No. 11-1327

In The
Supreme Court of the United States

LAMAR EVANS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Supreme Court

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

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

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STATEMENT OF THE CASE

At trial, defense counsel argued that the wrong charge had been brought, and so a directed verdict of acquittal should be granted. He argued that "the burning of real property means to the exclusion of burning an occupied or unoccupied dwelling." App. 63. Because, he argued, there was some evidence that someone was living in the house, there was insufficient proof of burning real property. An element, counsel urged on the court, of burning real property "is that the building was not a dwelling house. . . . 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 trial court noted that the witness had said they were "in the process" of moving in, with small appliances, and that there was no water, gas, or electricity. App. 66. Counsel asked for a directed verdict because "the fourth element is that the building was not a dwelling house. . . . the People have to prove that it was not a building house. It was not a house." App. 67. The prosecution argued that the statute (MCL § 750.73) does not require proof of the negative of the element that makes the offense the greater offense – that is, that the building is *not* a dwelling. App. 68. "The charge is arson of real property. Whether it's a dwelling, whether it's occupied, whether it's lived in doesn't matter for the purposes of the statute; only that a structure or building is burned." App. 69.

The trial judge, reading from the commentary to the jury instruction, noted that for this offense the

"legislature simply eliminated the element of habitation" (making it a less serious offense than arson of a dwelling). App. 69. The trial judge stated that the statute "Specifically says it cannot be a dwelling." App. 69. The trial judge then granted a "directed verdict" as a "matter of law." App. 70-71.

Respondent appealed. The Michigan Court of Appeals said that it was "undisputed that the trial court misperceived the elements of the offense with which defendant was charged and erred by directing a verdict," observing that "Even defendant admitted in his brief on appeal that the trial court's directed verdict of acquittal was 'technically incorrect.' "[1] App. 52. That court reversed and remanded for a new trial, concluding that the "trial court's order granting a directed verdict in favor of defendant does not constitute an acquittal for double jeopardy purposes, because the trial court failed to resolve any of the elements that actually must be satisfied to establish the offense of burning other real property."[2] The Michigan Supreme Court granted petitioner's application for leave to appeal, and affirmed the Court of Appeals. The court held that the directed verdict, despite its label, was not an acquittal for jeopardy purposes, as it resolved no actual factual element of

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[1] *People v. Evans,* 288 Mich. App. 410, 416, 794 N.W.2d 848, 852-853 (2010).

[2] 288 Mich. App. at 422, 794 N.W.2d at 856.

the offense charged.[3] App. 30. This Court then granted Petitioner's petition for certiorari.

SUMMARY OF ARGUMENT

Petitioner's trial was not ended before verdict without his consent; rather, he sought termination of his trial before verdict of the jury by requesting a directed verdict of acquittal. His counsel argued that the offense charged, arson of real property, contained a "fourth element"; namely, that the prosecution was required to prove the *absence* of the element that distinguished the charged offense from the greater offense of arson of a dwelling. The trial judge agreed that the offense charged contained that element, found a lack of sufficient proof regarding it, and entered a judgment of acquittal "as a matter of law." Both the Michigan Court of Appeals and the Michigan Supreme Court found that no acquittal had occurred, as the trial judge had not "actually" resolved, despite the label of her ruling, any of the "factual elements of the offense charged." Petitioner's appellate counsel conceded throughout the appellate

[3] "We hold 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." *People v. Evans,* 491 Mich. 1, 25, 810 N.W.2d 535, 548-549 (2012).

process that the trial judge had erred in identifying the elements of the charged offense.

The Michigan Supreme Court correctly resolved the double jeopardy issue. The label of the trial court's action is not controlling, and a judicial acquittal in a jury trial occurs only when the trial court "actually" resolves, whether correctly or incorrectly, one or more of the "factual elements of the charged offense." This is not a case where the trial judge wrongly excluded evidence, leading to a lack of sufficient proof on an element of the offense, or where the trial judge misperceived that evidence required to prove one of the factual elements of the offense. Rather, the trial judge "resolved" a fact that was not one of the constituent parts of the crime charged – one of those facts legally essential for punishment to be inflicted – which had to be proved to sustain a conviction. No acquittal of any sort occurred, and retrial is thus permissible.

Further, Respondent submits that a "verdictless" judgment of acquittal should not bar retrial under the Jeopardy Clause. An acquittal is a verdict by the factfinder, after weighing evidence and assessing credibility of witnesses, while a judgment of acquittal, which does not weigh evidence or assess the credibility of witnesses, is a ruling of law that the evidence is not sufficient to support a conviction. This ruling of law may be wrong. Jeopardy should be viewed as

continuing if that ruling of law is shown wrong, and a second trial thus allowed.

ARGUMENT

I.

A judicial acquittal in a jury trial is a resolution by the trial judge, correct or not, of one or more of the factual elements of the offense charged; that is, a resolution of one or more of the constituent parts of the crime charged – one or more of those facts legally essential for punishment to be inflicted – which must be proved to sustain a conviction.

A. Introduction

Several things are indisputable in this case.

- No wish of the Petitioner to have this case determined by the jury was thwarted by the prosecution or the court, the Petitioner seeking – successfully – to *avoid* a jury resolution of the case by having the trial judge take it from the jury.[4] The

[4] Petitioner misapprehends Respondent's point. Petitioner asserts at fn. 4 that Respondent is here arguing that Petitioner *waived* his jeopardy claim by moving for a directed verdict. But Respondent's point is that this is not a case involving a loss by a criminal defendant of his "valued right to have his trial completed by a particular tribunal," *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949), given the motion, and that further, if, whatever its label, the termination of the trial

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case involves no attempt to harass the defendant through repeated prosecutions, as all the State seeks is one full and fair opportunity to have the case decided by a jury.

- The trial court "wrongly added an extraneous element to the statute under which"[5] the Petitioner was charged, and terminated the trial, at Petitioner's urging, by finding an absence of proof on this "extraneous" or "faux" element; namely, that the element distinguishing an uncharged greater arson offense from

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was *not* an acquittal – because not a resolution, correct or not, of any actual element of the offense charged – then Petitioner's consent by moving for the termination of the trial is outcome-determinative of the jeopardy claim.

[5] *People v. Evans,* 491 Mich. 1, 3, 810 N.W.2d 535, 536 (2012). Though Petitioner's counsel argued at trial that the negative of the element distinguishing the greater offense from the charged offense – that the structure burned be a dwelling – is an element of the charged offense, that it is not an element has been conceded throughout the appellate proceedings by Petitioner's various counsel. As Petitioner's counsel put it in the Michigan Supreme Court, "The trial judge . . . determined that *Antonelli* [*People v. Antonelli (On Rehearing)*, 66 Mich. App. 138, 238 N.W.2d 551 (1975)] requires proof that the structure is not a dwelling house, and granted a directed verdict of acquittal after finding that the prosecution failed to present sufficient evidence as to this 'element'. . . . The *Antonelli* case itself holds otherwise. . . ." (Defendant's Brief, p. 10). And Petitioner in this Court recognizes the error of the trial judge, referring in his statement of the question to the trial judge "erroneously hold[ing] a particular fact to be an element of the offense. . . ." Petitioner's Brief, page i.

> the charged offense – that the structure burned be a dwelling – had not been proven to be *absent* from the charged offense.

In this case, the trial court erred by holding, on Petitioner's motion and consistent with his argument, that the prosecution was required to prove the absence of the element that distinguished the uncharged greater arson offense from the charged offense. "Greater" offenses are characterized by having an additional factual element or elements than their included offenses, which, where the greater offense is charged, are subsets of the factual elements of the greater offense.[6] If the jury is not convinced beyond a reasonable doubt of the *presence* of the additional element, but convinced beyond a reasonable doubt of the remaining elements, the proper verdict is one of guilt on the lesser offense. But it is *not* the case – indeed, it would be absurd beyond belief – that the jury, to convict of the included or lesser offense, must be persuaded beyond a reasonable doubt of the *absence* of the element that distinguishes the greater offense, whether instructed on that lesser offense as an included offense of a greater offense, or whether that lesser offense is charged, as here, alone.[7] That

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[6] *Schmuck v. United States,* 489 U.S. 705, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989); *People v. Cornell*, 466 Mich. 335, 646 N.W.2d 127 (2002).

[7] As the Michigan Supreme Court has cogently put the matter, " 'Elements are, by definition, positive. A negative element of a crime is a contradiction in terms.' In the instant case, 'without

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there is no such requirement with regard to the specific statute at issue here was determined in Michigan 34 years before the trial judge here held to the contrary.[8] And so, for second-degree murder, for example, the absence of premeditation need not be shown; for manslaughter, the lack of malice need not be shown; for unarmed robbery, the absence of a weapon need not be shown; and here, for arson of real property, the prosecution was not required to prove that the property was *not* a dwelling.

