No. 11-1327

In the Supreme Court of the United States

LAMAR EVANS, PETITIONER

v.

STATE OF MICHIGAN

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars retrial after a trial court enters a midtrial directed verdict of acquittal based entirely on a determination that the government presented insufficient evidence to prove a nonexistent element of the charged offense.

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rule:

Miscellaneous:

Miscellaneous—Continued: Page

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INTEREST OF THE UNITED STATES

This case presents a question about when a midtrial directed judgment of acquittal bars further prosecution and appeal under the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. The resolution of that question will affect federal criminal cases, because the Double Jeopardy Clause applies to the federal government; Federal Rule of Criminal Procedure 29(a) provides for midtrial judgments of acquittal; and 18 U.S.C. 3731 permits the United States to appeal in criminal cases only when the Double Jeopardy Clause does not prohibit further prosecution.

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person "shall * * * be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

1. In September 2008, Detroit police officers saw petitioner running away from the side of a burning house while carrying a gasoline can. Pet. App. 3. He was apprehended after a foot chase and told officers that "he had made a mistake and burned down the house." *Ibid.* At the time of the fire, the house was vacant and had no utility services, but someone was in the process of purchasing it and had begun moving his family's belongings into the house. *Id.* at 3-4. An arson investigator from the Detroit Fire Department determined that the fire was arson and that gasoline had been poured in three rooms. *Id.* at 3.

Petitioner was charged with "wilfully or maliciously" burning "any building or other real property" in violation of Section 73 of the Michigan Penal Code, which is punishable by a term of imprisonment of up to ten years. See Mich. Comp. Laws. Ann. § 750.73 (West 2004). That offense is a lesser-included offense of the crime of burning a dwelling house, which is punishable by a term of imprisonment of up to 20 years. See *id.* § 750.72. As the state court of appeals explained in 1975, "[t]he necessary elements to prove either offense are the same, except to prove the greater it must be shown that the building is a dwelling; to prove the lesser it is not necessary to prove that the building is not a dwelling." *People* v. *Antonelli*, 238 N.W.2d 551, 552 (Mich. Ct. App.).

2. In February 2009, petitioner's case was tried before a jury. Pet. App. 63. At the close of the prosecution's case, petitioner moved for a directed verdict of acquittal. *Id.* at 4, 64.

Petitioner's motion was based on one proposition: that the evidence indicated that the building in question was "a house" and that the prosecution had therefore

failed to prove "the fourth element of the offense." Pet. App. 63-67. In petitioner's view, the fourth element was "that the building was not a dwelling house." *Id.* at 63, 67. In support of that view, he relied on the bracketed fifth paragraph in a model jury instruction for the offense. *Id.* at 67-68.

In response, the prosecutor contended that the statute does not "require[] that this be a dwelling or not a dwelling" and that it "is not necessary to read to the jury" the fifth paragraph of the instruction with "this fourth element, as counsel is terming it." Pet. App. 68. The prosecutor offered to "pull the statute if the Court wants." *Ibid.*

The trial court stated that it did not "have an option of not reading all of the required elements in a jury instruction." Pet. App. 68. Reviewing the instruction and its commentary, the court recited that "an essential element is that the structure burned is not * * * 'a dwelling house.'" *Id.* at 69. The court concluded that the charged offense "specifically says it cannot be a dwelling." *Ibid.*

The prosecutor again asked for "a moment to go upstairs and pull the statute and make sure that the statute addressed that. Because my understanding of the law is that it doesn't matter whether it's a dwelling or not, it just has to be a structure." Pet. App. 69. After reading the statute, the trial court concluded that "a dwelling house, either occupied or unoccupied, is excluded by law." *Id.* at 70. The prosecutor requested "a moment to go upstairs and consult with my supervisors." *Ibid.* The court said: "You can consult with them when you tell them I've granted the motion. * * * As a matter of law." *Id.* at 70-71. The court entered a written

order, dated the same day, stating that "the Motion for Directed verdict of Acquittal" was granted. *Id.* at 72.

3. The State appealed. On appeal, petitioner conceded that the trial court had been "technically incorrect" in granting his motion. Pet. App. 52 n.2. As the court of appeals explained, the bracketed fifth paragraph of the jury instruction—which had been the foundation of petitioner's motion and of the trial court's ruling—was applicable "only when the offense of burning other real property is considered as a lesser included offense of the crime of burning a dwelling," but that had not been the case here. *Id.* at 52. Thus, the trial court "incorrectly determined that proof that the burned building was not a dwelling is an element of the charged offense and directed a verdict of acquittal on the ground that the prosecution had failed to present evidence of that nonelement." *Id.* at 53.

Petitioner nevertheless contended that "the trial court's order granting a directed verdict, though erroneous, constituted an acquittal for double jeopardy purposes, barring a retrial." Pet. App. 53. The court of appeals rejected that contention, concluding that the trial court's decision was not an "acquittal" in the relevant sense because it "never addressed any of the *actual* elements of burning other real property when granting the directed verdict, instead basing the directed verdict entirely on a determination that the prosecution had failed to establish a nonelement." *Id.* at 60-61.

4. Petitioner received leave to appeal from the state supreme court, which affirmed and remanded for further proceedings. Pet. App. 1-44.[1]

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[1] Because the remand contemplates a trial that petitioner contends would violate the constitutional guarantee against double jeopardy,

a. The state supreme court based its constitutional analysis on the definition of "acquittal" in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977): 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." See Pet. App. 12. The court observed that "an acquittal can occur in some circumstances when the trial court errs," but it concluded that this Court has "not directly considered * * * 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." *Id.* at 13.

