 F.2d 614, 623-24 (3d Cir. 1984) (ordering retrial after district judge acquitted defendant of mail fraud based on erroneous holding that government must prove entire scheme was planned beforehand), cert. denied, 472 U.S. 1017 (1985); *State v. Korsen*, 69 P.3d 126, 136-37 (Idaho 2003) (relying on *Maker* and ordering retrial after trial judge acquitted defendant of trespass based on erroneous holding that official must have adequate reason to order defendant to leave); *see also United States v. Lynch*, 162 F.3d 732, 735 (2d Cir. 1998) (rejecting argument that trial judge who acquitted abortion protestors of criminal contempt because they acted pursuant to genuine religious beliefs thereby added extra element); *id*. at 745-46 (Feinberg, J., dissenting) (arguing acquittal should be reversed and conviction entered because judge added "extra factor" to prosecution's burden).[6]

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[6] Other courts have explicitly rejected the argument that a defendant may be retried if the trial court granted a directed verdict after erroneously requiring the prosecution to prove additional facts not found in the charged offense. *See*, *e.g.*, *Carter v. State*, 227 S.W.3d 895, 898 (Ark.) (holding retrial of aggravated robbery barred even though trial judge erroneously required prosecution to prove defendant used gun as firearm and not as club), cert. denied, 549 U.S. 943 (2006); *State v. Large*, 607 N.W.2d 774, 780 (Minn. 2000) (holding retrial barred after acquittal even if trial judge erred in requiring prosecution to prove multiple sexual acts); *State v. Lynch*, 399 A.2d 629, 634-37 (N.J. 1979) (holding retrial of accessory after the fact charge barred

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Petitioner's case itself illustrates the arbitrary nature of the distinction drawn by the Michigan Supreme Court. The trial judge granted the acquittal after requiring the prosecution to prove that the property burned was not a dwelling house. But that error can equally plausibly be viewed as either: (1) the misconstruction of the second element of the charged offense, which requires proof that "the property that was burned was a building or any of its contents," Mich. Crim. Jury Inst. 2d 31.3(3); or (2) the addition of an "extra element" requiring proof that the property is not a dwelling house. The Michigan Supreme Court never explained why the trial judge's mistake could only be viewed as the latter type of error and not the former, just as it never explained why the trial judges' mistakes in *Rumsey*, *Smalis*, and *Smith* could only be viewed as the former and not the latter.

As all of these cases demonstrate, there is no substantive distinction between a judge requiring the prosecution to prove additional facts by misconstruing the elements of an offense and a judge requiring the prosecution to prove additional facts by adding an element to that offense. Any case in which the judge increases the prosecution's burden can equally plausibly be characterized either way. Since the "difference" is purely a matter of semantics, the application

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even though trial judge erred by requiring prosecution to prove defendant had personal knowledge of principal's crime).

of the fundamental Double Jeopardy Clause bar on further proceedings cannot turn on such a distinction.

This Court emphasized in *Scott* that there was "no difficulty distinguishing between those rulings which relate to the ultimate question of guilt or innocence and those which serve other purposes." 437 U.S. at 98 n. 11 (internal quotation and citation omitted). The Michigan Supreme Court's new exception to the line between acquittals and other rulings not only produces difficulty in distinguishing between rulings, it is simply impossible to apply meaningfully.

Finally, it is indisputable that the "extra element" exception would seriously undermine the core Double Jeopardy Clause protection against post-acquittal proceedings. If this Court adopts the exception, every time a trial judge grants a midtrial directed verdict of acquittal after interpreting the offense in a way with which the prosecution disagrees, the prosecution would be entitled to appeal in order to argue that the judge's interpretation effectively added an extra element. Presumably, most of those appeals would be unsuccessful because appellate courts would conclude that the judge really did acquit the defendant, in which case "the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him." *Smalis*, 476 U.S. at 145; *see also Green*, 355 U.S. at 187-88 (recognizing Clause intended to prevent State from subjecting once-tried defendant "to embarrassment, expense and ordeal and compelling

him to live in a continuing state of anxiety and insecurity").

Indeed, the Michigan Supreme Court's "extra element" exception would permit an appeal even from a *jury* acquittal in any case in which the prosecution claims that the judge erroneously instructed the jury so as to add an element to the charged offense and that the error caused the jury to acquit. *Compare Ashe v. Swenson*, 397 U.S. 436, 445 (1970) (examining trial record to determine reason for jury's acquittal).

Petitioner's case illustrates that point. If the judge had not granted a directed verdict and had instead instructed the jury that the prosecution must prove that the property burned was not a dwelling house, the jury presumably would have found Petitioner not guilty. Under the Michigan Supreme Court's reasoning, the prosecution would have been entitled to appeal that jury verdict and subject Petitioner to a retrial so long as it could convince an appellate court both that the instructions added an element to the offense and that the error caused the jury to acquit.

In short, the "extra element" exception is unworkable and arbitrary, and it is inconsistent with the line this Court drew in *Martin Linen* and *Scott* and with the cases this Court has decided since *Martin Linen*. It would create an enormous hole in the absolute bar against further proceedings following acquittals.

Contrary to the conclusion of the Michigan Supreme Court, Petitioner was acquitted on February 23, 2009, when the trial judge examined the governing

statute and the prosecution's evidence and issued a final decision concluding that Petitioner was not guilty of the charged offense. His jeopardy terminated that day because that decision, correct or not, was unquestionably a ruling "which relate[s] to the ultimate question of guilt or innocence" and was not a ruling intended to "serve other purposes." *Scott*, 437 U.S. at 98 n. 11.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted,

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