No. 02-524

In the Supreme Court of the United States

JANETTE PRICE, WARDEN, PETITIONER

v.

DUYONN ANDRE VINCENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

SRI SRINIVASAN
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The United States will address the following question:

Whether the Double Jeopardy Clause bars a trial court from reconsidering a ruling that grants a motion for a directed verdict of acquittal at the close of the prosecution's case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rule:

Miscellaneous:

In the Supreme Court of the United States

No. 02-524

JANETTE PRICE, WARDEN, PETITIONER

v.

DUYONN ANDRE VINCENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the Double Jeopardy Clause bars a trial court from reconsidering a ruling that grants a motion for a directed verdict of acquittal at the close of the prosecution's case. Because the Federal Rules of Criminal Procedure provide for the filing of a motion for judgment of acquittal after the government closes its evidence, Fed. R. Crim. P. 29(a), the question presented in this case arises in federal criminal trials. See, *e.g.*, *United States* v. *Baggett*, 251 F.3d 1087 (6th Cir. 2001), cert. denied, 534 U.S. 1167 (2002); *United States* v. *Byrne*, 203 F.3d 671 (9th Cir. 2000), cert. denied, 531 U.S. 1114 (2001); *United States* v. *Rahman*, 189 F.3d 88, 132-134 (2d Cir. 1999), cert. denied, 528 U.S. 1094 (2000). The United States there-

fore has a significant interest in the Court's disposition of this case.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

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

STATEMENT

1. Respondent and his two co-defendants, Dameon Perkins and Marcus Hopkins, were charged with open murder and unlawful possession of a firearm in connection with a shooting death that occurred in a confrontation between two groups of youths at a high school in Flint, Michigan. Michigan law permits the State to charge a defendant with "open murder," leaving to the jury the determination whether the specific offense is first-degree or second-degree murder. See Pet. App. 53a n.3. On March 31, 1992, after the prosecution rested its case at trial, the defendants moved for a directed verdict of acquittal on the charge of first-degree murder, arguing that there was insufficient evidence of premeditation and deliberation. Pet. App. 2a-3a, 27a-28a, 53a.

The trial court considered the motion outside the presence of the jury. After hearing argument from both sides, the court responded:

---

[1] The United States will not address the first question presented by the petition for a writ of certiorari, which concerns whether, for purposes of determining the appropriate standard of review of respondent's habeas claim, the Michigan Supreme Court's conclusion that the trial court had not rendered a directed verdict of acquittal constituted a determination of fact or a conclusion of law. See 28 U.S.C. 2254(d) and (e)(1).

> Well, my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different than anyone else * * * [b]ut I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgment was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

Pet. App. 3a. The court then took up several unrelated matters with counsel. At the end of the colloquy, before the proceedings adjourned for the day, the prosecutor requested an opportunity to make a "brief restatement" the next morning on the sufficiency of the evidence supporting the charge of first-degree murder, stating that he wanted to "find some law" on the issue. The trial court responded that it would be "glad to hear" the prosecutor's further argument. The trial docket for the day contains an entry stating, "MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER TO 2ND DEGREE MURDER"; but the court issued no written or formal order to that effect. *Id.* at 3a, 15a, 28a-29a, 54a-55a.

The next morning, April 1, 1992, the prosecutor, as planned, presented additional argument asserting that the evidence of first-degree murder was sufficient to

justify submitting the charge to the jury. Defense counsel responded that the court had granted a directed verdict of acquittal on that charge the previous day and was barred by the Double Jeopardy Clause from reconsidering its ruling. The court disagreed, emphasizing that the proceedings on the motion were taking place outside the presence of the jury and observing, "I consider things in great length * * * [and] I try to be open about things and flexible." Defense counsel turned to the merits of the sufficiency issue on premeditation, but later reiterated that double jeopardy principles precluded the court from reconsidering its decision to direct a verdict of acquittal. The court responded, "I haven't directed a verdict to anybody." Defense counsel then stated that the court had "granted our motion," prompting the court to reply, "[o]h, I granted a motion, but I have not directed a verdict." Pet. App. 4a-5a, 16a, 29a-30a, 55a-57a.

After hearing further argument from the prosecutor in support of submitting the charge of first-degree murder to the jury, the trial court decided that it would reserve its ultimate ruling on the defendants' motion for a directed verdict:

> Well, I'm going to consider the argument that Counsel has made. And Counsel should certainly be aware of the fact that there has been no harm that has come about by the Court[']s ruling earlier. The jury was not alerted or informed in any way whatsoever as to the, the conclusion this Court drew after arguments of counsel. I'm going to reserve a ruling on it. We'll come back to it a little later on after I hear a good more and think a little bit more about it. Now I'm basing, of course, the decision

> upon what we have up until such a time as the motion's being made. But I'll reserve the ruling.

Pet. App. 5a. The trial resumed that afternoon, with respondent presenting his own testimony and that of one witness. *Id.* at 5a, 57a.

