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IN THE SUPREME COURT OF THE UNITED STATES

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JANETTE PRICE, WARDEN, :
Petitioner :
v. : No. 02-524
DUYONN ANDRE VINCENT. :
- - - - -X

Washington, D. C.
Monday, April 21, 2003

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:03 a.m.

APPEARANCES:

ARTHUR A. BUSCH, ESQ., Flint, Michigan; on behalf of the
Petitioner.
JEFFREY A. LAMKEN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D. C. ; on
behalf of the United States, as amicus curiae,
supporting the Petitioner.
DAVID A. MORAN, ESQ., Detroit, Michigan; on behalf of the
Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 02-524, Janette Price, Warden
5 versus Duyonn Andre Vincent.

6 Mr. Busch.

7 ORAL ARGUMENT OF ARTHUR A. BUSCH

8 ON BEHALF OF THE PETITIONER

9 MR. BUSCH: Mr. Chief Justice, and may it please
10 the Court:

11 This case involves a gang-related murder in
12 which a jury found the defendant guilty beyond a
13 reasonable doubt. There was one trial conducted, and the
14 defendant was sentenced to life in prison.

15 The Sixth Circuit Court of Appeals erred in its
16 conclusion that the Michigan Supreme Court's decision on
17 double jeopardy was unreasonable. The AEDPA precludes
18 habeas corpus relief where a State court makes reasonable
19 factual determinations. The Michigan Supreme Court's
20 decision was not only reasonable, but also correct.

21 The Michigan Supreme Court's decision was
22 correct for three reasons.

23 First, this was a factual matter which was
24 reasonably decided.

25 Second, the trial judge's --

1 QUESTION: When you -- when you say this was a
2 factual matter, I got the impression that as to basic
3 facts, there really wasn't any dispute about them

4 MR. BUSCH: Mr. Chief Justice, the Michigan
5 Supreme Court was evaluating what exactly this trial judge
6 said. It was ambiguous. And in trying to determine what
7 he said, then we could understand, or they could
8 understand what he had done and what legal import that
9 had.

10 QUESTION: But -- but there was no -- all I'm
11 saying, there was no doubt about what -- what he said.
12 The -- the legal import is -- may be much more difficult
13 to figure out.

14 MR. BUSCH: Your Honor, the factual question in
15 terms of what it was that he said is -- is different than
16 what he had actually done. And therein lying --
17 understanding what this judge had done or said, the
18 meaning of it, then would give us some understanding of
19 what the legal import was.

20 QUESTION: Well, I guess there are really three
21 questions, aren't there? One is what he said, and
22 there -- as the Chief Justice says, there's no dispute on
23 what he said. The second question is what he meant by
24 what he said. And the third question is, once you know
25 what he meant, at law does that constitute a -- a final

1 judgment.

2 MR. BUSCH: Yes, that's correct.

3 QUESTION: So there are three questions, and --
4 and which one -- is the middle one, what he meant, as
5 opposed to what he said -- is that a factual or a -- or a
6 legal one?

7 MR. BUSCH: That -- it would be our position
8 that it is a factual question and courts -- the Court in
9 Parker versus Dugger and Wainwright versus Goode have
10 dealt with this issue. Where we have ambiguous rulings of
11 a trial judge, that has been found to be a factual --

12 QUESTION: I'm not sure actually -- your
13 inference. I mean, it's quite a fine point, but I guess I
14 wouldn't say necessarily that what he meant has anything
15 to do with it. That is, he said certain things in the
16 world, and if he had a secret meaning, we don't care nor
17 does the law. But having said these particular things in
18 the world, then the question would be, can the Michigan
19 Supreme Court -- does it -- did it -- it characterized
20 those things, and it said as a matter of Michigan law,
21 those things said in the world do not amount to a judgment
22 of acquittal.