In concluding that no precedent from this Court controlled, the state court distinguished three decisions on the ground that they "involve[d] evidentiary errors regarding the proof needed to establish a factual element"—or "how to prove" an element of the offense—rather than whether a particular element was part of the offense. Pet. App. 16 (discussing *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)). The court acknowledged that the "acquittals" in those cases were "based on the prosecution's failure to prove something that the law did not actually require it to prove," but it stressed the "key distinction" between the erroneous resolution of "one of the factual elements charged" and the trial court's decision in this case to "add[] an element and then f[ind] it unsupported by evidence in the record." *Id.* at 17 n.39.

The state supreme court explained that the trial court had "undisputedly misapprehended" the jury in-

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the state court's decision is final for purposes of 28 U.S.C. 1257(a). See *Smalis* v. *Pennsylvania*, 476 U.S. 140, 143 n.4 (1986).

struction and incorrectly "added an extraneous element to the charged offense." Pet. App. 21, 23. The trial court therefore "did not resolve or even address any factual element necessary to establish a conviction for" the offense that had actually been charged, "burning other real property." *Id.* at 24. Accordingly, its decision was "unrelated to [petitioner's] guilt or innocence on the elements of the charged offense" and "did not involve a resolution of any of the factual elements of the charged offense." *Id.* at 24-25, 26-27. The directed verdict thus did not satisfy *Martin Linen*'s "definition of acquittal for the purposes of double jeopardy." *Id.* at 27.

b. Three justices dissented. Justice Cavanagh (joined by Justice Kelly) focused on decisions from this Court emphasizing that acquittals are "final," "absolute," and "may not be reviewed" even when they are "based on an incorrect foundation," are "egregiously erroneous," or the result of "erroneous evidentiary rulings *or* erroneous interpretations of governing legal principles." *Id.* at 32-35 (internal quotation marks omitted). He believed the majority had "elevate[d] form over substance" by "creating a distinction between improperly adding an element to an offense and misconstruing an actual element of a statute." *Id.* at 38. In a separate dissent, Justice Hathaway "disagree[d] with the distinction that the majority dr[ew] 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." *Id.* at 44.

SUMMARY OF ARGUMENT

A trial court's midtrial determination as a matter of law that the government has failed to present sufficient evidence of a nonexistent element of the charged offense is not an acquittal for double-jeopardy purposes.

A. In the double-jeopardy context, this Court has consistently defined an "acquittal" as a decision that "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). That definition's focus on the elements of the offense is consistent with the constitutional text, which requires that a defendant have been placed in jeopardy for a particular "offence." U.S. Const. Amend. V. A criminal offense is defined by its elements, and an acquittal requires a determination that the defendant is not guilty of at least one element of the charged offense (or has established an affirmative defense that negates culpability).

B. Here, the trial court's decision to grant judgment as a matter of law rested entirely on its determination that the prosecution had failed to provide sufficient evidence to satisfy a *nonexistent* element of the charged offense. Because that decision was not based on petitioner's guilt or innocence on the elements of the charged offense, it was not an acquittal. The post-*Martin Linen* decisions that petitioner invokes are distinguishable, because they involved disputes about whether evidence would suffice to establish an actual element of an offense, not decisions pertaining to a spurious element.

C. Double-jeopardy protections balance the defendant's interests against the public's interest "in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978). Petitioner's midtrial motion for judgment as a matter of law could just as well have been resolved before trial and before jeopardy attached. Permitting the State to appeal the resulting de-

cision—which, at petitioner's behest, kept the factfinder from making any decision about guilt or innocence—would be consistent with this Court's decisions involving other defense motions to terminate proceedings. See, *e.g.*, *Lee* v. *United States*, 432 U.S. 23, 28 (1977). Otherwise, defendants would have an incentive to raise legal questions at the least opportune time, increasing the likelihood of judicial errors (and insulating them from review).

D. If the Court declines to draw a distinction between evidentiary-insufficiency determinations that depend on nonexistent elements and those that do not, it should accept respondent's invitation to reconsider those aspects of its prior cases that have equated court-decreed acquittals on the basis of insufficient evidence with true acquittals (by juries or judges) that rest on factual findings. The only reason the Court has ever given in support of that equivalence is that the appealability of an acquittal as a matter of law should not depend on its timing. But that premise has been vitiated by this Court's subsequent double-jeopardy cases, which permit appeal of postverdict judgments of acquittal. And no historical basis justifies equating midtrial acquittals with jury verdicts for double-jeopardy purposes. The very premise for granting an acquittal as a matter of law without allowing the case to go to the jury would have been irreconcilable with the Founding-era understanding that the jury itself had the right to judge the law.

ARGUMENT

A MIDTRIAL DETERMINATION AS A MATTER OF LAW THAT THE GOVERNMENT HAS FAILED TO PRESENT SUFFICIENT EVIDENCE ABOUT A NONEXISTENT ELEMENT OF A CHARGED OFFENSE IS NOT AN ACQUITTAL FOR DOUBLE-JEOPARDY PURPOSES

A. For Double-Jeopardy Purposes, An "Acquittal" Must Reflect A Resolution Of At Least One Factual Element Of The Charged Offense

Consistent with the common-law plea of *autrefois acquit*, a principal purpose of the Double Jeopardy Clause is to ensure that "once a person has been acquitted of an offense he cannot be prosecuted again on the same charge." *Green* v. *United States*, 355 U.S. 184, 192 (1957); see *United States* v. *Ball*, 163 U.S. 662, 671 (1896) ("[I]n this country a verdict of acquittal * * * is a bar to a subsequent prosecution for the same offence.").[2] In recent decades, the Court has maintained that that constitutional protection applies to "a court-decreed acquittal to the same extent" that it does to "an acquittal by jury verdict." *Smith* v. *Massachusetts*, 543 U.S. 462, 467 (2005) (citing cases). That does not, however, obviate the need to determine in the first instance whether a judge's decision as a matter of law is actually an acquittal.