The following morning, April 2, 1992, respondent and his co-defendants rested their cases. The court then informed the parties that it had "reconsidered the ruling that the Court earlier made and [had] decided to let the jury make its own determination on the Degrees. That's where we'll stand now so we'll let them have all those issues submitted to them, First, Second, Manslaughter and you can go on from there." The jury found respondent guilty of first-degree murder and felony firearm possession. Pet. App. 5a, 58a.[2]

2. Respondent and his co-defendants appealed, each arguing, *inter alia*, that the trial court was barred by the Double Jeopardy Clause from submitting the charge of first-degree murder to the jury. Pet. App. 14a-25a.

a. The three appeals were considered by separate panels of the Michigan Court of Appeals. Pet. App. 17a. The panels that heard the appeals of respondent's co-defendants rejected their double jeopardy claims and affirmed their convictions. *Id.* at 17a-19a. The panel that heard respondent's appeal reached the opposite conclusion, ruling that the trial court's remarks on March 31, 1992, amounted to an oral grant of a directed verdict on first-degree murder and that any further

---

[2] The same jury found respondent's co-defendant Hopkins guilty of involuntary manslaughter and felony firearm possession. Respondent's remaining co-defendant, Perkins, was tried before a separate jury and was found guilty of second-degree murder and felony firearm possession. Pet. App. 58a n.5.

proceedings on that charge were prohibited by the Double Jeopardy Clause. *Id.* at 19a-25a.

b. The Michigan Supreme Court reversed the panel's decision in respondent's case. Pet. App. 26a-51a. The court began by explaining that an "acquittal" for double jeopardy purposes entails a "ruling" that "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 34a (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). There had been no "actual resolution" in this case, the court determined, because the trial judge's "remarks did not sufficiently resolve anything." *Id.* at 36a n.6. In the court's view, the trial judge's statements from the bench on March 31, 1992, lacked sufficient "clarity and finality" to "be construed as an order." *Id.* at 35a. Those remarks, the court determined, were "no more than a judge thinking out loud," *id.* at 38a, were "clearly equivocal," and were akin to "an initial assessment of a possible future ruling," *id.* at 41a.

The court held that, "in order to qualify as a directed verdict of acquittal there must be either a clear statement in the record or a signed order of judgment articulating the reasons for granting or denying the motion so that it is evident that there has been a final resolution of some or all the factual elements of the offense charged." Pet. App. 42a. Here, the court found, the trial judge's comments "lack[ed] the requisite degree of clarity" to constitute a "final resolution," and "there was no formal judgment or order." *Ibid.* The court thus held that the "continuation of the trial and subsequent conviction" on the charge of first-degree murder did not violate the Double Jeopardy Clause. *Ibid.*

3. Respondent renewed his double jeopardy claim in a petition for a writ of habeas corpus filed in the United States District Court for the Eastern District of Michigan.

a. The district court granted respondent relief. Pet. App. 52a-77a, 78a-83a. The court rejected the conclusion of the Michigan Supreme Court that the trial judge's remarks on March 31, 1992, were tentative or inconclusive, finding that the judge had made a "determinative ruling on the sufficiency of the evidence" that amounted to an "acquittal on the first-degree murder charge for double jeopardy purposes." *Id.* at 72a. The court held, relying principally on this Court's decision in *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986), that the trial judge was barred by double jeopardy from reconsidering his initial ruling and subjecting respondent to further trial proceedings on the charge of first-degree murder. Pet. App. 75a, 80a; see *id.* at 66a-68a, 71a.

b. The court of appeals affirmed. Pet. App. 1a-12a. After scrutinizing "the precise language" used by the trial judge in his oral statements on March 31, 1992, the court determined that the judge had orally granted the motion for directed verdict on first-degree murder. *Id.* at 10a-11a. The court held that the judge "was not entitled to reverse that decision later in the trial," *id.* at 12a, because the "Double Jeopardy Clause prohibit[ed] any further prosecution of the defendant for that crime," *id.* at 9a (citing *Martin Linen Supply*, 430 U.S. at 564, and *Smalis*, *supra*).

SUMMARY OF ARGUMENT

A trial court may reconsider a ruling that the evidence presented by the prosecution is insufficient to convict, because the court's interlocutory decision does not constitute a final judgment of acquittal within the

meaning of the Double Jeopardy Clause. Under the Double Jeopardy Clause, a final judgment of acquittal has a special status: once there is a judgment acquitting the defendant by finding the evidence insufficient to sustain a guilty verdict, the defendant may not be subjected to a new trial or to additional fact-finding proceedings. Accordingly, the prosecution may not appeal a judgment of acquittal when reversal would necessitate such proceedings. *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986).