But Petitioner insists that the termination of the trial here on his motion and over the objection of the prosecution, by a finding of a lack of proof regarding a "fact" that is concededly *not* a "factual element of the charged offense," constitutes an acquittal.[9] Respondent will argue first that the

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malice' is the absence of an element, rather than an additional element which the people must prove beyond a reasonable doubt. Malice or "malice aforethought" is that quality which distinguishes murder from manslaughter. . . ." *People v. Doss,* 406 Mich. 90, 99, 276 N.W.2d 9, 12 (1979).

[8] *People v. Antonelli (On Rehearing)*, 66 Mich. App. 138, 140-141, 238 N.W.2d 551, 552-553 (1975): "Our previous opinion in this case has been correctly characterized as 'reverse reasoning'. . . . the offense of burning a building not a dwelling would be a lesser included offense of the crime of burning a building which is a dwelling."

And see *Evans*, 491 Mich. at 20, 810 N.W.2d at 546: "The elements of burning of other real property . . . are '(1) the burning of any building or other real property, or the contents thereof, and (2) that the fire was willfully or maliciously set.' "

[9] One is reminded of the apt response of Inigo Montoya to Vizzini in *The Princess Bride*. After Vizzini tries to kill Dread

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termination of a trial with the consent of a criminal defendant, based on a finding of a lack of proof of an "extraneous" or "faux" "factual element," is not, under this Court's precedents, an "acquittal," that question requiring a determination of "whether the ruling of the judge, whatever its label, *actually represents* a resolution, correct or not, of some or all of the factual elements of the offense charged."[10] Rather, it is a termination of the trial – again, with the Petitioner's approval – "before verdict on grounds unrelated to factual guilt or innocence,"[11] so that retrial is permitted under the Jeopardy Clause. Respondent will then argue that the Court should consider a refinement or alteration of its current doctrine concerning "judicial acquittals" in jury trials.

Pirate Roberts (who is actually Westley) by cutting his rope, but Westley, rather than falling, clings to a rock, Vizzini exclaims "He didn't fall?! Inconceivable!" to which Inigo responds "You keep using that word. I do not think it means what you think it means."

[10] *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977) (emphasis supplied).

[11] *United States v. Scott,* 437 U.S. 82, 87, 98 S.Ct. 2187, 2191-2192, 57 L.Ed.2d 65 (1978).

B. Judicial Acquittals In Jury Trials and the Protection Against Double Jeopardy: "We must Determine Whether the Ruling of the Judge, Whatever its Label, Actually Represents a Resolution, Correct or Not, of Some or All of the Factual Elements of the Offense Charged"

(1) The *Martin Linen* test requires reference to the actual "factual elements of the offense charged"

The lead case is *United States v. Martin Linen Supply.*[12] A judgment of acquittal was requested by the defense and granted by the trial court after a mistrial had been declared because the jury was "hopelessly deadlocked," and thus unable to reach a verdict. The appeal by the United States was disallowed by the circuit court in reliance on *United States v. Jenkins*,[13] the circuit court observing that "*Jenkins* stated the general rule for appealability as follows: 'But it is enough for purposes of the Double Jeopardy Clause, . . . that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. . . .'" The circuit court concluded that

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[12] *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977).

[13] *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975), overruled by, *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978).

> In the case of a mistrial followed by a timely motion for acquittal under Rule 29(c), F.R.Crim.P., which motion is granted, further proceedings devoted to the resolution of factual issues would necessarily follow a successful appeal by the Government. . . . The *Jenkins* standard thus leads inescapably to the conclusion that no appeal lies from the directed verdict ordered by the court below.[14]

This Court then took up the case; focusing on the jeopardy interest against the prevention of multiple trials, the Court found jeopardy offended by the prosecution's appeal because a successful government appeal would result in "another trial."[15] Though certainly second trials are permissible in some circumstances, continued the Court, this is not so after an acquittal, which the Court then defined 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"[16] (in the context of what might be called a "judicial acquittal" in a jury trial, by the entry of a judgment of acquittal).

What, then, does "a ruling of the judge, whatever its label, [that] actually represents a resolution,

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[14] *United States v. Martin Linen Supply Co.*, 534 F.2d 585, 588-589 (CA 5, 1976). The *Jenkins* standard relied on by the circuit court no longer governs, that case being overruled later, after the decision by this Court in *Martin Linen*.

[15] 97 S.Ct. at 1354.

[16] 97 S.Ct. at 1355.

correct or not, of some or all of the factual elements of the offense charged" mean? What reading will the language bear? Just as constitutional provisions themselves are to be given their ordinary meaning,[17] in construing these provisions this Court should also be taken to have "employed words in their most natural sense" and to "have intended what it said." Parsing the language, then, first, it matters not what label is placed on the ruling, or what form that action took.[18] Though called a "dismissal" the termination of a trial may constitute an acquittal; similarly, though labeled an acquittal a termination of a trial may constitute a dismissal. Rather than the form or label controlling, the action of the trial judge must "*actually*" resolve something – and what must it resolve? – one or more of the *factual elements* of the *offense charged*. And what are the factual elements of a crime? It has been said that at common law, "the word 'element' refers to a constituent part of a crime which must be proved by the prosecution to sustain a conviction."[19] As pointed out by Justice Thomas concurring in *Apprendi v. New Jersey*,[20] Bishop refers to the elements as "whatever is in law essential to the

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[17] " . . . the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden,* 22 U.S. 1, 188, 6 L.Ed. 23, 9 Wheat. 1 (1824).

[18] 97 S.Ct. at 1354.

[19] *Pazcoguin v. Radcliffe,* 292 F.3d 1209, 1215 (CA 9, 2002).

[20] *Apprendi v. New Jersey*, 530 U.S. 466, 510, 120 S.Ct. 2348, 2373, 147 L.Ed.2d 435 (2000).

punishment sought to be inflicted"[21] and as "that wrongful aggregation out of which the punishment proceeds."[22] And the "elements" of an offense have been described as "those facts legally essential to the punishment to be inflicted."[23] A "judicial acquittal" in a jury trial, then, is the termination of the trial by the trial judge, however labeled by the judge, by actually resolving,[24] correctly or incorrectly, one or more of the constituent parts of the crime charged – one or more of those facts legally essential for punishment to be inflicted – which must be proved to sustain a conviction.

Under the test enunciated in ordinary language in *Martin Linen,* a termination of the trial on a defendant's motion by a resolution by the trial judge of something *other* than "one or more of the factual elements of the offense charged" – something *other* than one or more of the constituent parts of the crime

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[21] 1 J. Bishop, *Law of Criminal Procedure* § 50 (2d ed. 1872).

[22] 1 J. Bishop, *New Criminal Procedure* § 84, p. 49 (4th ed. 1895).

[23] See, for example, *Harris v. United States*, 536 U.S. 535, 561, 122 S.Ct. 2406, 2416, 153 L.Ed.2d 524 (2002); *Blakely v. Washington*, 542 U.S. 296, 302, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004).

[24] "Resolving" in this context does not mean "being persuaded," but means that the judge makes a finding that, taking the evidence in the light most favorable to the prosecution, no reasonable juror *could* be persuaded of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

charged, one or more of those facts legally essential for punishment to be inflicted – is not an acquittal, and jeopardy does not bar appeal and retrial. Has this Court in any subsequent case or cases undermined what it said in ordinary language in *Martin Linen*? It has not. This Court has continued to employ the *Martin Linen* formulation of that which constitutes an "acquittal" – a "factual elements of the offense charged" test – through as recently as the last term of the Court.[25] And in so doing, the Court has given no hint that it no longer matters whether that resolved by the trial judge in terminating the trial is a "factual element of the offense charged."

(2) Petitioner's modification of *Martin Linen* to divorce that which must be resolved by the trial court's action from the "factual elements of the offense charged" is inconsistent with that decision

Petitioner subtly modifies the actual language of the *Martin Linen* test, so as to greatly alter its meaning. Where this Court defined a judicial acquittal as a

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[25] See, e.g., *Lee v. United States*, 423 U.S. 23, 30, 97 S.Ct. 2141, 2145, 53 L.Ed.2d 80 (1977); *United States v. Scott*, 437 U.S. 82, 97, 98 S.Ct. 2187, 2197, 57 L.Ed.2d 65 (1977); *Sanabria v. United States*, 437 U.S. 54, 71, 98 S.Ct. 2170, 2183, 57 L.Ed.2d 43 (1978); *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct 1745, 1748, 90 L.Ed.2d 116 (1986); *Smith v. Massachusetts*, 543 U.S. 462, 468, 125 S.Ct. 1129, 1134, 170 L.Ed.2d 914 (2005); *Blueford v. Arkansas*, ___ U.S. ___, 132 S.Ct. 2044, 2050, 182 L.Ed.2d 937 (2012).

resolution, correct or not, of some or all of the factual elements of the offense charged, Petitioner reframes the test as "a trial court ruling, whatever its label, correct or not, finding that the prosecution had *failed to prove the defendant's guilt*."[26] The latter is scarcely simply a different way of stating the former; they are as like as chalk and cheese. Petitioner's formulation removes from this Court's test the requirement that the trial court's ruling "actually" resolve – whether correctly or incorrectly – one or more of the "factual elements of the offense charged," so that, under Petitioner's test, if the ruling is one that *purports* to find that the prosecution had "failed to prove the defendant's guilt," then *that* ruling, whether correct or not, constitutes an acquittal, *whatever* its basis, which may have nothing whatsoever to do with the "factual elements of the offense charged," as was the case in the trial judge's ruling in the present case. None of this Court's cases following *Martin Linen* in any way suggest that the requirement that the resolution of the trial judge, whatever its label, and whatever its correctness, be of one or more of the "factual elements of the offense charged," is actually irrelevant to the inquiry; as Respondent has noted, this Court quoted the "one or more of the factual elements of the offense charged" language of *Martin Linen* only last term.