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[2] Blackstone described the plea of *autrefois acquit*, "or a former acquittal," as being "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." 4 William Blackstone, *Commentaries on the Laws of England* 329 (1769). As a result, "when a man is once fairly found not guilty upon any indictment, or other prosecution, he may plead such acquittal in bar of any subsequent accusation for the same crime." *Ibid.*

1. The Court's cases about "acquittals" have focused on whether elements of the offense have been resolved

The Court has acknowledged that "[t]he word ['acquittal'] has no talismanic quality for purposes of the Double Jeopardy Clause," and whether a particular action constitutes an "acquittal" is therefore a question that "cannot be divorced from the procedural context in which the action so characterized was taken." *Serfass* v. *United States*, 420 U.S. 377, 392 (1975) (citation omitted); see Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 137-138 (1979) ("For purposes of double jeopardy, an acquittal is a conclusory term used to describe rulings possessing the quality of finality.").

When evaluating whether a decision constitutes an acquittal for double-jeopardy purposes, the Court has repeatedly applied the definition it articulated in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977), which asks 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." *Id.* at 571. In 2005, the Court applied that definition and accurately described it as "the definition of acquittal that our double-jeopardy cases have consistently used." *Smith*, 543 U.S. at 467-468; accord, *e.g.*, *Blueford* v. *Arkansas*, 132 S. Ct. 2044, 2053 (2012) (Sotomayor, J., dissenting) (reciting same definition in describing when "a jury's decision" constitutes "an acquittal"); *Price* v. *Vincent*, 538 U.S. 634, 640 (2003) (finding, in habeas case, that state court "properly followed *Martin Linen*" by applying same definition). In light of that definition, the Court has explained that an appellate court's reversal of a conviction on the grounds that the government had failed to prove the defendant had the

mental capacity to be responsible for criminal acts is an acquittal. *Burks* v. *United States*, 437 U.S. 1, 10 (1978). On the other hand, when a defendant's successful midtrial motion to dismiss on grounds of pre-indictment delay results in a "termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he [was] accused," that decision is not an acquittal. *United States* v. *Scott*, 437 U.S. 82, 97, 98-99 (1978); see also *Lee* v. *United States*, 432 U.S. 23, 30-31 & n.8 (1977) (affirming conviction on retrial after judge granted midtrial motion to dismiss indictment as insufficient during earlier trial).

In such cases, the Court has focused on the distinction between a finding that pertains to guilt or innocence (and thus to the elements of the offense or a culpability-negating defense) and a finding that rests on some other legal ground that does not establish factual guilt or innocence.[3] In *Burks*, for instance, the Court distinguished between reversals for trial error, which "impl[y] nothing with respect to the guilt or innocence of the defendant," and reversals for evidentiary insufficiency. 437 U.S. at 15.

2. Focusing on elements of the offense is consistent with the text of the Double Jeopardy Clause

The focus in *Martin Linen*'s definition of acquittal on "the factual elements of the offense charged" (430 U.S. at 571) is consistent with the text of the Double Jeopardy Clause, which requires that a defendant have been

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[3] Culpability for an offense can be negated by proof of an affirmative defense like duress, insanity, or self-defense, and a verdict for the defendant on those grounds also counts as an acquittal for double-jeopardy purposes. See *Burks*, 437 U.S. at 10-11 (insanity defense). As used in this brief, the "elements" of an offense encompass legally recognized defenses that would negate culpability.

placed in jeopardy for a particular "offence." U.S. Const. Amend. V. As a result, "[d]ouble-jeopardy analysis focuses on the individual 'offence' charged." *Smith*, 543 U.S. at 469 n.3.

The Constitution's reference to an "offence" has been interpreted to focus on the elements of that offense, because a criminal offense is defined by its elements. That is true for purposes of the Due Process Clause and the Sixth Amendment right to a jury trial, with respect to which the Court has explained that, in order to "return a verdict of guilty," the "factfinder" must be persuaded beyond a reasonable doubt of the facts necessary to establish "all elements of the offense charged." *Sullivan* v. *Louisiana*, 508 U.S. 275, 277-278 (1993). It is also true in the context of the Double Jeopardy Clause, where the determination of whether two offenses are the same is governed by a comparison of their "elements," not other facts related to the underlying conduct. *United States* v. *Dixon*, 509 U.S. 688, 704-709 (1993).

After *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), an "element" of an offense for constitutional purposes is properly understood as encompassing those matters defined by the legislature as elements and any fact (other than a prior conviction) that justifies "an increase beyond the maximum authorized statutory sentence"; such a fact, even if labeled a sentencing factor, "is the functional equivalent of an element of a greater offense" and triggers the same constitutional protections. *Id.* at 494 n.19; see *Ring* v. *Arizona*, 536 U.S. 584, 605 (2002) (Sixth Amendment jury-trial right); *United States* v. *Cotton*, 535 U.S. 625, 627 (2002) (Fifth Amendment indictment right); *Apprendi*, 530 U.S. at 476 (jury trial and proof beyond a reasonable doubt); see also *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111 (2003) (plurality

opinion) (finding "no principled reason" to distinguish an "offense" for double-jeopardy purposes from an "offense" for purposes of the jury-trial right).

A "criminal conviction[]" is required "to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged." *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995). By the same logic, an *acquittal* sensibly depends on a determination that the defendant is not guilty of at least one element of the charged offense.

B. A Decision About A Nonexistent Element Is Not An "Acquittal" Because It Does Not Speak To The Defendant's Guilt Or Innocence Of The Charged Offense

In this case, the trial court's decision to grant judgment as a matter of law in favor of petitioner indisputably rested on a single consideration: that the prosecution had failed to provide sufficient evidence to satisfy a *nonexistent* element of the charged offense (*i.e.*, that the burned building was not a dwelling). See pp. 3-4, *supra*. Although petitioner's oral motion for a directed verdict was based on the premise that non-dwelling status was "the fourth element" of the charged offense (Pet. App. 63, 67), he no longer contends that non-dwelling status was an element. And the state appellate courts made abundantly clear that non-dwelling status was not—and never had been—an element of the offense as it was charged in this case. *Id.* at 21-23, 51-53. In those circumstances, the state supreme court properly invoked *Martin Linen*'s definition of an acquittal and concluded that "the trial court's decision was based on an error of law unrelated to [petitioner's] guilt or innocence on the elements of the charged offense, and thus * * * did not constitute an acquittal." *Id.* at 24-25.