Although *Smalis* bars an appeal from the grant of an acquittal at the completion of the prosecution's evidence, the trial court's reconsideration of its own ruling, as occurred in this case, raises distinct issues. At the time of an appeal—as was at issue in *Smalis*—the trial court necessarily will have reached a definitive resolution in favor of acquittal and would lack jurisdiction to alter its ruling. But while the case remains in the trial court, the settled rule is that the court possesses an inherent authority to reconsider and correct its interlocutory rulings. And when a court indicates a willingness to reconsider its ruling granting an acquittal, the effect is to render the initial ruling non-final and inconclusive. In that situation, the prohibition against post-acquittal trial proceedings recognized in *Smalis* is inapplicable: the purpose of the reconsideration is to determine whether the defendant in fact will be acquitted of the charge. The court's initial mid-trial ruling does not represent the final resolution of the issue necessary to constitute an acquittal.

A trial court's reconsideration of its grant of an acquittal at the close of the prosecution's evidence offends no double jeopardy values. Because reinstatement of the charge would merely lead to completion of the initial trial, the prosecution would have no oppor-

tunity to improve its case or wear down the defendant by initiating a second trial. For the same reason, the defendant would retain his right to resolution of the charges against him by the initial tribunal— jury or judge—before which jeopardy has attached. Moreover, the burdens on the defendant from continuing the trial to completion are no greater than if the trial court had reserved ruling on the motion for acquittal.

Prohibiting a trial court from reconsidering its erroneous grant of an acquittal, however, would compromise the societal interest in achieving just outcomes in criminal cases. It would allow a defendant to retain the benefit of an acquittal even though no court—including that one that initially awarded it—believes an acquittal to be justified. If a trial court were barred from reconsidering its initial grant of an acquittal, moreover, the attachment of double jeopardy protections would frequently turn on an effort to determine whether the court's extemporaneous remarks from the bench amounted to a concrete ruling in favor of an acquittal. That approach, as this case illustrates, is highly indeterminate, and it bears no relation to the basic purposes of the Double Jeopardy Clause.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT A TRIAL COURT FROM RECONSIDERING ITS GRANT OF A MOTION FOR ACQUITTAL AT THE CLOSE OF THE PROSECUTION'S CASE

The court of appeals addressed respondent's double jeopardy claim by closely examining the trial judge's remarks on March 31, 2002, to determine whether they amounted to an oral grant of an acquittal. If so, the court held, that ruling was irrevocable and immune from reconsideration by the judge. The approach of

focusing on the precise language the trial judge used misdirects the double jeopardy inquiry.

Although this Court has held that the grant of an acquittal at the close of the prosecution's case may not be reviewed in an interlocutory appeal, *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986), this case involves reconsideration of such a ruling by the trial court itself, not an appeal. Those two contexts are distinct from the perspective of the Double Jeopardy Clause. As the Court has explained, "the language of cases in which we have held that there can be no appeal from, or further prosecution after, an 'acquittal' 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). A court's reconsideration of its mid-trial grant of a motion challenging the sufficiency of the evidence should not be regarded as a judgment of acquittal under the Double Jeopardy Clause.[3]

A. The Grant Of An Acquittal May Not Be Appealed When Reversal Would Necessitate Further Trial Proceedings On The Charge

1. The Double Jeopardy Clause "protect[s] an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green* v. *United States*, 355 U.S. 184, 187

---

[3] The Michigan Supreme Court and the court of appeals disagreed on whether the trial court in fact had granted respondent an acquittal. The second question presented by the petition for a writ of certiorari, however, presumes that the motion for acquittal was granted. Under the approach that we believe is correct, there would be no need to resolve whether the trial court's comments amounted to a grant of the motion, because its reconsideration of any grant would raise no double jeopardy issue.

(1957). Although "the prohibition against multiple trials is the 'controlling constitutional principle,'" *United States* v. *DiFrancesco*, 449 U.S. 117, 132 (1980) (quoting *United States* v. *Wilson*, 420 U.S. 332, 346 (1975)), there is no flat bar against a retrial when the initial trial ends either in a conviction or in the declaration of a mistrial, see *id.* at 130-133. But the "law attaches particular significance to an acquittal," "whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict." *United States* v. *Scott*, 437 U.S. 82, 91 (1978); see *DiFrancesco*, 449 U.S. at 129-130.

An acquittal—whether the product of a jury verdict or a judicial determination of evidentiary insufficiency —affords absolute protection against a new trial for the offense. See *Scott*, 437 U.S. at 91; *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571-576 (1977). The "Constitution conclusively presumes that a second trial would be unfair" following an acquittal, and the "defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978) (quoting *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962)). Because an acquittal forecloses a second trial, double jeopardy law also precludes any appeal of an acquittal when reversal would require a new trial. See *Scott*, 437 U.S. at 91; *Martin Linen Supply*, 430 U.S. at 570-571. The sole exception to the bar against appeal of an acquittal arises when the court grants a judgment of acquittal after the jury returns a verdict of guilty: there is no prohibition against an appeal by the prosecution in that situation because reversal would entail reinstatement of the jury verdict rather than commencement of a new trial. See *Scott*, 437 U.S. at 91 & n.7; *Martin Linen Supply*, 430 U.S. at 569-570;

United States v. *Wilson*, 420 U.S. at 335-336, 342-345, 352-353.