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[26] Petitioner's Brief, p. 13.

Petitioner attempts to remove the "factual elements of the offense charged" from the test – that removal being essential to his obtaining relief – by reference to several cases of this Court which in fact quote the "factual elements of the offense charged" language. Perhaps central to Petitioner's claim is *United States v. Scott*.[27] There the defendant moved both before and during trial for dismissal of several counts of the indictment on the ground of prejudicial preindictment delay, and the trial court granted the motion at the end of the government's case. The government's attempt to appeal was properly rebuffed by the Sixth Circuit because of the holding in *United States v. Jenkins*[28] that jeopardy was offended if "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. . . ." But this Court overruled *Jenkins*, though the case had been decided only three terms previously, concluding that the case "placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empaneled to try him so as to include those cases *where the defendant himself seeks to terminate the trial before verdict on grounds unrelated to factual guilt or innocence*."[29] So here; that the structure burned not be

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[27] *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1977).

[28] *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975).

[29] *Scott*, 98 S.Ct. at 2191 (emphasis supplied).

a dwelling no more related to "factual guilt or innocence" of the offense charged than a requirement that the structure burned be blue.

There is no inconsistency between *Scott* and *Martin Linen*, nor does *Scott* modify *Martin Linen* in any way. Petitioner emphasizes that the line drawn by *Scott* distinguishing acquittals from other defendant-consented-to terminations of the trial is that with the latter the termination must be based on grounds "unrelated to factual guilt or innocence." But this does not undermine the "factual elements of the offense charged" portion of the *Martin Linen* test, unless one allows the "form of the action" or the label employed by the trial judge to control, which is precisely what Petitioner does. In what sense was the ruling of the trial judge here a "finding that the prosecution had failed to prove the defendant's guilt," as Petitioner reformulates the test? Only in the sense that the trial judge *said that's what she was doing*. Set aside the label, or form of the action, however, and it is plain that the trial judge did *not* resolve – not even incorrectly – *any* of the "factual elements of the offense charged." Petitioner admits this is so; his statement of the question says that the trial judge "erroneously held a particular fact to be an element of the offense." Because the trial judge terminated the trial *without* resolving, correctly or incorrectly, any element at all of the offense charged, the ruling of the trial judge was, by definition, "unrelated to the factual guilt or innocence" of the defendant of the offense charged. To say otherwise renders the "factual

elements of the offense charged" language of *Martin Linen* entirely meaningless.

Nor do any other of this Court's cases cut the *Martin Linen* acquittal test loose from its moorings to the factual elements of the offense charged. Petitioner cites *Sanabria v. United States*,[30] but in so doing is "wounded in the house of his friends."[31] *Sanabria* in fact applies *Martin Linen* to find an acquittal where the trial court found the proofs on one of the "factual elements of the offense charged" insufficient. Whether that insufficiency was *caused* by an erroneous evidentiary ruling of the trial court is of no moment under *Martin Linen*; the question was and is, did the trial judge, correctly or incorrectly, resolve one or more of the factual elements of the offense charged? He did in *Sanabria*, where this Court applied the "factual elements of the offense charged" test to so conclude. This Court specifically found that "the ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence,"[32] citing and applying *Martin Linen*, and clearly focusing on the factual elements of the offense as critical to its decision – " . . . petitioner here was acquitted for insufficient proof *of an element of the*

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[30] *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978).

[31] Zechariah 13:6.

[32] 98 S.Ct. at 2181.

crime. . . . This finding of fact stands as an absolute bar to any further prosecution. . . ."[33]

Petitioner also looks to *Arizona v. Rumsey*,[34] a sentencing case, for support. But in that case legal error occurred with regard to the construction of an actual "sentencing element" of the offense. The trial judge considered the factor of pecuniary gain as an aggravating circumstance, and found that this "element" or aggravating circumstance had not been shown (the judge acting as trier of fact) because he mistakenly believed that "receipt, or expectation of the receipt, of anything of pecuniary value" referred only to murders for hire, when actually proof that the murder was committed to obtain money would have been sufficient to *prove* the aggravating circumstance. This Court held that the misconstruction of the "pecuniary gain" aggravating circumstance by the trial judge did not change the fact that the judge, as trier of fact, had "acquitted" the defendant of this "element." But in the present case the trial judge did not require particular *proof* on an element – on a factual element that the *statute* required be proven by the prosecution – but required proof of a faux factual element that the legislature had not made part of the "offense charged." *Rumsey* is thus inapposite.

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[33] 98 S.Ct. at 2183 (emphasis supplied).

[34] *Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2304, 81 L.Ed.2d 164 (1984).

Smith v. Massachusetts[35] is also cited by Petitioner. Again, there is no question that an actual element – one of the factual elements of the offense charged – was "resolved" by the trial judge, though the judge made a mistake of law. As this Court noted, the element at issue was that the firearm involved have a barrel of less than 16 inches in length. No specific proof on length was presented, and the trial judge found that no reasonable juror could find guilt beyond a reasonable doubt on that element. After granting defendant's motion for acquittal, and after the trial had proceeded through the defense case, the prosecutor showed the trial judge an appellate precedent to the effect that testimony as to the *kind* of gun was sufficient to allow a finding on the length of the barrel. The trial judge then reversed her ruling on the judgment of acquittal. In a straightforward application of *Martin Linen*, this Court found that defendant had been acquitted because the trial judge had resolved a factual element of the offense charged, even if she had done so incorrectly.[36]

And so *Martin Linen*'s requirement that what is "resolved" by the trial judge in terminating the trial be one or more of the "factual elements of the offense

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[35] *Smith v. Massachusetts*, 543 U.S. 462, 125 S.Ct. 1129, 170 L.Ed.2d 914 (2005).

[36] The "more difficult question" the Court faced was whether the trial judge could reconsider her ruling as she did, a question this Court answered in the negative, in the absence of a court rule so allowing.

charged" has not been altered by this Court. Several cases from other jurisdictions illustrate the point. In *Commonwealth v. Hosmer*,[37] a decision of the Massachusetts Appeals Court, during the examination of the Commonwealth's first witness, the prosecutor moved to amend the information to reflect that the offense charged had occurred a day earlier than stated in the charging document. Defense counsel objected, and the judge denied the motion and terminated the trial. The Commonwealth acknowledged on appeal that the judge uttered, "not guilty," as he left the bench, and the District Court docket, by a check mark, recorded a finding of not guilty.[38]

The Court of Appeals agreed that "If there was a finding of not guilty, principles of double jeopardy prevent a retrial of the defendant on the same charge." But, said the court,

> [i]n considering "the exact nature of the action taken by the District Court judge," . . . we are not bound by labels or checkmarks on a form, but we inquire whether there was a resolution of any of the facts *that make up the offense charged*. We conclude that the judge dismissed the Commonwealth's complaint, and that this was an abuse of discretion for the "date is not an essential ingredient of the offense. . . ."[39]

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[37] *Commonwealth v. Hosmer*, 727 N.E.2d 537 (Mass. App. 2000).

[38] *Hosmer*, at 538.

[39] *Hosmer*, at 538, 539 (emphasis supplied).

The court concluded that the trial judge, despite his characterization of his actions as an acquittal, had aborted the trial on grounds unrelated to guilt or innocence.

And in *United States v. Maker*[40] the third circuit, pointing to several *post-Martin Linen* decisions,[41] found that it is "generally understood" that the test for an acquittal is "only when, in terminating the proceeding, the trial court actually resolves in favor of the defendant *a factual element necessary for a criminal conviction*." Thus the appeal of the government in the case before it, the court concluded, was "barred only if the district court's legal determination about the elements of a single scheme conviction is correct."[42] Because that ruling was incorrect, the trial court misunderstanding the actual elements of the offense, the government appeal, and retrial, were not precluded by jeopardy.[43]

Similarly, in *State v. Korsen*[44] the State appealed a directed verdict of acquittal, and the Idaho Supreme Court framed the issues as first, "Did the

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[40] *United States v. Maker*, 751 F.2d 614, 622 (CA 3, 1984) (emphasis supplied).