1. The Court has not retreated from the elements focus of Martin Linen

In response, petitioner contends (Br. 12-16) that this Court has distanced itself from an elements-based definition by focusing more generally on whether the trial court, however erroneously, believed it was determining whether the prosecution had proved guilt or innocence.

The Court has indeed repeatedly stressed that a judge's acquittal as a matter of law does not cease to be an acquittal simply because it is based on legal error—even when that error is "patent[]" (*Smith*, 543 U.S. at 473) or "egregious[]" (*Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962)). But when a court erroneously "label[s]" its decision an acquittal (or non-acquittal), this Court still looks to the decision's substance to determine what it is—and the answer to that question turns on whether the decision resolves "some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571. The court's resolution need not be legally "correct" (*ibid.*), but it does need to resolve at least one element of the offense—as opposed to extraneous facts that do not pertain to culpability for the offense. Otherwise, the ruling would have no tether to the constitutional text, which requires the ruling to be about the "offence" in order to implicate the Double Jeopardy Clause.

Petitioner contends that the Court's decision in *Scott* clarified *Martin Linen*'s definition of acquittal by explaining that a non-acquittal is a decision that is "unrelated to the defendant's guilt or innocence." Pet. Br. 12-13 (emphasis omitted); see Resp. Br. 14-17 (noting that petitioner finds it necessary to modify *Martin Linen*'s test). To that end, petitioner quotes (Br. 13) *Scott*'s statement that a defendant who has been released for reasons that "are unrelated to factual guilt or innocence,

has not been determined to be innocent in any sense of that word." 437 U.S. at 98 n.11. Yet, when a purported acquittal rests entirely on a ground that is not an element of the offense, it is equally true that the defendant has not been found to be "innocent" in any sense of the word, because the only determination that has been made is immaterial to resolving guilt on the crime charged. It is therefore unsurprising that the Court has continued to quote *Martin Linen*'s reference to "factual elements" without indicating that *Scott* prescribes a different inquiry unbounded by the elements of the charged offense. See, *e.g.*, *Smith*, 543 U.S. at 468.

Accordingly, petitioner errs in concluding (Br. 15) that the trial court's "ruling, correct or not, was entirely about [p]etitioner's innocence of the charged offense." That is simply not true, and cannot be true, because "innocence of the charged offense" cannot turn on something that is concededly not an element of the offense. If, for example, a defendant who was charged with robbery moved for a midtrial judgment of acquittal on the ground that the government had presented no evidence that anyone had died in the course of the crime, the court's granting of that motion could perhaps be seen as an acquittal—that is, a resolution on the facts—of a homicide or felony-murder charge, but it could not "represent[] a resolution * * * of some or all of the factual elements of the" charged offense of robbery. *Martin Linen*, 430 U.S. at 571. Or, to use the offense in this case, the trial court's decision that the building at issue was not a dwelling had no more to do with petitioner's guilt or innocence than would a decision about whether the building happened to be blue. See Resp. Br. 16-17.

2. The state supreme court correctly distinguished this Court's previous cases

Petitioner contends that three of this Court's decisions are inconsistent with the state supreme court's focus on the nonelement predicate of the trial court's judgment. Br. 16-19, 23-25 (discussing *Smith*, *supra*; *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986); and *Arizona* v. *Rumsey*, 467 U.S. 203 (1984)). But those cases are readily distinguishable, because they involved garden-variety disputes about whether evidence would suffice to establish an actual element of an offense, not decisions pertaining to a spurious element.

a. *Smith* involved a jury trial on three counts, including a firearms charge. 543 U.S. at 464. An undisputed "element" of the firearms charge was that the weapon "had a barrel less than 16 inches in length." *Ibid.* (internal quotation marks omitted). At the close of the prosecution's case, the defendant moved for a judgment of acquittal on that charge, arguing that evidence that the weapon was a "pistol" was insufficient to satisfy that element. *Id.* at 465. The court granted the motion, and the defense proceeded with its case on the remaining charges. *Ibid.* Before closing arguments, the prosecutor informed the court about precedent holding that testimony that a weapon is a "pistol" could prove the barrel-length element, and the court "reversed" its previous ruling and submitted the firearms charge to the jury, which convicted on all three counts. *Id.* at 465-466.

This Court held that, in the absence of a previously established rule or precedent permitting the trial court to reconsider its midtrial judgment of acquittal, the defendant was entitled to rely on the court's "facially unqualified" dismissal of that charge when deciding whether and how to present his defense on the other charges.

Smith, 543 U.S. at 473. The Court also concluded that, although legally incorrect, the trial court's ruling was an acquittal, because—like a federal court's ruling under Federal Rule of Criminal Procedure 29—it "resolve[d] elements of the offense" on the basis of the judge's evaluation of the prosecution's evidence. *Smith*, 543 U.S at 468, 469.