23 So then I guess we would -- if that's the way to
24 look at it, then we would have the problem of deciding
25 whether, even though as a matter of Michigan law, those

1 events that took place in the world do not amount to a
2 judgment of acquittal. Nonetheless, for purposes of the
3 Federal Double Jeopardy Clause, do they amount to a
4 judgment of acquittal?

5 Those would be two legal questions. One, a
6 State law question, and one, a Federal question, and no
7 factual question.

8 MR. BUSCH: Well --

9 QUESTION: But that's something of a quibble
10 because I don't know that leads us to a different place.

11 MR. BUSCH: The Michigan court found that this
12 trial judge's decision was, in fact, tentative. And that
13 decision and conclusion was reasonable. The judge, at
14 page 12 of the joint exhibit, speaks of -- and if I could
15 turn to that page. The judge starts out by saying, well,
16 my impression is at this time --

17 QUESTION: What page?

18 MR. BUSCH: Page 12 of the --

19 QUESTION: Page 12 of what?

20 MR. BUSCH: At the bottom of page 12 of the
21 joint -- the joint appendix. Excuse me.

22 The court says, nothing? Well, my impression at
23 this time is that there's not been shown. And then at
24 page 18 of the same exhibit, the court actually schedules
25 an 8:30 motion the following day when the prosecutor in

1 this case -- the assistant prosecutor asked the court if
2 he could be heard. And the judge said, I'll be glad to
3 hear you. And in fact, the court had originally scheduled
4 the attorneys to be there at 10:00 and then changed the
5 time for them to show up before the jury came back.

6 And lastly I think it shows that no one who was
7 involved in this case at the trial level actually believed
8 that a final ruling had been made. The court says at
9 page 34 -- excuse me. The defense counsel says -- and I'm
10 quoting Mr. Odette -- that's correct. They don't -- I'm
11 not disputing that, but it's my firm impression that when
12 I left the court yesterday, that there had been a ruling
13 and that Mr. Stamos had indicated he'd like to have the
14 matter reconsidered. And I believe the court said,
15 whatever.

16 And what's instructive is what the judge said
17 next. That's right. And I -- well, I said, yes, I'd be
18 glad to listen, or words to that effect.

19 Lastly --

20 QUESTION: What about the docket entry? Was
21 there a docket entry too?

22 MR. BUSCH: There was a docket entry which was
23 made by a clerk which was not reviewed by -- and which is
24 not reviewed by the trial judge. And in Michigan, the
25 docket entry isn't dispositive of whether or not the judge

1 had made a final ruling of acquittal or a judgment of
2 acquittal.

3 QUESTION: May I -- may I just ask you a further
4 question to make sure that I understand the -- the sort of
5 the assumption behind your argument? And it's really the
6 same question that Justice Breyer and Justice Scalia I
7 think were -- were raising.

8 My understanding is that the courts, up to this
9 point, have treated the issue here as an issue of fact.
10 What was the judge -- what did the judge think he was
11 doing? Did he understand or could one reasonably
12 understand that he had made a final ruling or not?

13 It might also have been treated as an issue of
14 law. Given what the judge did, even if he thought he had
15 made a final ruling, he might, as a matter of law,
16 consistent with the Double Jeopardy Clause, have been able
17 to change his mind if he hadn't issued a formal order and
18 if no one had acted in reliance.

19 But I understand that legal question, the way I
20 just put it, is not the question that people understood
21 has been decided in this case, and that everybody is
22 treating this as a -- as an issue of the factual question
23 and that's what you're addressing. Am I correct?

24 MR. BUSCH: That's correct.

25 QUESTION: Okay.

1 MR. BUSCH: The Court has also -- and without
2 conceding my case, in the alternative, if this Court was
3 to conclude that this judge had, in fact, issued or made a
4 judgment of acquittal, it would be the people's position
5 or the petitioner's position that the trial court need not
6 be able to reconsider to reach a just result because
7 they -- they rule so swiftly. In other words, the
8 Michigan court was correct because judges, trial judges in
9 particular, need time to reflect. They're often making
10 these decisions without trial transcripts, in many cases
11 without extensive legal research.