[41] *Carter v. Estelle,* 677 F.2d 427, 452-453 (CA 5, 1982); *United States v. Dahlstrum,* 655 F.2d 971, 974 (CA 9, 1981); *United States v. Moore,* 613 F.2d 1029, 1037 (CA DC, 1979); *Sedgwick v. Superior Court for the District of Columbia,* 584 F.2d 1044, 1049 (CA DC, 1978).

[42] *Maker*, 751 F.2d at 622.

[43] *Maker*, 751 F.2d at 623-624.

[44] *State v. Korsen*, 69 P.3d 126 (Idaho, 2003).

magistrate err by granting Korsen's Rule 29 motion for acquittal based upon the State's failure to prove a legitimate reason for asking Korsen to leave the premises, when the statute has no such requirement as one of its elements?"; and second, "Is Korsen protected by double jeopardy principles from a retrial on the trespass charge?"[45] The court, citing the test of *Martin Linen,* found that the lower court "as a result of legal error, determined that the government could not prove a fact that is not necessary to support a conviction," so that what had occurred was not an acquittal, and appeal and retrial were thus not barred.[46]

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[45] *Korsen*, 69 P.3d at 131.

[46] *Korsen*, 69 P.3d at 137. Petitioner cites several cases for the opposite proposition. In *State v. Lynch*, 399 A.2d 629 (N.J., 1979) the court found the situation analogous to that in *Sanabria*; that is, "The trial court's interpretation of the statute, though erroneous, led to prohibiting the admission of certain evidence, a ruling which may be 'characterized as an erroneous evidentiary ruling,' which in turn caused the acquittal for insufficient evidence." 399 A.2d at 636-637. The Minnesota Supreme Court in *State v. Large*, 607 N.W.2d 774 (Minn., 2000) also found *Sanabria* controlling, citing the same language. And in *Carter v. State*, 227 S.W.3d 895 (2006), the Supreme Court of Arkansas found that a finding of insufficiency of evidence of aggravation in an aggravated armed robbery case based on a legal error as to that which was necessary to prove aggravation was nonetheless an acquittal of that charge. To the extent that *Carter* may be read to find that an acquittal occurs when the trial judge resolves something other than "one or more of the factual elements of the offense charged," Respondent submits that it is mistaken for the reasons argued previously.

(3) The Michigan Supreme Court decision is a faithful application of the *Martin Linen* acquittal test

The Michigan Supreme Court here applied the *Martin Linen* test, taking the words to mean what they say. The court reviewed the cases by this Court discussed above, and concluded that "each of these cases involves evidentiary errors regarding *the proof needed to establish a factual element* of the respective crimes at issue."[47] There is "a constitutionally meaningful difference," said the court, between the present case, "in which the trial court identified an extraneous element and dismissed the case solely on that basis, and *Rumsey, Smalis*, and *Smith,* in which the trial courts made evidentiary errors regarding how to prove the governing law."[48] An "acquittal for double-jeopardy purposes is 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.'" Here, "the trial court did not resolve or even address any factual element necessary to establish a conviction for burning other real property." The ruling was "based on an error of law unrelated to defendant's guilt or innocence on the elements of the charged offense, and thus the trial court's dismissal of the charge did not constitute an acquittal."[49] This is an application of *Martin Linen*

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[47] 491 Mich. at 14, 810 N.W.2d at 542 (emphasis supplied).

[48] 491 Mich. at 15, 810 N.W.2d at 543.

[49] 491 Mich. at 20-21, 810 N.W.2d at 546.

faithful to its text, and to the historical understanding of an "element" of a crime as one of the constituent parts of the crime charged – one of those facts legally essential for punishment to be inflicted – which must be proved to sustain a conviction.

Petitioner, who in his reframing of the *Martin Linen* test removes all reference to the "factual elements of the offense charged,"[50] takes the Michigan Supreme Court to task on the ground that it implicitly added one word, a second "correct," to the test, so that as the Michigan Supreme Court applied it, the test reads that an acquittal occurs if the trial court's ruling, whatever its label, represents "a resolution, correct or not, of some or all of the *correct* factual elements of the offense charged." But it is not necessary to *add* the word "correct" to the test, for there are no other kinds of elements of a crime than "correct" ones. There are constituent parts of the crime charged – facts legally essential for punishment to be inflicted – which must be proved to sustain a conviction, and there are facts unrelated to guilt or innocence of the charged offense, which may, or may not, go to proving a higher or different offense. To use the phrase, as did the Michigan Supreme Court, "extraneous element" to define something identified by the trial court as a "constituent part" of the charged offense which in fact is *not*, or the phrase "faux

[50] Petitioner rewrites the *Martin Linen* acquittal test as "a trial court ruling, whatever its label, correct or not, finding that the prosecution had *failed to prove the defendant's guilt*."

element," employed by Respondent for the same purpose, is not to identify some different "kind" of element of the offense from the "correct" or "actual" elements, it is simply a shorthand to describe that universe of facts that do *not* constitute constituent parts of the offense charged. To add "correct" before "factual elements" in *Martin Linen* adds nothing; what else would this Court have been referring to in that case in requiring, for an acquittal, a resolution, correct or not, of one or more of the "factual elements of the offense charged"? For example, if, in a second-degree murder case, a trial judge found insufficient proof of premeditation, an element of first-degree murder but not second-degree murder, the judge would not have resolved an "incorrect element" of second-degree murder, but no element at all. Indeed, to determine whether two offenses are the "same" for double jeopardy purposes, a court must determine "whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution."[51] Could a prosecutor justify successive prosecutions or additional punishment by pointing to some fact that is not a constituent part of one of the offenses, arguing that the test is satisfied because this Court in *Blockburger*[52] and *Dixon* did not

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[51] *United States v. Dixon,* 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); see *Wilson v. Belleque*, 554 F.3d 816, 828-829 (CA 9, 2009).

[52] *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

refer to the "correct" elements? Of course not – there simply is no other kind.[53]

Petitioner seems to be rewriting the *Martin Linen* test a second way as well. The "resolution" *of* a "factual element" spoken to in that case plainly refers to a determination by the trial judge that no reasonable juror could find an element or elements proven beyond a reasonable doubt. And that resolution by the trial judge can be incorrect.[54] It may even be the result of erroneous evidentiary rulings, or of a misunderstanding as to that proof which is necessary to establish the element or elements in question. Petitioner in effect rewrites *Martin Linen*'s test to say that an acquittal occurs where the trial court's ruling, whatever its label, represents "a resolution, correct or not, *of that which the trial judge identifies as an element*, *correctly or not*, of the offense charged." But *Martin Linen* does not speak to the legal question of determining those "ingredients"[55] which make up the

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[53] And it has often been said that the trial judge has a duty "to tell a jury what facts they must find before they can convict – that is, to instruct the jury as to the elements of the crime charged." See, e.g., *United States v. Baird*, 134 F.3d 1276, 1283 (CA 6, 1998). Surely this duty cannot be satisfied by a misinstruction on the elements, on the ground that it is never said that the duty of the court is to instruct on the "correct elements" of the crime. There are *only* "correct" elements.

[54] See *United States v. Wilson*, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975).

[55] See *Apprendi v. New Jersey*, 530 U.S. 466, 500, 120 S.Ct. 2348, 2368, 147 L.Ed.2d 435 (2000) (Thomas, J., concurring).

offense charged, allowing *that* determination to be legally incorrect, but, again, to the determination by the trial judge that, as a matter of law, no reasonable juror could find an element or elements proven beyond a reasonable doubt, whether *that* determination be correct or not. The "correct or not" language in the test enunciated by the Court refers to the resolution "*of*" an element, not to a determination of what the elements *are*. To say otherwise is to say that "factual elements of the offense charged" in the *Martin Linen* test has no meaning, and that this Court did not say what it meant in that case.

(4) Petitioner's policy arguments are unavailing

Petitioner argues that reading the acquittal test of *Martin Linen* to mean what it says would allow appeals from jury acquittals, encourage prosecution appeals from directed verdicts or judgments of acquittal entered by taking the case from the jury, and is too difficult to apply, being essentially a matter of "semantics." Petitioner is mistaken. Certainly no appeal from a jury verdict of acquittal can be taken even where the jury is instructed on the need to find a "faux element" proven beyond a reasonable doubt. Jury verdicts are general, and there would be no way of knowing what led the jury to acquit. Jeopardy *terminates* or concludes upon a jury acquittal;[56] this

[56] See section C, infra.