In discussing *Smith*, petitioner focuses (Br. 18, 25) on the Court's statements that legal error does not prevent a decision from being an acquittal. But that misses the point: The Court found that there had been an acquittal because the trial court's decision resolved an "element[] of the offense." 543 U.S. at 468. *Smith* gave no indication that the decision would still have been an unreviewable acquittal even if it had had nothing to do with the offense elements (and thus nothing to do with the actual firearms charge).[4]

b. In *Smalis*, the defendants opted for a bench trial on various charges relating to the burning of a building that resulted in two deaths. 476 U.S. at 141. At the close of the prosecution's case, they moved for a "demurrer" based on the insufficiency of the evidence, which the trial court granted, on the ground that the evidence failed to "link the defendants to the cause of the fire." Pet. App. at 108a, *Smalis*, *supra* (No. 85-227) (discussing murder and manslaughter counts); see *id.* at 110a (similar finding about lack of evidence that "the defendants were the person or persons responsible for the fire" for purposes of catastrophe counts). On appeal, the

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[4] To the extent *Smith* was driven by the Court's concern that a "false assurance of acquittal on one count" had affected the defendant's trial strategy with respect to remaining counts, 543 U.S. at 472, no such prejudice occurred here, because the trial court's judgment terminated all proceedings before petitioner could present his case.

Pennsylvania Supreme Court determined that the demurrer was not an acquittal, because "by definition, a demurrer is not a factual determination" but "purely one of law." 476 U.S. at 143.

This Court reversed, rejecting the contention that a purely legal decision could not constitute an acquittal. *Smalis*, 476 U.S. at 144. In a three-sentence discussion, it held that, under its previous cases, including *Martin Linen*, a ruling "as a matter of law [that] the State's evidence is insufficient to establish [the defendant's] factual guilt" is an acquittal. *Id.* at 144 & n.6. In a footnote, the Court observed that that conclusion was "not affected by the Commonwealth's allegation that the [trial] court 'erred in deciding what degree of recklessness'" was necessary for one count, because that would not have altered the essential character of the acquittal. *Id.* at 144 n.7.

Nothing in *Smalis*, however, involved adding a nonexistent element to the offense. At most, the Court was willing to regard as immaterial an arguable misunderstanding of a conceded mental-state element. That error (if it occurred at all) did not convert the trial court's decision from a typical sufficiency-of-the-evidence decision—like the ones that had been at issue in the cases the Court cited (including *Martin Linen* and *Burks*), 476 U.S. at 144 & n.6—into nonexistent-element legal error. Nor did the trial court's opinion about its demurrer appear to add an extra element to any of the charged offenses. Instead, it simply found insufficient evidence that the defendants had played any role in causing the fire at issue. See p. 17, *supra*. Accordingly, *Smalis* is inapposite.

c. *Rumsey* dealt with the sentencing phase of a capital case.[5] To impose the death penalty, the State had to prove at least one statutory aggravating circumstance beyond a reasonable doubt. See 467 U.S. at 210. The State contended that Rumsey's crime involved the aggravating circumstance of being committed "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." *Id.* at 205 (internal quotation marks omitted). At sentencing, the trial court entered a sentence of life imprisonment and explained that the pecuniary-value aggravating factor had not been satisfied by evidence that the murder occurred in the course of a robbery, because that factor was meant "to apply to a contract-type killing situation." *Id.* at 206 (internal quotation marks omitted). On appeal, the state supreme court reversed the trial court's interpretation of the statutory aggravating factor, explaining that "theft committed in the course of a murder could constitute an aggravating circumstance." *Id.* at 207 (internal quotation marks omitted). On remand, the sentencing court found that the aggravating factor had been established and imposed a death sentence, which the state supreme court then set aside on double-jeopardy grounds. *Id.* at 208-209.

This Court affirmed, holding that the trial court's initial sentencing decision constituted "an acquittal on the

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[5] The Court had previously held that double-jeopardy protections attached to death-penalty-phase proceedings before a jury. See *Bullington* v. *Missouri*, 451 U.S. 430, 446 (1981). *Rumsey* extended that holding to Arizona's capital-sentencing scheme, "in which the judge, as opposed to a jury," determined the sentence. *Monge* v. *California*, 524 U.S. 721, 731 (1998). As the Court later recognized, the reasoning of those cases was specific to "the capital sentencing context," which "is in many respects a continuation of the trial on guilt or innocence of capital murder." *Id.* at 731-732.

merits" that barred retrial because it was "based on findings sufficient to establish legal entitlement to the life sentence," and because it addressed "the merits of the central issue in the proceeding—whether death was the appropriate punishment." *Rumsey*, 467 U.S. at 211. The Court acknowledged that the trial court had "relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance," but it explained that "an error of law" does not alter the double-jeopardy effects of "a judgment that amounts to an acquittal on the merits." *Ibid.*

Rumsey did not indicate that it was altering the definition of acquittal—except to encompass the death-penalty-sentencing-phase equivalent of an element: "detailed statutory standards defining aggravating and mitigating circumstances," 467 U.S. at 210; cf. *Sattazahn*, 537 U.S. at 111 (plurality opinion).[6] Petitioner contends (Br. 24) that the trial court's error in *Rumsey* could "easily be regarded as adding an extra element—that the defendant committed the killing pursuant to a contract." But no party or court in the case ever disputed that, under the circumstances, the statute required the State to prove beyond a reasonable doubt that the murder was committed for pecuniary gain. In other words, the court's legal error was not about the existence *vel non* of an "element" of the crime of capital murder. In-

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[6] *Rumsey* also referred to the relevant decision as "an acquittal on the merits by *the sole decisionmaker* in the proceeding," 467 U.S. at 211 (emphasis added), raising some question about whether it applies to a context like this case, where the judge took the decision away from the jury by granting judgment as a matter of law. One treatise suggested that *Rumsey* "in the end, sheds little light," because it seems to be "a reflection of the many special protections imposed on death sentence procedures." 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3919.5, at 662-663 (2d ed. 1992).

stead, as in *Smith* and *Smalis*, it was about what evidence would suffice to prove that the defendant had in fact killed for pecuniary gain.

d. Petitioner's amicus (NACDL Br. 4) contends that respondent cannot prevail unless the Court overrules its decision in *Sanabria* v. *United States*, 437 U.S. 54 (1978), which purportedly involved a trial court's error about a "distinct element" of an offense. But even amicus admits (Br. 10-11) that no "distinct element" argument was "presented to," or "expressly" addressed by, the Court. In fact, *Sanabria* stated that the petitioner there "was found not guilty for a failure of proof on a key 'factual element of the offense charged.'" 437 U.S. at 71. It also observed that "the [d]istrict [c]ourt did not find that the [relevant] count failed to charge a necessary element of the offense," but instead "found the indictment's description of the offense too narrow to warrant the admission of certain evidence." *Id.* at 68. The Court thus "characterized" the decision "as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence." *Id.* at 68-69 (footnote omitted). That holding is not inconsistent with the reasoning of the state supreme court here that a judge's legal ruling that the State failed to prove a nonexistent element is not an acquittal for double-jeopardy purposes.