12 QUESTION: Well, Mr. Busch, this case here
13 come -- the case comes to us under -- under AEDPA; that
14 is, that you don't have to show that the Michigan Supreme
15 Court was correct as a matter of law in its decision. You
16 have -- your -- your opponent has to show that either it
17 was an unreasonable application of our precedents or
18 contrary to our precedents, if it's a legal question, and
19 if it's a factual question, that the Michigan Supreme
20 Court made unreasonable findings of fact.

21 MR. BUSCH: Exactly. And also, this Court has
22 held and the statute requires that that finding of fact be
23 presumed to be correct.

24 QUESTION: Mr. Busch, why wouldn't it be
25 unreasonable if, as respondent asserts, the Michigan rules

1 provide that a directed verdict made at the close of the
2 evidence, that the judge may not reserve decision, must
3 decide it, may not reserve decision. I think that's what
4 the judge ended up doing here, is that not so? When he
5 reconsidered, he reserved decision 'til the end of the
6 defense case.

7 MR. BUSCH: Yes, and in fact, in this particular
8 case, the judge did not come to a conclusion as to -- did
9 not enter a verdict of acquittal. In this particular
10 matter, the court held -- in that particular circumstance,
11 it said in the opinion that it was harmless error in their
12 opinion. However --

13 QUESTION: They -- did they address -- I didn't
14 notice that the court had addressed the Michigan rule that
15 said --

16 MR. BUSCH: They --

17 QUESTION: -- you can't reserve decision.

18 MR. BUSCH: The rule of the Michigan courts --
19 that is, the Michigan Rules of Criminal Procedure at
20 6.419, I believe it is -- requires that there be some
21 plain statement made, essentially, that there be something
22 clear. And that was -- and it is -- our position that the
23 court --

24 QUESTION: I don't understand what you mean.
25 Are you addressing Justice Ginsburg's question? She's

1 talking about the rule that says you can't reserve --

2 MR. BUSCH: Yes.

3 QUESTION: -- when a motion is made at the close
4 of all -- was this motion made at the close of all the
5 evidence?

6 MR. BUSCH: At the close of the prosecutor's
7 proof.

8 QUESTION: Is that what the rule applies to? At
9 the close of the prosecutor's proof? Or does it apply to
10 only when the whole trial has been completed?

11 MR. BUSCH: It -- it applies when the motion is
12 made is my understanding.

13 QUESTION: I don't understand that.

14 QUESTION: Well, that's not really an answer.
15 If it's just the prosecutor's case and the motion is made,
16 is that covered by the rule, or is it required that both
17 the prosecutor and the defense case be in?

18 MR. BUSCH: No. It can be made at any time
19 and -- and any point in --

20 QUESTION: A motion can be made, but --

21 MR. BUSCH: That is, the motion for a directed
22 verdict of acquittal.

23 QUESTION: Do you have the rule, the rule of
24 criminal procedure, so we'll know -- that might give us
25 the answer to this question.

1 MR. BUSCH: The --

2 QUESTION: The Michigan rule that says the trial
3 judge shall not reserve decision on the defendant's
4 motion. Does that rule apply when the motion is made at
5 the close of the prosecutor's case?

6 MR. BUSCH: The rule is 6.419(D), and it's cited
7 at page 17 of the petitioner's brief.

8 QUESTION: Is it quoted there too?

9 QUESTION: What does it say?

10 MR. BUSCH: It says -- about in the middle of
11 the page in -- in bold, it says, did not substantially
12 comply with the requirements of MCR 6.419(D), and provide
13 that, quote, the court must state orally on the record or
14 in a written ruling made a -- a part of the record its
15 reasons for granting or denying a motion for a directed
16 verdict of acquittal. And my understanding of that is --
17 that rule is that anytime the motion is made, the judge is
18 supposed to make clear the reasons why he's granting a
19 directed verdict.