Court held long ago that appeals from actual verdicts of acquittal are not permitted.[57]

And *Martin Linen*'s acquittal test, referring to actual resolutions of one or more of the factual elements of the offense charged, has been in existence for 35 years, the *Scott* decision, allowing retrial when the trial is terminated with defendant's consent on a ground unrelated to factual guilt or innocence, for 34 years, and the *Maker* decision for 28 years. Prosecutors, were they so inclined, have had every reason to believe that whatever the label or form of the action, if the trial was terminated by the trial judge with the consent of the defendant and by a resolution of something *other* than one or more of the factual elements of the offense charged, taking an appeal is possible, as no acquittal has occurred and so double jeopardy does not preclude a second trial. Yet there are few such appeals when trial judges enter directed verdicts of acquittal or judgments of acquittal, and this is because trial judges *do not commonly mistake the elements of the offense charged*. When prosecutors disagree with these terminations of the trial, it is ordinarily because the prosecutor disagrees with the trial judge's assessment that, taking the evidence in the light most favorable to the prosecution, no reasonable juror could find guilt beyond a reasonable doubt, the trial judge perhaps having acted as 13th

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[57] *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904).

juror.[58] Appeal in this situation is precluded by *Martin Linen*. Less often, the prosecution may feel aggrieved by a directed verdict or judgment of acquittal that terminates a jury trial because the prosecution feels an erroneous evidentiary ruling caused the insufficiency of the evidence. Appeal is precluded by *Martin Linen* and *Sanabria*. And even less often, the prosecution may feel aggrieved by a directed verdict or judgment of acquittal that terminates a jury trial because the prosecution feels that the trial court found the evidence inadequate to prove a factual element of the offense charged by misunderstanding the proofs necessary to establish that element. *Martin Linen, Rumsey* and *Smith* disallow retrial in this

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[58] See *United States v. Freeman*, 208 F.3d 332, 343 (CA 1, 2000): "Our trial system makes a sharp distinction between functions: the judge is 'not a thirteenth juror, much less [is] he a super-juror whose views of credibility could override the jury's verdict.' . . . Accordingly, . . . the court . . . must take the evidence in the light most favorable to the government in ruling on a motion for a judgment of acquittal."

And see Richard Sauber, Michael Waldman, "Unlimited Power: Rule 29(A) and the Unreviewability of Directed Verdicts of Acquittal," 44 Am. U. L. Rev. 433 (1994).

Judicial intrusion into matters that should be left to the jury has long been a concern, in both civil and criminal cases. As Professor Thayer said long ago, while a jury verdict "must not be absurd or whimsical," this is "a different thing from imposing upon the jury the judge's own private standard. . . . judges do not undertake to set aside the verdict because of their own opinion of the conduct in question differs from the jury's. They are not an appellate jury. . . . We might anticipate that this clear but delicate line would often be overstepped. It often has been." Thayer, *A Preliminary Treatise on Evidence* (1898), p. 208-210.

situation, as the trial judge has, nonetheless, resolved, even if incorrectly, one of the actual factual elements of the offense charged.

Nor is the matter one of "semantics." In *Smith*, for example, the factual element involved was the length of the barrel of the weapon. The trial judge erred in finding that only direct testimony as to length was sufficient, when circumstantial evidence – testimony as to the type of weapon – would do. The judge thus erred in finding the evidence presented insufficient to show a factual element. If the judge had instead required proof that the weapon was a blue steel revolver, or that it was possessed in a school, any reasonable person could readily discern that proof of some fact not a constituent part of the offense had been required. And where a trial judge requires proof of an element that actually belongs to a greater offense, such as premeditation in a second-degree murder case, or as here, proof of the *absence* of that greater element, it is apparent that proof of a fact not a constituent part of the offense has been required. The trial judge here did not find that the proof that real property was burned was insufficient by misconstruing the sort of proof adequate to make that showing. Instead, she required proof of an additional fact not a constituent part of the offense charged, just as if she had required that the prosecution prove the structure was of a certain value, or was blue in color, neither of which are required by the statute.

And so if this Court affirms the Michigan Supreme Court's holding that where the defendant consents to the termination of the trial by requesting and gaining a resolution of something *other* than one of the "factual elements of the offense charged," nothing will have changed. In considering whether to allocate increasingly scarce resources to a possible appeal, prosecutors will still be required to assess whether the trial judge's action was, whatever its label, a resolution, even if incorrect, of one or more of the factual elements of the offense charged, or was instead a resolution of something *other* than one of the constituent parts of the crime charged which must be proved to sustain a conviction.

(5) Conclusion: retrial is permitted when a trial is terminated at the request of a criminal defendant by a resolution of something other than a factual element of the offense charged, as no acquittal has occurred, but instead a termination of the trial on a ground unrelated to actual guilt or innocence

Petitioner here urged upon the trial court a termination of the trial on a resolution of a "fourth element" – that the structure burned *not* be a dwelling – that the prosecution was not, under the statute passed by the legislature,[59] required to prove. The

[59] As this Court said in *Sanabria*, "Congress [the legislature] . . . establishes and defines offenses. . . . once Congress has

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trial judge resolved something other than one of the "factual elements of the offense charged," a point conceded throughout all appellate proceedings. She did not resolve one of the constituent parts of the crime charged – one or more of those facts legally essential for punishment to be inflicted – which must be proved to sustain a conviction, and so no acquittal occurred. Petitioner's proposed modification of *Martin Linen* turns the storied protections of the Jeopardy Clause into a parlor trick, or game of "heads I win, tails you lose." Should the defendant convince the trial judge to terminate the trial by concluding that as to one of the factual elements of the offense charged, no rational juror could, on the evidence presented, find that element proven beyond a reasonable doubt, the defendant, even if the ruling is incorrect, "wins"; should the defendant convince the trial judge to terminate the trial by concluding that, as to some fact that is *not* a constituent part of a crime which must be proved by the prosecution to sustain a conviction, no rational juror could, on the evidence presented, find that fact proven beyond a reasonable doubt, the prosecution loses.

Because that the structure burned here *not* be a dwelling was not one of the "factual elements of the offense charged," the termination of the trial on this

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defined a statutory offense by its prescription of the 'allowable unit of prosecution,' . . . that prescription determines the scope of protection afforded by a prior conviction or acquittal." 98 S.Ct. at 2181.

basis was a termination on a ground unrelated to the factual guilt or innocence of the Petitioner on the offense charged. The Michigan Supreme Court correctly held that jeopardy does not bar retrial.

C. *Martin Linen* Revisited: a "Directed Verdict" or "Judgment of Acquittal" Entered by the Court in a Jury Trial Without A Verdict From That Body Is a Ruling of Law, and Reversal of that Ruling Leads to a Second Trial Within the Original Jeopardy

(1) Introduction

In *Smith v. Massachusetts*,[60] this Court observed that it has "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. . . . This is so whether the judge's ruling of acquittal comes in a bench trial or, as here, in a trial by jury."[61] And this despite the fact that, as the Court itself pointed out, "the common-law protection against double jeopardy historically applied only to

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[60] *Smith v. Massachusetts*, 543 U.S. 462, 125 S.Ct. 1129, 170 L.Ed.2d 914 (2005).

[61] 125 S.Ct. at 1133-1134, the Court citing *Fong Foo v. United States,* 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962), *Sanabria,* and *Martin Linen.* Respondent would note that an acquittal by a judge at a bench trial is a *verdict*, not a "ruling" of law, as is a judgment of acquittal entered in a jury trial.

charges on which a jury had rendered a verdict. . . ."[62] Earlier, in its overruling of the *Jenkins* decision in *United States v. Scott*,[63] the Court took note of Justice Holmes' dissent in the *Kepner*[64] case, remarking that "Mr. Justice Holmes' concept of continuing jeopardy would have greatly simplified the matter of Government appeals, but it has never been accepted by a majority of this Court."[65] Because a "verdictless judgment" – which is what the modern judgment of acquittal is – does not form a part of the historical backdrop of the Jeopardy Clause, reconsideration of the foundations of *Martin Linen* is appropriate, particularly given that this Court in *Fong Foo* and its progeny has never explained the leap from a double jeopardy protection "historically applied only to charges on which a jury had rendered a verdict" to the present practice of application of that protection to what are essentially "verdictless" judicial judgments in jury trials. These judgments are rulings of law,[66] can be mistaken, and *should* be reviewable on appeal.

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[62] 125 S.Ct. at 1133, citing 2 M. Hale, *Pleas of the Crown* 246.

[63] *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed. 2d 65 (1978).

[64] *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904).

[65] *Scott*, 98 S.Ct. at 2193. See also *Jenkins,* 95 S.Ct. at 1006.

[66] See *Wilson*, supra, 95 S.Ct. at 1023, referring to the "postverdict ruling of law" under consideration there.