C. Allowing A Legal Decision Predicated On A Nonexistent Element To Be Appealed Is Consistent With The Purposes Of Double Jeopardy

When defining the contours of double-jeopardy protections, this Court has balanced the interests of defendants "against the public interest in insuring that justice is meted out to offenders." *Scott*, 437 U.S. at 92; see *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). The public has an important interest "in affording the prose-

cutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978); accord *Sattazahn*, 537 U.S. at 114-115.

1. Other judgments on matters of law that could have been raised before jeopardy attached are already appealable

Petitioner sought judgment as a matter of law in the middle of trial based on an erroneous legal contention (*i.e.*, that non-dwelling status was an element of the charged offense). That claim could just as well have been resolved before trial and before jeopardy attached. Permitting the State to appeal the decision here—which, at petitioner's behest, kept the factfinder from making any decision about guilt or innocence—would be consistent with this Court's decisions involving other defense motions to terminate proceedings.

a. In *Lee* v. *United States*, 432 U.S. 23 (1977), the information inadvertently omitted the knowledge and intent elements of the charged offense, and the defendant moved to dismiss the information after the government's opening statement in a bench trial. *Id.* at 25. At the end of the trial, the judge, without announcing a verdict, granted the motion to dismiss. *Id.* at 26-27. On retrial based on an indictment alleging all of the elements, the defendant was convicted, and this Court rejected a double-jeopardy challenge. *Id.* at 27, 34. The Court held that the dismissal was "functionally indistinguishable from a declaration of mistrial" and that, therefore, the proceedings had not "terminated in [defendant's] favor," as would be required for there to be an acquittal. *Id.* at 30, 31; cf. *United States* v. *Dinitz*, 424 U.S. 600, 606-608 (1976) (finding no double-jeopardy bar to retrial after defendant's successful motion for mistrial). *Lee*

emphasized that, by raising the issue so late, the defendant had "invited the court to interrupt the proceedings before formalizing a finding on the merits." 432 U.S. at 28; see also *Serfass*, 420 U.S. at 380, 390, 394 (permitting appeal and remand for trial when lower court dismissed indictment on grounds that petitioner was factually innocent of charged offense; rejecting contention that lower court's determination was the "functional equivalent of an acquittal on the merits" because it rested on facts).

The erroneous addition of an element to a charged offense involves a functionally similar situation. Indeed, identifying the elements of an offense is a necessary step in determining the sufficiency of a charging document. Such a determination can be undertaken before trial. When a defendant waits until the middle of trial to ask the court to determine the elements of the offense—regardless of how that request is phrased—he "invite[s] the court to interrupt the proceedings before formalizing a finding on the merits." *Lee*, 432 U.S. at 28. Moreover, when the resulting decision is based on a nonexistent element of the offense, it does not, as discussed above, establish that the defendant is "innocent in any sense of that word." *Scott*, 437 U.S. at 98 n.11. Therefore, such a midtrial motion, like a motion to dismiss on legal grounds, should not result in a double-jeopardy bar to further proceedings after an appeal.

Here, the State did not allege that the burned structure was "not a dwelling." As in *Lee*, the issue of what the statute required the prosecution to prove could have been brought to the court's attention before jeopardy attached. Having gone to trial and then raised the issue midstream, petitioner cannot now claim that a retrial would "'deprive[]' [him] of his valued right to go to the

first jury." *Scott*, 437 U.S. at 100. Rather, "only the public [will have] been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.'" *Ibid.* (quoting *Arizona* v. *Washington*, 434 U.S. at 509).[7]

b. Petitioner's amicus contends (NACDL Br. 11) that petitioner "should not have to face another determination of guilt or innocence" because "[t]he error was not his" and "he did not avoid the first determination." But petitioner did elicit the trial court's directed verdict of acquittal, and he did so by contending solely that the prosecution had failed to prove that the building was not a dwelling (Pet. App. 63-68)—a fact that petitioner now concedes was irrelevant to petitioner's guilt or innocence of the charged offense. As in *Scott*, "[t]his is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact." 437 U.S. at 96; see Pet. App. 28-29. Nor is it one where the prosecutor is "seeking 'another opportunity to supply evidence which it failed to muster' before jeopardy terminated." *Smith*, 543 U.S. at 473-474 n.7 (quoting *Burks*, 437 U.S. at 11).

c. Treating erroneous midtrial determinations of the elements of an offense as acquittals would give defendants an incentive to raise complicated issues of statutory

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[7] This is not an argument that petitioner waived his double-jeopardy rights, see Pet. Br. 19 n.4, but a recognition that he must live with the "consequences of his voluntary choice." *Scott*, 437 U.S. at 99; see *Jeffers* v. *United States*, 432 U.S. 137, 152 (1977) ("there is no violation of the Double Jeopardy Clause when [a defendant] elects to have * * * two offenses tried separately and persuades the trial court to honor his election," even if one offense is a lesser-included offense of the other).

interpretation at the least opportune time, increasing the likelihood of judicial errors (and insulating them from review). Cf. *United States* v. *Appawoo*, 553 F.2d 1242, 1246-1247 (10th Cir. 1977) (district judge's explanation to defense counsel that it would be better for the defendant and the court to postpone ruling on statute's constitutionality, via a judgment of acquittal, until after jeopardy had attached). This Court recognized the injustice associated with such incentives in *Lee* and *Scott*, and it should also do so here.