2. In *Smalis* v. *Pennsylvania*, this Court held that the "Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.'" 476 U.S. at 146 (quoting *Martin Linen Supply*, 430 U.S. at 570). The trial court in *Smalis* acquitted the defendant on certain counts at the close of the prosecution's case, finding the evidence insufficient to support the charges. 476 U.S. at 141. The trial court then—in an anomalous ruling made possible because the case was tried to the bench rather than a jury—stayed completion of the trial on the remaining charges pending a mid-trial appeal by the prosecution of the court's acquittal order. *Ibid.*; see *Commonwealth* v. *Smalis*, 480 A.2d 1046, 1048 n.1 (Pa. Super. Ct. 1984).[4] The Commonwealth argued that its mid-trial appeal was permissible because reversal of the trial court's acquittal order would lead only to resumption of the initial trial rather than commencement of a new trial. 476 U.S. at 145-146. This Court disagreed, holding that the appeal of an acquittal is barred by double jeopardy whenever reversal would

[4] The Pennsylvania Superior Court concluded that the trial court's decision to allow a mid-trial appeal was "not recommended," explaining that, "[a]fter a criminal trial has been commenced, it should not be delayed by piecemeal appeals from orders which do not terminate the proceedings finally." 480 A.2d at 1048 n.1; cf. *DiBella* v. *United States*, 369 U.S. 121, 126 (1962) ("the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law").

lead "to further trial proceedings," even if not an entirely new trial. *Id.* at 146.

Respondent, like the court of appeals, reads *Smalis* to establish that the grant of a motion for judgment of acquittal is irrevocable and cannot be reconsidered by the trial court consistent with the Double Jeopardy Clause. Br. in Opp. 11-16. Respondent reasons (*id.* at 14) that any reconsideration of such a ruling by the trial court—like the mid-trial appeal in *Smalis*—"would translate into further proceedings of some sort, devoted to the resolution of factual issues" on the charge of first-degree murder. 476 U.S. at 146 (internal quotation marks omitted). That argument overlooks the pivotal distinction between reconsideration of an initial ruling by the trial court itself and reversal of the trial court's ruling on appeal. Although both contemplate "further trial proceedings" on the charge, *ibid.*, a court's reconsideration of its own initial decision to grant a motion for acquittal raises no double jeopardy concerns.[5]

B. The Double Jeopardy Bar Against Appeal Of A Trial Court's Grant Of An Acquittal Does Not Diminish The Court's Authority To Reconsider Its Own Ruling

A "trial court's ruling in favor of the defendant is an acquittal only if it 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Lee* v. *United States*, 432 U.S. 23, 30 n.8 (1977) (citation omitted); see *Scott*, 437 U.S. at

---

[5] In *Smalis*, the trial court had granted the Commonwealth's motion for reconsideration of its ruling, ultimately concluding that the initial ruling was correct. See *Smalis*, 480 A.2d at 1048 n.2. The defendant did not argue—and neither this Court's opinion nor any of the state court opinions suggested—that the trial court was barred by the Double Jeopardy Clause from reconsidering its initial decision.

97; *Martin Linen Supply*, 430 U.S. at 571. The prohibition against "postacquittal factfinding proceedings" recognized in *Smalis*, 476 U.S. at 145, thus comes into play only if the trial court has "actually" reached its "resolution" of "the factual elements of the offense charged," *Lee*, 432 U.S. at 30 n.8. See *Justices of Boston Mun. Court* v. *Lydon*, 466 U.S. 294, 309 (1984) (emphasizing the need for a "resolution" in order to trigger the double jeopardy bar against further trial proceedings). An appeal necessarily implicates the prohibition against post-acquittal trial proceedings, see *Smalis*, 476 U.S. at 145-146, because, at the time of appellate review, the trial court by definition will have reached its final resolution of the charge. When a trial court reconsiders its own initial decision to grant an acquittal, by contrast, the court by definition has not reached a resolution—the very purpose of the court's reconsideration is to determine what resolution it will reach.

1. *A trial court possesses inherent authority to reconsider a mid-trial ruling granting a motion for acquittal*

a. It has long been settled that trial courts possess an inherent authority to reconsider and correct their interlocutory rulings. See, *e.g.*, *John Simmons Co.* v. *Grier Bros.*, 258 U.S. 82, 88 (1922) ("If it be only interlocutory, the court at any time before final decree may modify or rescind it."). That authority rests on the recognition that the trial context is fluid and frequently requires the court to rule without the benefit of extended deliberation, and that the interests of justice therefore would not be served by precluding a court from correcting its interlocutory decisions. See, *e.g.*, 18B Charles Alan Wright et al., *Federal Practice and*

Procedure § 4478.1 (2d ed. 2002) ("All too often, * * * a trial court could not operate justly if it lacked power to reconsider its own rulings as an action progresses toward judgment. Far too many things can go wrong, particularly with rulings made while the facts are still undeveloped or with decisions made under the pressures of time and docket.").