A form of Justice Holmes' "continuing jeopardy" formulation, Respondent submits, would, as this Court said in *Scott*, "simplify the matter of Government appeals," and do so *without* permitting Government appeals of *verdicts* of acquittal rendered by juries, or by judges acting as factfinder in cases where trial by jury is waived.[67] As Justice Holmes said, "there can be but one jeopardy in one case."[68] The question becomes, when does that jeopardy *conclude*? Respondent submits that the jeopardy that continues in "one case" should be viewed as having concluded, once it has attached, by 1) a termination of the trial short of verdict without the defendant's consent and without manifest necessity; 2) a termination of the trial short of verdict *with* the defendant's consent, deliberately provoked by the prosecuting official;[69] 3) a final verdict of guilty,[70] 4) a *verdict* of

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[67] And this Court has applied the principle of "continuing jeopardy" in other circumstances. See *Richardson v. United States*, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984); *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984).

[68] *Kepner*, 24 S.Ct. at 807.

[69] *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982).

[70] That is, jeopardy continues through the defendant's direct appeal, so any retrial ordered for prejudicial error is a part of the "original" jeopardy; " . . . the Constitution permits a second trial in the same case. The reason, however, is not the fiction that a man is not in jeopardy, in case of a misdirection, for it must be admitted that he is in jeopardy, even when the error is patent on the face of the record. . . . The reason . . . is that there can be but one jeopardy in one case." *Kepner*, 24 S.Ct. at 807.

acquittal,[71] 5) a final post-judgment determination that the evidence is insufficient to support a verdict of guilty.[72] But a termination of the trial short of verdict *with defendant's consent* that was not deliberately provoked by the prosecuting official should not terminate jeopardy, so that prosecution appeals, even from "verdictless judgments" in defendant's favor, should be permitted.

(2) The "Directed Verdict" Was An Instruction to the Jury, Not A Verdict By the Court

The "directed verdict" of acquittal in the modern sense – the termination of the trial on the defendant's motion without submission of the case to the jury for its decision – was unknown at the time of the founding. Indeed, the notion of "directing" a jury to reach a particular decision is at best awkward, and so today, both in civil and criminal cases, in some jurisdictions a different nomenclature is employed. For example, in federal civil cases the former "directed verdict" is now known as a "motion for a judgment as a matter of law," allowing the granting of judgment "as a

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[71] "As regards a new trial after acquittal, 'It was never known,' said Chief Justice Pratt, in 1724, 'that a verdict was set aside by which the defendant was acquitted, in any case whatsoever upon a criminal prosecution.'" Thayer, p. 175. And see discussion at p. 175-179.

[72] *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

matter of law" on a claim or defense if the court finds "that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue. . . ."[73] In federal criminal cases, what was once known as a motion for a "directed verdict of acquittal" is now a motion for "a judgment of acquittal," which is to be granted "if the evidence is insufficient to sustain a conviction."[74] The Advisory Committee Note states that the purpose of the change from motion for "directed verdict" to motion for "a judgment of acquittal" was simply "to make the nomenclature accord with the realities," for modernly, judges do not instruct juries to return particular verdicts, and judgment is entered without a verdict. Modern judges determine whether, *as a matter of law*, there is sufficient evidence to allow a reasonable juror to find guilt beyond a reasonable doubt on a factual element or elements. Trial judges *can be wrong* in making this decision, as can appellate courts, and, under current doctrine, where no further trial is required, may be reversed, as when a judge grants such a motion *after* a jury has returned a verdict of guilty, or when an intermediate appellate court reverses a conviction on insufficient evidence. What, then, is an "acquittal," bearing in mind that labels placed by judges on their actions do not control?

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[73] Federal Rules of Civil Procedure, Rule 50.

[74] Federal Rules of Criminal Procedure, Rule 29.

(a) An acquittal is a verdict delivered by the factfinder

An acquittal is a *verdict*. Legal dictionaries from the 18th and early 19th centuries define "acquittal" and "verdict" inconsistently with the modern termination of the trial on a judicial finding that, as a matter of law, there is insufficient evidence from which a jury could reach the conclusion of guilt, a finding that does not involve the weighing of evidence or assessment of the credibility of witnesses. For example, Jacob's *A New Law Dictionary* (1729) defines "Verdict" as " . . . the Answer of a Jury given to the Court, concerning the Matter of Fact in any Cause committed to their Trial . . . A General Verdict is that which is brought into Court in like general terms to the General Issue; as if a Defendant pleads Not guilty, or no Wrong, then the Issue is general, whether he be guilty, or the Fact be a wrong, or not. . . ." "Acquittal" is defined as " . . . a Deliverance and Setting free from the Suspicion of Guilt; as he that on Trial is discharged of a Felony, is said to be *Acquietatus de Felonia*; and if he be drawn in Question again for the same Crime, he may plead *auter foits acquit*. . . . *Acquittal in Fact* is when a Man is found Not guilty of the Offense by a jury, on Verdict. . . ."[75]

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[75] Giles Jacob, *A New Law Dictionary* (1729). See similarly, Richard Burn, *A New Law Dictionary* (1792); Thomas Potts, *A Compendious Law Dictionary* (1815); Thomas Walter Williams, *A Compendious and Comprehensive Law Dictionary* (1816)

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(b) The "directed verdict" was an instruction to the jury; taking the case from the jury is a modern development

Until well into the 19th century, the "directed verdict" was not a ruling by the court granting judgment without verdict, but an instruction to the jury. At the time of the framing, juries had long since ceased being composed of witnesses to the event in controversy, and performed no investigatory function, being judges of the facts in legal controversies. As jury trial developed in England, though juries were free to render that verdict they believed appropriate, rendering a verdict in opposition to the direction of the court could lead to fine and imprisonment of the jurors. Finally, in 1670 in *Bushel's Case*[76] it was established that a jury could not be punished for its verdict, even if contrary to instructions and the

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("*when a person is found not guilty of the offence by a jury, on verdict, he is acquitted in fact*" (emphasis supplied)).

Respondent would include all verdicts, including those found by a judge at a bench trial. The bench trial was largely unknown in our early history, and there is no right in the defendant to a bench trial and verdict. *Singer v. United States,* 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965). Indeed, in some jurisdictions, a waiver of the right to jury trial was held impossible absent a specific authorizing statute. See *People v. Kirby*, 440 Mich. 485, 490-491, 487 N.W.2d 404, 406 (1992): "While it was acknowledged that possibly with proper legislative authority, a defendant could waive his right to trial by jury, . . . waiver of a jury was recognized at this time as a substantial right only if allowed by the Legislature."

[76] *Bushel's Case,* 124 Eng.Rep. 1006 (C.P.1670).

evidence. William Penn was charged with sedition, and, though directed to convict, the jurors at first hung, and then returned a verdict on a lesser offense. The jurors were ordered to deliberate again and returned the same verdict. The court ordered them locked in the jury room "without meat, drink, fire and tobacco," until they reached a "proper verdict." After several days, the judge accepted the verdict but fined the jurors. When they refused to pay, they were imprisoned. Some paid, but Bushel and several others appealed, and the Chief Justice held that a trial court could never punish a juror for his verdict.[77]

But this did not mean that jurors could not be instructed by the court as to their "proper" verdict. The judge "could direct the jury to find for the plaintiff or for the defendant," but "the jury was not bound by the direction of the judge."[78] Indeed, into the 20th century it was held permissible in Michigan for the trial judge to direct the jury to *convict* in a criminal case. In 1886 Justice Campbell wrote for the court upholding a directed verdict of guilty:

> Complaint is also made that the court had no right to direct the jury to find a verdict of guilty. . . . Where all the facts are admitted

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[77] See Thayer, *A Preliminary Treatise on Evidence* (1898), p. 166-169.

[78] Suja A. Thomas, "The Seventh Amendment, Modern Procedure, and the English Common Law," 82 Wash.U. L.Q. 687, 729 (2004).

> there is nothing for the jury to pass upon. The judgment must be affirmed.[79]

The trial judge was, however, limited to so instructing the jury. It was required that the jury retire and deliberate, and a verdict in contradiction of the court's instructions that the duty of the jury was to return a verdict of guilty could not be overturned, nor the jurors coerced in any way.[80] And so also with directions to the jury to acquit. Judicial direction to jurors regarding verdict "was either instruction on the law or advice on the facts, or a mixture of the two. It was not a device for taking a case from a jury. . . ."[81] As Bishop put it in 1872, " . . . if the evidence, giving it full credit, does not show a crime . . . it is the duty

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[79] *People v. Richmond,* 59 Mich. 570, 573, 26 N.W. 770, 770 (1886). See also *People v. Elmer*, 109 Mich. 493, 496 67 N.W. 550, 551 (1896) (" . . . when the facts are admitted or are undisputed, it is the duty of courts to instruct juries that the facts proven constitute the offense. There was no question of fact for the jury to pass upon. *The conclusion is one of law*, and not of fact. Guilt follows, as a matter of law, when the facts are undisputed" (emphasis added)); *People v. North*, 153 Mich. 612, 117 N.W. 63 (1908); *People v. Doyle*, 160 Mich. 423, 125 N.W. 358 (1910).