2. Jurisdictions following the state supreme court's approach have not had difficulties in application

Petitioner contends (Br. 20) that the state supreme court's focus on the nonelement predicate of the trial court's decision is "unworkable in application." But that argument depends on petitioner's apparent belief (Br. 25) that the rationale would allow any evidentiary-insufficiency ruling to be "recast as requiring the prosecution to prove an 'extra element.'" Here, there was no need to recharacterize the trial court's decision in order to conclude that it was premised entirely on the addition of a spurious element. The colloquy about petitioner's motion for judgment addressed nothing but the phantom "fourth element" of non-dwelling status. See pp. 3-4, *supra*.

Moreover, experience belies petitioner's fears. Jurisdictions that have adopted (or at least not rejected) the state supreme court's approach have not been overrun with "prosecutorial appeals after many, if not most, midtrial directed verdict grants." Pet. Br. 21. To the contrary, such jurisdictions have been careful to allow an appeal only when it was clear that the decision in question did in fact turn on a nonexistent element. The Third Circuit allowed an appeal in such a case in 1984.

See *United States* v. *Maker*, 751 F.2d 614, 623-624, cert. denied, 472 U.S. 1017 (1985). But it appears not to have seen another one in the intervening 28 years. The Idaho Supreme Court allowed an appeal in such a case in 2003, see *State* v. *Korsen*, 69 P.3d 126, 136-138, but found that a subsequent case was distinguishable because the trial court there had "required the State to meet an additional, unnecessary" evidentiary requirement "to prove one of the necessary elements of the crime," but it had not "require[d] the State to prove an additional element," *State* v. *Howard*, 248 P.3d 722, 730 (2011). In 1998, the Second Circuit did not question the distinction between mere legal error and a decision based on an "additional, distinct, and severable element." *United States* v. *Lynch*, 162 F.3d 732, 735. It did, however, hold that the district-court decision at issue there reflected an "error of law" about the actual element of willfulness, and not a spurious "fifth element of the offense" of criminal contempt. *Ibid.* Such decisions demonstrate that the state supreme court has not stepped onto a slippery slope.

Nor is there reason to believe, as petitioner suggests (Br. 21, 29), that the state supreme court's rationale poses a threat to decisions that are made by actual juries, which necessarily involve facts rather than decisions made as a matter of law. Juries' verdicts have always received special solicitude, and their acquittals cannot be set aside. See, *e.g.*, *Sparf* v. *United States*, 156 U.S. 51, 105 (1895); *Ball*, 163 U.S. at 671. Although petitioner invokes (Br. 29) this Court's decision in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), as evidence that courts might attempt to determine the foundation of an acquittal, the Court has been careful to avoid "impugn[ing] the legitimacy" of even "logically inconsistent" jury verdicts. *Yeager* v. *United States*, 557 U.S. 110, 125 (2009).

D. If Necessary, The Court Should Reconsider Its Cases Equating Midtrial Judgments Of Acquittal As A Matter Of Law With Verdicts Of Acquittal By Factfinders

As discussed above, this Court may affirm the state supreme court's judgment and rationale simply by declining to extend its previous cases about evidentiary insufficiency on acknowledged elements to the context of a trial-court decision that depends only on a nonexistent element of the charged offense. If, however, the Court believes that *Smith*, *Rumsey*, and *Smalis* do not permit review of a judge's mistaken addition of an element to an offense, that aspect of those cases should be reconsidered. It is simply illogical to find an acquittal when the judge has misconstrued the elements of the offense before finding the evidence to be insufficient. In such a case, no one has determined that, as a factual matter, the prosecution failed to prove its case, because the judgment is based on a legal error that is collateral to the sufficiency of the evidence.

Furthermore, if the Court perceives no distinction, in the context of midtrial judgments of acquittal as a matter of law, between the addition of a nonexistent element and the finding of insufficient evidence, it should accept respondent's invitation (Br. 34-56) to reconsider those aspects of its prior cases that have—without analysis or recourse to historical practice—equated court-decreed acquittals on the basis of insufficient evidence with true acquittals (by juries or judges) that rest on factual findings.[8]

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[8] In *Smalis*, the United States filed an amicus brief urging the Court to reconsider *Martin Linen*, because "a court's legal conclusion that the evidence is insufficient, although labeled an 'acquittal' in Rule 29, is not in constitutional analysis entitled to the special weight accorded to the factfinder's determination of innocence." U.S. Ami-

1. The Court has "never felt constrained" to follow a decision that has proved to be "unworkable," *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991), that has had its underpinnings eroded by later precedent, *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997), or that is not "well reasoned," *Montejo* v. *Louisiana*, 556 U.S. 778, 792-793 (2009). Moreover, the Court's "considered practice [is] not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases," *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962), or "in the case of a procedural rule such as this, which does not serve as a guide to lawful behavior," *Gaudin*, 515 U.S. at 521.

The Court's double-jeopardy jurisprudence in particular has already provided a rich field for reconsiderations—perhaps because the bulk of its cases came in a relatively brief period after the Court's 1969 decision to apply the Double Jeopardy Clause to the States (*Benton* v. *Maryland*, 395 U.S. 784, overruling *Palko* v. *Connecticut*, 302 U.S. 319 (1937)) and Congress's 1971 amendment to 18 U.S.C. 3731, eliminating nonconstitutional restrictions on federal government appeals in criminal cases.[9]

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cus Br. at 12, 21-25, *Smalis*, *supra* (No. 85-227). Short of that, the United States suggested that the Court should, at a minimum, clarify that there is no "acquittal" when "the court misapprehends the elements of the charged offense" and "holds the evidence insufficient because the prosecution failed to prove a nonexistent element." *Id.* at 25 n.17. The Court's opinion did not address the United States' arguments, except to state that "[o]ur past decisions, which we are not inclined to reconsider at this time, hold that such a ruling is an acquittal." 476 U.S. at 144.