The basic power of a trial court to reconsider its interlocutory rulings derives from the common law, and exists equally in criminal and civil cases. See, *e.g.*, *United States* v. *Washington*, 48 F.3d 73, 79 (2d Cir.), cert. denied, 515 U.S. 1151 (1995); *United States* v. *LoRusso*, 695 F.2d 45, 52-53 (2d Cir. 1982), cert. denied, 460 U.S. 1070 (1983); *United States* v. *Jerry*, 487 F.2d 600, 605 (3d Cir. 1973) ("whether the case * * * be civil or criminal," as "long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so"); see also *United States* v. *Benz*, 282 U.S. 304, 306-307 (1931) (stating common law rule that orders and judgments could be modified by court within the term in which they were entered). As a result, a trial court's "grant of a motion for acquittal" before the completion of trial proceedings "is 'no more than an interlocutory order,' which the court has 'inherent power to reconsider and modify . . . prior to the entry of judgment.'" *Washington*, 48 F.3d at 79 (quoting *LoRusso*, 695 F.2d at 52-53); see *United States* v. *Baggett*, 251 F.3d 1087, 1095 (6th Cir. 2001) (explaining that "an oral grant of a Rule 29 motion outside of the jury's presence does not terminate jeopardy, inasmuch as a court is free to change its mind prior to the entry of judgment"), cert. denied, 534 U.S. 1167 (2002).

Not only does a trial court possess inherent authority to reconsider its interlocutory grant of an acquittal, but a request by the prosecution for the court to reconsider its ruling—or an indication by the court *sua sponte* that it may do so—specifically renders the initial ruling non-final and hence inconclusive. See *United States* v. *Ibarra*, 502 U.S. 1, 6 (1991) (observing that "a motion for rehearing in a criminal case * * * renders an otherwise final decision of a district court not final until it decides the petition for rehearing"); see also *United States* v. *Dieter*, 429 U.S. 6 (1976); *United States* v. *Healy*, 376 U.S. 75 (1964).[6] In that situation, consequently, the trial court's initial decision to grant an acquittal cannot be viewed as its resolution of the charge for purposes of triggering the prohibition against post-acquittal trial proceedings. Instead, the ruling inherently is subject to revision until the entry of final judgment, and a request by the government to reconsider the ruling or a suggestion by the court that the ruling may be reconsidered has the effect of rendering the matter unresolved and the initial ruling non-final. In this case, for instance, the trial judge's oral grant of the motion for an acquittal was rendered non-final when he agreed shortly thereafter to permit further argument on the charge and then specifically ruled the next day that he was reserving his final decision.

b. An appeal presents the opposite situation, in which the trial court's ruling by nature is final. An

---

[6] This Court's decisions in *Ibarra*, *Dieter*, and *Healy*, establish that a motion for rehearing filed by the government in a federal criminal case has the effect of rendering the court's initial judgment non-final and thus non-appealable, so that the time for taking an appeal begins to run only after the court rules on the motion.

appeal from a trial court's grant of a motion for acquittal— whether an interlocutory appeal, see *Smalis*, 476 U.S. at 145-146, or an appeal from a final judgment following discharge of the jury, see *Martin Linen Supply*, 430 U.S. at 570—presupposes that the trial court has completed its resolution of the charge. A perfected appeal by nature requires that the trial court have reached a definitive and concrete ruling amenable to meaningful appellate review. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468-469 (1978) (explaining that mid-trial order must "conclusively determine the disputed question" to fall within collateral order exception to final judgment rule for appeals, and concluding that order denying class certification does not meet that condition because it is "subject to revision in the District Court").

Moreover, even if the trial court were inclined to reconsider its grant of an acquittal, an appeal generally leaves the court powerless to do so: the "filing of a notice of appeal is an event of jurisdictional significance —it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam). Any further proceedings on the charge thus could ensue only from action by the appellate court, not reconsideration by the trial court. Because an appeal presumes that the trial court has reached its definitive resolution, an appeal from a mid-trial ruling granting a judgment of acquittal squarely implicates the double jeopardy bar against post-acquittal fact-finding proceedings. See *Smalis*, 476 U.S. at 145-146.