[80] *People v. Doyle*, 160 Mich. at 425, 125 N.W. at 359 ("It is the right of the trial judge to instruct the jury that it is their duty to bring in a verdict of guilty, if in his judgment the evidence in the case and the law applicable thereto warrants such instruction. Having so directed, he may not go further and compel the jury to follow his instructions. If this is done, the verdict is not that of the jury, but becomes that of the court, and the constitutional right to trial by jury is denied").

[81] W.W. Blume, "Origin and Development of the Directed Verdict," 48 Mich. L. Rev. 555, 561 (1950).

of the court so to instruct the jury, and order a verdict to be rendered for the defendant."[82] Several mid-19th Century cases illustrate the point. In one, for example, it was said that "It appears by the exceptions that the defendant requested the judge to instruct the jury that there was no evidence that the beer sold by the defendant in his tenement was intoxicating; but that the court declined so to do, and left the question to the jury. Perhaps, when there is no competent evidence to support the issue by the party holding the affirmative, it is competent for the court so to instruct the jury,"[83] and in another the court held that "The omission to instruct the jury in a criminal case that the evidence does not prove the offence laid in the indictment is good ground of exception."[84] Nor could a defendant be discharged on writ of error on the ground that the evidence was insufficient to convict. No review of factual matters was permitted on writ of

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[82] 1 Bishop, *Commentaries on the Law of Criminal Procedure*, (2d ed. 1872), § 977, p. 600.

[83] *Commonwealth v. Taylor,* 80 Mass. 26, 28, 14 Gray 26 (Mass. 1859). And see *Rex v. Doaks,* Quincy's Mass. Reports 90 (Mass. Super. Ct. 1763), where it is said that "The Jury by Direction of the Court, brought in their Verdict 'Not Guilty.' "

[84] *Commonwealth v. Merrill,* 80 Mass. 415, 418, 14 Gray 415 (Mass. 1860). And see, for example, *Budd v. People,* 143 U.S. 517, 519, 12 S.Ct. 468, 469, 36 L.Ed. 247 (1892), where "defendant's counsel requested the court to instruct the jury to render a verdict of acquittal . . . The court declined to direct a verdict of acquittal, and the defendant excepted."

error;[85] the remedy lay with the trial judge, as " . . . whenever, in a criminal case, the verdict appears not to have been warranted by the evidence, a new trial will be granted."[86] Indeed, it was not until 1978 that this Court, overruling its prior decision in *Bryan v. United States*,[87] held that retrial is not permitted

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[85] 3 Blackstone, *Commentaries on the Laws of England* (1768) p. 405-406: "A writ of error lies from some supposed mistake in the proceedings. . . . [it] only lies upon matters of law arising from the face of the proceedings, so that no evidence is required to substantiate or support it: and there is no method of reversing an error in the determination of facts, but by an attaint, or a new trial, to correct the mistakes of the former verdict."

In England, as late as Stephen's 1883 treatise, the lack of the ability to review verdicts for evidentiary sufficiency was lamented by the author: "In relation to the verdict of the jury, two matters only require notice, namely, the rule that the jurors must be unanimous, and the right of the jury to return whatever verdict they think right without being subject to be punished at the will of the court." "No provision whatever," Stephen observed, "is made for questioning the decision of a jury on matters of fact." "However unsatisfactory such a verdict may be, whatever facts may be discovered after the trial, which if known at the trial would have altered the result, no means are at present provided by law by which a verdict can be reversed." Stephen suggested the remedy of new trial. 1 Stephen, *History of the Criminal Law of England* (1883): p. 304, 312-315.

[86] 1 Bishop, § 1104, p. 696. And see Thomas, 82 Wash. U. L.Q. at 730 ("Cases do show that the court might order a new trial if the jury did not follow the direction of the judge").

[87] *Bryan v. United States*, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 334 (1950).

where on appeal it is finally held that the evidence at trial was insufficient to support the verdict of guilt.[88]

As time passed, there grew up judicial methods of "controlling the jury and correcting their errors,"[89] beyond "the method of granting new trials when the verdict was unreasonable, without punishing the jurors,"[90] such as nonsuit and demurrer.[91] And so when it was determined that the sufficiency of the evidence is a question of law, the entering of judgment by taking of the case from the jury no longer appeared, in civil cases, to violate the right to jury trial.[92] The entertaining of a motion for acquittal in criminal cases, and the entry of judgment without verdict, were a part of this "evolutionary trend which . . . increased the supervisory role of the judge over the trial process."[93] It has been said that the judges in this country began to utilize the directed verdict in civil cases to grant judgment in the 19th century, and that the "motion for judgment of acquittal in criminal cases came still later and was probably influenced by

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[88] *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

[89] Thayer, at p. 137.

[90] Thayer, at p. 139.

[91] Blume, at p. 562 ff.

[92] "Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 659, 55 S.Ct. 890, 892, 79 L.Ed. 1636 (1935).

[93] Theodore W. Phillips, "The Motion for Acquittal: A Neglected Safeguard," 70 Yale L.J. 1151 (1961).

these earlier developments in the civil trial."[94] As one commentator has put it, "the power to direct an acquittal developed as a corollary to the directed verdict in civil cases, with little apparent thought or reasoning."[95] And, importantly, when this authority was codified in 1907 for the federal courts, the government did not have, as is true in many jurisdictions today, the statutory authority to appeal consistent with allowance of the Jeopardy Clause on retrials, but virtually no right to appeal at all.[96]

And so today, cases may be taken from the jury when, taking the evidence in the light most favorable to the opposing party, as *a matter of law* the movant – which, in a criminal case, can only be the defendant – is entitled to judgment; that is, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as *a matter of law*"[97] is a question the court may resolve.

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[94] Phillips, 70 Yale L.J., at 1152.

[95] Richard Sauber, Michael Waldman, "Unlimited Power: Rule 29(A) and the Unreviewability of Directed Verdicts of Acquittal," 44 Am. U. L. Rev. 433, 434 (1994)

[96] Sauber and Walman, 44 Am. U. L. Rev. at 434.

[97] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252, 106 S.Ct. 2505, 2512 (1986) (emphasis added).

(3) *Autrefois acquit* requires a verdict

The prohibition in the federal constitution against double jeopardy was, as is commonly understood, derived from the common-law English pleas of *autrefois acquit* and *autrefois convict*. Blackstone stated that:

> . . . the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once *fairly found not guilty* upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.[98]

Blackstone also observed that the:

> . . . plea of autrefois convict, or a former conviction for the same identical crime . . . is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. . . .[99]

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[98] 4 *Blackstone's Commentaries* 335 (emphasis supplied).

[99] 4 *Blackstone's Commentaries* at 329-331.

These pleas in bar were a reaction to generations of multiple prosecutions, which were "so commonplace that the only people to escape such a fate were those capable of surviving the tortuous physical battles of trial by ordeal."[100]

This tradition of the pleas in bar of *autrefois acquit* and *autrefois convict*, each of which required a judgment by the jury in a prior proceeding as a necessary prerequisite, was carried over to the legal tradition of the colonists.[101] New Hampshire was the first colony to specifically recognize the jeopardy bar in its post-revolutionary constitution, providing that "No subject shall be liable to be tried, after an acquittal, for the same crime or offence."[102] Courts in other states also recognized this form of plea in bar.[103] This rich history was thus before the First Congress which proposed the Bill of Rights, including the double jeopardy prohibition. As originally proposed by Madison, the clause simply stated: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence. . . ."[104] The original amendments submitted to the House for consideration included an amendment to prohibit a "second trial after acquittal." The

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[100] See Francine Ward, "The Double Jeopardy Clause of the Fifth Amendment," 26 Am. Crim. L. Rev. 1477, 1479 (1989).

[101] See, e.g., the Massachusetts Body of Liberties of 1641.

[102] N.H. Const., art. I, sec. 16 (1784).

[103] See Ward, 26 Am. Crim. L. Rev. at 1480-1481.

[104] 1 Annals of Cong. 434.

language which evolved prohibiting more than "one trial" was roundly debated, as concern was expressed that this language might prevent a second trial even where sought by the defendant on a claim of error after a conviction, whereas the common law was to the contrary. The result was the language now appearing in the Fifth Amendment Jeopardy Clause, referring, significantly, to *one jeopardy*, rather than *one trial*.

Thus, our Jeopardy Clause is an amalgam of common law pleas in bar, which required an actual verdict in a prior proceeding before the bar of *autresfois acquit* could be effectively pled. As stated by Justice Story at a time very much closer to the ratification of the Bill of Rights, the double Jeopardy Clause was understood to mean "that a party shall not be tried a second time for the same offense, after he has once been convicted, or acquitted of the offense charged, by the *verdict of a jury, and judgment passed thereon for or against him.*"[105] And in *Ball v. United States*[106] this Court found the retrial of Ball, who had been acquitted by the "verdict of the jury," improper, as Ball had been "discharged by the circuit court by reason of his acquittal by the jury, and not by reason of any insufficiency in the indictment. . . ." and so the "verdict of acquittal was final, and could not be

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[105] Story, 3 *Commentaries on the Constitution* (1833) § 1781, p. 659 (emphasis added).