[9] See, *e.g.*, *Dixon*, 509 U.S. at 712 (overruling *Grady* v. *Corbin*, 495 U.S. 508 (1990)); *Scott*, 437 U.S. at 87 (overruling *United States* v. *Jenkins*, 420 U.S. 358 (1975)); *Burks*, 437 U.S. at 9-10, 18 (overruling an entire line of earlier decisions).

2. Although *Smith* recognized that the Court has, for double-jeopardy purposes, treated "a court-decreed acquittal" no differently than "an acquittal by jury verdict," 543 U.S. at 467 (citing cases), those cases date back only to 1970.[10]

More importantly, when the Court summarily equated a judge's insufficiency ruling with a jury's verdict of acquittal, it gave, as commentators have observed, virtually no reason at all for that treatment. See 6 Wayne R. LaFave et al., *Criminal Procedure* § 25.3(c), at 633 (3d ed. 2007) ("It is unclear exactly what has convinced the Supreme Court to treat all directed acquittals alike, and to treat all as parallel to a jury acquittal."); Westen & Drubel, 1978 Sup. Ct. Rev. at 132 n.237 (noting that the Court has not "seriously addressed" why "the reasons for according jury acquittals non-appealable finality" "should apply to judicial acquittals"); cf. 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3919.5, at 669 (2d ed. 1992) ("For whatever reasons, it is established—at least for the time being—that the government may not appeal if a preverdict judgment of acquittal rests on a trial court assessment of the sufficiency of the evidence, no matter how clearly mistaken the trial court may have been in requiring any proof whatever of the matters involved.").

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[10] *Smith* cites (543 U.S. at 467), and respondent discusses (Br. 50-51), the Court's 1962 per curiam decision in *Fong Foo*, *supra*, which applied the Double Jeopardy Clause, without discussion, to a "judgment of acquittal" that followed a directed verdict. 369 U.S. at 143. But that "acquittal"—which was based in part on prosecutorial misconduct and which occurred near the beginning of the prosecution's case, *id.* at 142—would not qualify as an acquittal after *Scott* and *Martin Linen*.

The only reason articulated in any of the cases cited in *Smith* was that a *mid*trial acquittal should not be treated differently from a "post-verdict directed acquittal," *United States* v. *Sisson*, 399 U.S. 267, 290 (1970), because that would make "the constitutional significance of a Rule 29 judgment of acquittal [turn] on a matter of timing," *Martin Linen*, 430 U.S. at 574.

Whether or not that premise was well founded in 1970, it has been vitiated by the Court's recognition that the government may in fact "appeal from a ruling in favor of the defendant after a guilty verdict has been entered by the trier of fact." *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980). Indeed, the midtrial acquittal, however mistaken, has become an isolated bastion of unreviewability, in contrast to pretrial judicial mistakes, posttrial judicial mistakes, midtrial dismissals caused by prosecutorial mistakes in drafting the indictment, and procedural mistakes during trial that are not acquittals. See *United States ex rel. Young* v. *Lane*, 768 F.2d 834, 839 (7th Cir. 1985) (citing cases). In that light, "[i]t is hard to understand the special finality given to such mid-trial blunders." *Ibid.* Double-jeopardy law would be more consistent and coherent if such midtrial acquittals were also reviewable. Cf. Edward H. Cooper, *Government Appeals in Criminal Cases: The 1978 Decisions*, 81 F.R.D. 539, 555 (1979) ("For all its troubles, the Court is not yet prepared to accept the increasingly cogent argument that the double jeopardy clause should not be read to bar government appeals that rest only on matters of law.").

3. Petitioner has identified no historical basis for treating midtrial acquittals as equivalent to jury verdicts for double-jeopardy purposes. The rise of directed verdicts in criminal cases began in the latter half of the

nineteenth century, see Theodore W. Phillips, Note, *The Motion for Acquittal: A Neglected Safeguard*, 70 Yale L.J. 1151, 1152 (1961), and the very premise for granting an acquittal as a matter of law without allowing the case to go to the jury at all would have been irreconcilable with the Founding-era understanding that the jury itself "had the right to judge the law." Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 Ohio St. L.J. 959, 968 (2010).

4. The practice of granting finality to midtrial judicial rulings of evidentiary insufficiency carries substantial costs for the criminal justice system, causing prosecutions to be terminated before verdict, some on plainly erroneous grounds that are unappealable. As discussed above (see pp. 24-25, 30, *supra*), that practice creates a mechanism by which defendants and trial courts may seek to insulate from judicial review legal rulings that would be reviewable if made earlier or later in the same proceeding. The special solicitude for a genuine acquittal entered by a factfinder should not apply when the defendant has voluntarily chosen to terminate his trial prematurely by seeking a legal ruling that forecloses the possibility of a verdict. A ruling of evidentiary sufficiency does not resolve credibility issues or draw inferences from the facts, but instead represents a legal conclusion about the inadequacy of the proof. The defendant has not been deprived of his valued right to present his case to the first factfinder, but has abandoned that right for reasons he deems appropriate. He faces no risk of retrial if the grounds for the midtrial ruling in his favor are correct. But if they turn out to be legally erroneous, he has no valid claim to a windfall, rather than being required to undergo one full trial. See *Arizona* v. *Wash-*

ington, 434 U.S. at 505 (describing the prosecutor's interest in having "one full and fair opportunity to present his evidence to an impartial jury").

CONCLUSION

The judgment of the Supreme Court of Michigan should be affirmed.

Respectfully submitted.

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