2. *A trial court's reconsideration of its grant of a motion for acquittal does not infringe double jeopardy principles*

a. This Court's decisions do not suggest that double jeopardy protections diminish a trial court's basic authority to revisit its interlocutory rulings. To the contrary, *Swisher* v. *Brady*, 438 U.S. 204 (1978), supports the conclusion that a court's reconsideration of its mid-trial grant of an acquittal raises no double jeopardy concerns. *Swisher* involved a two-stage system for juvenile court adjudications in Maryland under which a court master, after receiving the evidence, reported his proposed findings, conclusions, recommendations, and orders to the juvenile court. Although the master's proposals were not considered final action until acted on by the juvenile court, the court could simply adopt (or modify or reject) the master's proposed rulings, the court was limited to the record before the master unless the parties gave consent to supplement the record, and the master served his report on the State and the juvenile who could then file exceptions to the report in the juvenile court. *Id.* at 210-211, 215-216.

A class of juveniles contended that, in cases in which the master concludes that the State has failed to establish guilt beyond a reasonable doubt and reports that conclusion in his proposed findings and orders to the juvenile court, the juvenile court is barred by double jeopardy from considering the State's exceptions to the master's proposed findings. This Court held that a juvenile is not put twice in jeopardy by the court's review of the master's conclusions; instead, he is "subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge." 438 U.S. at 215; see *DiFrancesco*, 449 U.S.

at 140-141 (explaining that *Swisher* involved a "continuing single process").

The trial court's reconsideration in this case of its initial ruling granting an acquittal likewise was part of a "continuing single process." *DiFrancesco*, 449 U.S. at 141. Just as the juvenile court in *Swisher* had authority to adopt, modify, or reject the master's findings and orders recommending an acquittal, a trial court possesses inherent authority to sustain, modify, or withdraw its own initial conclusion that an acquittal is warranted. The State's filing of exceptions to the master's findings in favor of an acquittal is analogous to the prosecution's seeking reconsideration of a trial court's interlocutory grant of an acquittal. Unlike an appeal, which transfers the proceedings to a different court, reconsideration by the trial court merely continues a "single proceeding" before a single tribunal. *Swisher*, 438 U.S. at 215; see *id.* at 217-218 & n.15 (distinguishing *United States* v. *Jenkins*, 420 U.S. 358 (1975), and *Kepner* v. *United States*, 195 U.S. 100 (1904), in part on ground that both decisions involved "appellate review").

b. Reconsideration by the trial court also "does not impinge on the purposes of the Double Jeopardy Clause." *Swisher*, 438 U.S. at 215. This Court has described "the primary purpose of the Double Jeopardy Clause" as "protect[ing] the integrity of a final judgment." *Scott*, 437 U.S. at 92; see *DiFrancesco*, 449 U.S. at 128; *Crist* v. *Bretz*, 437 U.S. 28, 33 (1978). A trial court's mid-trial grant of an acquittal is subject to reconsideration by the court, and therefore does not constitute a "final judgment" on the charge.[7]

---

[7] The double jeopardy interest in respecting a final judgment "is akin to that served by the doctrines of *res judicata* and collat-

Moreover, when a court reconsiders its grant of an acquittal at the close of the prosecution's case, it does not afford "the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States*, 437 U.S. 1, 11 (1978); see *Swisher*, 438 U.S. at 216-217; *Wilson*, 420 U.S. at 352. The prosecution has completed the presentation of its evidence, and it seeks only to continue the trial to a verdict rather than to initiate a new trial at which it can present a more persuasive case. Any further evidentiary proceedings after the trial court's reconsideration can come about only at the initiative of the defendant. See *Swisher*, 438 U.S. at 216 (concluding that the prosecution does not have a "forbidden 'second crack'" before the juvenile court because the "State presents its evidence once before the master," and the "record is then closed, and additional evidence can be received * * * only with the consent of the minor").

Because reconsideration only results in continuation of the trial before the initial finder of fact, moreover, it does not infringe the defendant's "valued right to have [his] trial concluded by a particular tribunal." *Arizona* v. *Washington*, 434 U.S. at 505; see *Swisher*, 438 U.S. at

---

eral estoppel." *Crist*, 437 U.S. at 33. An interlocutory ruling generally is not entitled to preclusive effect for purposes of res judicata and collateral estoppel. See Restatement (Second) Judgments § 13 (1982). Instead "the judgment must ordinarily be a firm and stable one, the 'last word' of the rendering court—a 'final' judgment." *Id.* § 13 cmt. a; see *id.* § 13 cmt. b ("when res judicata is in question a judgment will ordinarily be considered final in respect to a claim (or a separable part of a claim * * *) if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement").

216. For the same reason, reconsideration does not "enhanc[e] the risk that an innocent defendant may be convicted" as a consequence of undergoing multiple prosecutions before a series of fact-finders. *Swisher*, 438 U.S. at 216 (quoting *Arizona* v. *Washington*, 434 U.S. at 504); see *DiFrancesco*, 449 U.S. at 130; *Green*, 355 U.S. at 188. To the contrary, a court's correction of its erroneous grant of an acquittal "significantly advance[s] the public interest in assuring that each defendant shall be subject to a just judgment on the merits of his case, without 'enhancing the possibility that even though innocent he may be found guilty.'" *Scott*, 437 U.S. at 101 (quoting *Green*, 355 U.S. at 188).