[106] *Ball v. United States*, 163 U.S. 662, 667, 16 S.Ct. 1192, 1193, 41 L.Ed. 300 (1896).

reviewed . . . without putting him twice in jeopardy, and thereby violating the constitution."[107]

(4) *Fong Foo*: the creation of the doctrine of "judicial acquittals" as verdicts

The development of the modern doctrine of "judicial acquittals"[108] in jury trials, and their relationship to the jeopardy protection, began in the early 1960's with *Fong Foo v. United States*.[109] There, a corporation and two of its employees were brought to trial for conspiracy, as well as a substantive offense. After seven days of trial, and the promise of many more, and while the fourth government witness was testifying, the district judge directed the jury to return verdicts of acquittal as to all respondents, and a formal judgment of acquittal was entered; it appears, however, that the case was not taken from the jury, but the jury "directed" to acquit, an instruction which it followed.[110] The trial judge's action was based

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[107] 16 S.Ct. at 1195.

[108] Respondent does not here refer to verdicts rendered by judges at bench trials, where, rather than serving the gatekeeper function of determining whether the evidence is sufficient to allow a reasonable juror to find guilt beyond a reasonable doubt, the judge, as factfinder, weighs evidence and assesses credibility, and renders a verdict in the same fashion as does a jury.

[109] *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962).

[110] See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573-574, 97 S.Ct. 1349, 1356, 51 L.Ed.2d 642 (1977), where the Court discussed the argument of the Government that "the

(Continued on following page)

on alleged misconduct of the assistant United States Attorney, and a supposed lack of credibility of the witnesses to that point. The government appealed, and the Circuit Court of Appeals reversed, holding that the district court had no authority to grant the directed verdict of acquittal under the circumstances of the case. This Court, though agreeing with the Court of Appeals that the "acquittal was based upon an egregiously erroneous foundation," nonetheless held that the judgment was "final and could not be reviewed." In its per curiam opinion, which stretches to amount to a page and one half, the Court announced this conclusion without any discussion of whether the text or history of the Jeopardy Clause compelled the result that a "judgment of acquittal" either entered or ordered by the trial judge, rather than reached by the jury through its own deliberations, falls within the protections of the double Jeopardy Clause, as the scope and purpose of that clause are revealed in history.[111]

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judge's directed verdict in *Fong Foo* was binding for double jeopardy purposes because the formal verdict of acquittal, though on direction, was rendered not by the judge, *but by the jury*, which then was discharged" (emphasis supplied).

[111] In dissent Justice Clark referred to this "so-called acquittal," and plainly believed the *label* affixed to the actions of the trial judge was not controlling: "The word 'acquittal' in this context is no magic open sesame freeing in this case two persons and absolving a corporation from serious grand jury charges of fraud upon the Government." 82 S.Ct. at 672-673.

This Court has not addressed the question since *Fong Foo*, relying on that decision for the doctrine that a "judgment of acquittal" entered at the instance of the defendant is, for jeopardy purposes, the equivalent of a jury verdict.[112] And so *Martin Linen*, taking *Fong Foo* as a given, built on that decision to define more explicitly a judicial acquittal as a "resolution, correct or not, of some or all of the factual elements of the offense charged." But a judicially entered judgment of acquittal is not a *verdict*, and indeed, it is not a "resolution" of an element or elements. Juries – or judges at bench trials – "resolve" elements, as they assess credibility and weigh evidence, to reach a conclusion as to whether the elements have been shown beyond a reasonable doubt. These tasks – weighing evidence and assessing credibility – are forbidden to the judge, when the motion is assessed appropriately, in making the determination not of whether an element has been proven to the judge's satisfaction beyond a reasonable doubt, but of whether a reasonable jury *could* so find. This is a ruling of law, and even when not marred by an improper exclusion of evidence, or a misconstruction of the proof that is required to show the element, may be *wrong*. When this is so, and so found by an appellate court, the original jeopardy should continue with a trial, the

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[112] See *Sanabria*, 98 S.Ct. at 2178-2179; *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 108 S.Ct. 1745, 1748, 90 L.Ed.2d 116 (1986) ("Our past decisions, which we are not inclined to reconsider at this time, hold that such a ruling is an acquittal under the Double Jeopardy Clause"); *Martin Linen*, 97 S.Ct. at 1354.

first trial not having concluded with a verdict; that is, with the factfinder "*fairly finding*" the defendant "*not guilty.*"

(5) Conclusion: the ruling of law, on defendant's motion, that the evidence is not sufficient to allow a reasonable juror to find guilt beyond a reasonable doubt, terminating a trial, should be reviewable, a second trial being within the original jeopardy in the case

A termination of a defendant's trial on his or her motion based on the resolution by the trial judge, correctly or incorrectly, of some fact that is not one of the constituent parts of the crime charged – one of those facts legally essential for punishment to be inflicted – which must be proved to sustain a conviction, does not constitute an acquittal under *Martin Linen*, for no "factual element of the offense charged" has been resolved by the Court. And so this case may be resolved on that basis.

This Court has, however, on occasion revisited its jurisprudence on concluding that its holdings have become divorced from the original understanding of the right at issue. Recently, for example, in *Crawford v. Washington*[113] this Court overruled *Ohio*

[113] *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

v. Roberts,[114] though conceding that the case could be resolved "by simply reweighing the 'reliability factors' under *Roberts* and finding that Sylvia Crawford's statement falls short."[115] But the Court determined that the *Roberts* test not only led to improbable results, but was contrary to the Framer's design as expressed in the confrontation clause, as understood by reference to history.

Venerated members of this Court, speaking as a minority in *Kepner* to be sure, once expressed the view that government appeals for prejudicial error even of verdicts of acquittal are not barred by the Jeopardy Clause, there being but one jeopardy in one case.[116] And later, eight members of the Court, through an opinion by Justice Cardozo, expressed much sympathy with that view while upholding a state statute allowing government appeals from verdicts of acquittal as against a due process clause challenge. Justice Cardozo said for the Court that the dissenting opinions in *Kepner* showed "how much was to be said in favor of a different ruling" than that of the *Kepner* majority, and approached the question before the Court by asking "Is double jeopardy in such circumstances*, if double jeopardy it must be*

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[114] *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 507 (1980).

[115] 124 S.Ct. at 1373.

[116] *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904) (Holmes, J., dissenting).

called, a denial of due process forbidden to the States?"[117]

It is not necessary, of course, for this Court to revisit either *Kepner* or the overruling of *Palko* in *Benton v. Maryland*,[118] nor even to modify *Martin Linen*. Respondent submits, however, that, for the reasons stated, preclusion of a government appeal from the termination of a trial on defendant's motion based on the legal determination that the prosecution's proof is insufficient to prove guilt beyond a reasonable doubt on one or more elements is not required by the Jeopardy Clause. To paraphrase this Court in *Palko*, where the government appeals in this situation

> the state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on [where sufficient evidence on the elements *was* in actuality presented] until there shall be a [verdict from the jury]. . . . This is not cruelty at all, nor even vexation in any immoderate degree. If [a conviction of the accused had been had on insufficient proof], there might have been review at his instance. . . . [If a]

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[117] *Palko v. State of Connecticut,* 302 U.S. 319, 323, 58 S.Ct. 149, 150-151, 82 L.Ed. 288 (1937).

[118] *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

> reciprocal privilege, [when the trial is terminated at defendant's instance by a finding that no juror could find guilt proven beyond a reasonable doubt] . . . [is] granted to the state. . . . [t]here is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.[119]

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[119] 58 S.Ct. at 153.

And see Westen and Drubel, "Toward A General Theory of Double Jeopardy," 1978 Sup.Ct. Rev. 81, 155 (1979), taking the view that when a trial judge rules as a matter of law that the evidence and inferences therefrom, viewed in the light most favorable to the government, would not support a finding of guilt beyond a reasonable doubt, that ruling should be "freely reviewable on appeal because, by hypothesis, it does not depend on an assessment of credibility or weight of evidence," those questions by definition being resolved in favor of the Government. Current doctrine "tends to distort the trial process," as a judge may rule in a respondent's favor and shield his ruling from review, by making it before the jury returns a verdict, thereby not only causing an "acquittal" that "might not otherwise occur," but also "guaranteeing that his ruling will never be *reviewed.*" And see also Am.Law Inst., Administration of the Criminal Law, Official Draft: Double Jeopardy (1935), § 13, p. 13 ("Where a person has been acquitted generally, and in the course of the trial a material error has been made to the prejudice of the State the State shall be entitled to a new trial").

CONCLUSION

WHEREFORE, the People request this Honorable Court to affirm the Michigan Supreme Court.

Respectfully submitted,

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