Finally, when a trial court, upon reconsideration, permits the trial to proceed to completion on the reinstated charge, it does not "unfairly subject[] the defendant to the embarrassment, expense, and ordeal of a second trial." *Swisher*, 438 U.S. at 216 (citing *Green*, 355 U.S. at 184); see *Martin Linen Supply*, 430 U.S. at 570 n.7 ("The absence of a threatened second trial * * * substantially reduces the expense and anxiety to be borne by the defendant."). The burdens on the defendant from continuing the trial on the reinstated charge are no different than if the court had initially denied an acquittal or had reserved its ruling. Those burdens are especially immaterial when, as in this case, the court indicates that it may reconsider its initial ruling promptly after announcing it. See *United States* v. *Baker*, 419 F.2d 83, 88 (2d Cir. 1969) (explaining that, although the defendant's "hopes were first raised, then quickly lowered" when the court reconsidered its grant of an acquittal at the close of the prosecution's case, "so ephemeral and insubstantial an injury" raises no double jeopardy violation), cert. denied, 397 U.S. 971 (1970); cf. *Wilson*, 420 U.S. at 345

("Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.").[8]

Whereas a trial court's reconsideration of a mid-trial acquittal thus accords with the core purposes of the Double Jeopardy Clause, barring the court from reconsidering an erroneous acquittal would compromise the important interest recognized in this Court's double jeopardy decisions "in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona* v. *Washington*, 434 U.S. at 509; see *id.* at 505 (discussing the "public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury"); see also *Schiro* v. *Farley*, 510 U.S. 222, 230 (1994); *Ohio* v. *Johnson*, 467 U.S. 493, 501 (1984). Precluding the trial court from reconsidering its grant of an acquittal infringes that interest in a manner that the prohibition against an appeal does not: barring reconsideration by the trial court itself would permit a defendant who may

---

[8] In some cases, the trial court may decide to reconsider its grant of an acquittal only after trial proceedings have resumed or after the jury has been informed that the charge was dismissed. See, *e.g.*, *United States* v. *Blount*, 34 F.3d 865 (9th Cir. 1994). At that point, reinstatement of the charge might unfairly prejudice the defendant's presentation of his case to the jury. That sort of prejudice more squarely implicates the Due Process Clause than the Double Jeopardy Clause. In any event, there is no prejudice when, as in this case, the trial court advises the parties before the trial resumes that it is reserving its final ruling and the jury has no knowledge of the initial ruling or its reconsideration.

be guilty to obtain the benefit of an acquittal even though *no* court believes him entitled to it.

3. *The approach pressed by respondent and applied by the court of appeals is unworkable*

Under the approach adopted by the court of appeals and advocated by respondent, the grant of a motion for acquittal would be irrevocable. The applicability of the Double Jeopardy Clause in this case thus would hinge on whether the trial court's oral statements on March 31, 1992, rose to the level of a grant of respondent's motion for acquittal, at which point the court would have been prohibited from proceeding any further on the charge. That framework not only lacks a grounding in the core purposes of the Double Jeopardy Clause, but it also is unworkable.

When a defendant moves for a judgment of acquittal at the close of the prosecution's case, the trial court, in the interests of avoiding an extended delay before resuming the trial, frequently will rule on the motion orally rather than through a formal order. The determination whether the court in fact granted an acquittal thus would often turn on a parsing of the judge's extemporaneous remarks from the bench. Reviewing courts would be confronted with the task of drawing fine distinctions among myriad factual scenarios based on the exact words used by the trial judge, the precise order in which they were spoken, and the extent to which statements suggesting a decision to grant an acquittal were sufficiently distinct from remarks suggesting equivocation on the matter.[9]

---

[9] See, *e.g.*, *United States* v. *Baggett*, 251 F.3d at 1091-1092 (trial judge initially stated that "I don't believe that the proof has made out a case of interstate domestic violence," agreed immediately thereafter to "hold [its ruling] in abeyance," but then later stated

That approach is highly indeterminate and defies principled application. As one court has explained, "[m]uch of the determination [would] come[] down to after-the-fact analysis of subtle distinctions preserved in the record of the proceedings. The outcome of something as important as deciding whether a defendant was exposed to double jeopardy should not hang on such guesswork." *State* v. *Collins*, 771 P.2d 350, 353 (Wash. 1989). Distinguishing a situation involving the grant of an acquittal followed promptly by reconsideration from one involving equivocation all along

---

that it had "granted the motion" for a judgment of acquittal); *United States* v. *Byrne*, 203 F.3d 671, 674 (9th Cir. 2000) (court first stated that it was "granting the defendant's motion under Rule 29," but then "immediately after that announcement" was asked to reconsider its ruling, which it ultimately agreed to do, observing, "I have made up my mind, unless I can be convinced otherwise"), cert. denied, 531 U.S. 1114 (2001); *United States* v. *Rahman*, 189 F.3d 88, 132-134 (2d Cir. 1999) (court orally grants motion for acquittal, indicates on the next day that it is willing to reconsider the ruling, and on the following day reinstates the charges), cert. denied, 528 U.S. 1094 (2000); *United States* v. *Washington*, 48 F.3d 73, 79 (2d Cir.) (court "orally granted [the] motion for acquittal" on one count at the close of the government's case, resumed the trial on the remaining charge, but then reversed its ruling during an adjournment for lunch after one defense witness had begun testifying), cert. denied, 515 U.S. 1151 (1995); *People* v. *Williams*, 721 N.E.2d 524, 526 (Ill. 1999) (judge states that "I'm going to grant the motion for a directed finding and finding of not guilty," but then says to the prosecutor later in the course of the same colloquy, "if you want to provide me with something, I'll be happy to look at it if you want me to hold that in abeyance but I don't think that it's established"); *State* v. *Collins*, 771 P.2d 350, 351 (Wash. 1989) (court grants acquittal but then, "[m]inutes later," prosecutor offers contrary authority, prompting judge to "reverse[] his first ruling"); *Lowe* v. *State*, 744 P.2d 856, 856-857 (Kan. 1987) (court grants acquittal *sua sponte* but then reverses its ruling the following morning before trial resumes).

would prove especially difficult because "[i]ndividual trial judges' styles of ruling vary. Many judges will think out loud along the way to reaching the final result." *Ibid.*

The facts of this case highlight the shortcomings of respondent's proposed approach. In the trial judge's remarks from the bench on March 31, 1992, he stated, "my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder." Pet. App. 3a. He ended that set of remarks by adding, "I think that Second Degree Murder is an appropriate charge." *Ibid.* Later in the course of his discussions with the parties, the judge said that he would be "glad to hear" further argument from the prosecutor the next morning on whether an acquittal on the charge of first-degree murder was warranted. *Id.* at 29a.

The Michigan Supreme Court, in concluding that the judge's statements did not rise to the level of an oral ruling granting an acquittal, emphasized that his comments were sprinkled with "clearly equivocal" language —*e.g.*, "my impression at this time," "I think"—and also that the judge agreed to hear additional argument the following day. Pet. App. 41a-42a. The court of appeals, by contrast, after examining precisely the same language, found "no ambiguity" in the judge's statements. And although the court of appeals relied in part on the judge's comment the following day that he had "granted the motion," *id.* at 10a-11a, the judge also stated contemporaneously that he had "not directed a verdict," *id.* at 30a, and the very fact that he readily agreed to hear additional argument on the issue may suggest that he had not reached a definitive resolution. In any event, the opposite conclusions drawn by the

two courts demonstrate that the trial judge's treatment of the motion—as will frequently be the case—eludes clear categorization.[10]

For those reasons, it would elevate form over substance to scrutinize the "precise language he used" (Pet. App. 10a) to determine whether the trial judge, at some particular point during the various exchanges, had reached a sufficiently conclusive decision to grant an acquittal that he was barred from considering the issue any longer. This Court "ha[s] disparaged" those sorts of "'rigid, mechanical' rules in the interpretation of the Double Jeopardy Clause." *Serfass*, 420 U.S. at 390 (citation omitted). The better approach gives effect to a trial court's inherent authority to reconsider its interlocutory rulings, a rule born of the recognition that the trial context by its nature is highly fluid. That approach is straightforward in its application, it obviates the need to dissect a trial judge's extempo-

---

[10] The court of appeals found "[a]dditional support" for its conclusion in the docket entry indicating that the judge had reduced the charge of first-degree murder to second-degree murder. Pet. App. 11a-12a. The court of appeals did not assess whether the characterization of actions in the trial docket has legal significance in the Michigan courts, see *People* v. *Kelley*, 449 N.W.2d 109 (Mich. Ct. App. 1989) (explaining that docket entries do not constitute orders for purposes of computing the time for taking an appeal), and the Michigan Supreme Court declined to rehear the case after the docket entry was brought to its attention, see Pet. App. 6a & n.1. If this Court agrees with respondent that a trial court is barred by double jeopardy from reconsidering its grant of an acquittal, the docket entry would support the conclusion that the trial judge had granted respondent an acquittal insofar as courts in Michigan play a substantive role in formulating the language of the docket entries instead of assigning that function to the court clerk as among the clerk's ministerial duties. The record, however, does not illuminate the relative roles of court and clerk.

raneous remarks to pinpoint particular statements beyond which the judge was barred from proceeding, and it is fully consistent with this Court's double jeopardy decisions and with the purposes of the Double Jeopardy Clause.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

SRI SRINIVASAN
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

FEBRUARY 2003