20 QUESTION: Well --

21 QUESTION: What is --

22 QUESTION: But in ordinary trial practice
23 certainly you -- you can't -- the defense counsel in a
24 criminal case can't get up after the prosecution has
25 called two witnesses and said, I move for -- I -- I move

1 for a judgment of acquittal. I would think the first time
2 that could be made ordinarily would be --

3 MR. BUSCH: Yes.

4 QUESTION: -- after the close of the
5 prosecution's case.

6 MR. BUSCH: That's correct, once the evidence is
7 presented.

8 QUESTION: And what has the rule, as you just
9 quoted it, got to do with -- with reservation? In other
10 words, the judge can say, my reasons are A, B, and C, but
11 I'm going to sleep on it, and -- and tomorrow morning I
12 may come up with D and -- and rule the other way. I mean,
13 what's that -- what's it got to do with reservation,
14 his -- his reserving his right to change the ruling at a
15 later time?

16 MR. BUSCH: The rights of the judge to change
17 his mind -- our -- our position is, is that he has that
18 right until the jury would be discharged.

19 QUESTION: Well, does the rule address that? I
20 mean, Justice Ginsburg asked a question going to
21 reasonableness that depended on what she understood from
22 the -- from the briefs to be a Michigan rule saying the
23 judge can't reserve his right to change his mind later or
24 reserve judgment on the motion when it's made.

25 QUESTION: In respondent's brief, it's put in

1 quotes. And it sounds like it's quoting from a rule,
2 6.419(A). Quote: The court may not reserve decision on
3 the defendant's motion.

4 MR. BUSCH: Yes, that --

5 QUESTION: Do those words appear in the rule?

6 MR. BUSCH: Yes, that's the rule.

7 QUESTION: That's fine. And what motion does it
8 refer to? A motion made at what point? At any point at
9 all?

10 MR. BUSCH: That's my -- I don't think it's
11 specific, but I think the --

12 QUESTION: Wow.

13 MR. BUSCH: -- Chief Justice --

14 QUESTION: So after two witnesses are called by
15 the prosecution, the motion can be made and the judge
16 cannot reserve?

17 MR. BUSCH: Excuse me. At the close of the
18 prosecutor's proofs, that motion would be appropriate
19 under our rules of criminal procedure.

20 QUESTION: Do -- do we have the full text of
21 this rule before us?

22 MR. BUSCH: The rule is quoted at page 29a,
23 note 1 of the --

24 QUESTION: 29 of the --

25 QUESTION: Of what?

1 MR. BUSCH: Of our brief.

2 QUESTION: 29?

3 MR. BUSCH: Excuse me. Of the joint appendix.

4 Petition's appendix --

5 QUESTION: 29.

6 MR. BUSCH: -- petitioner's appendix.

7 QUESTION: Petitioner's appendix?

8 QUESTION: The cert petition.

9 QUESTION: In the cert petition.

10 QUESTION: Yes, and footnoted.

11 QUESTION: Yes. It -- it says after the

12 prosecution's case has rested.

13 MR. BUSCH: Yes, that's right.

14 QUESTION: It's a little hard to understand

15 that. Anyway, they said it was harmless error. The --

16 the court -- the courts -- the Michigan court said it's

17 harmless error, all right. But it's a little hard to

18 understand.

19 It says you -- you -- the prosecution finishes

20 the case. The defendant then says, judge, I move for a

21 directed verdict. All right? Or a failure of proof,

22 whatever the words are. Then it says the judge could give

23 his reasons in writing -- I mean, that's one way -- or

24 orally. How is the judge supposed to do this without

25 taking some time? What does reserve there mean? Does it

1 mean he has to pass on it before they present the --
2 the -- he has to decide it before the defense presents its
3 case? Does it mean you can't reserve it 'til after the
4 defense has presented the case? Does it mean you have to
5 rule instantly? What does it mean?

6 MR. BUSCH: Your Honor, I --

7 QUESTION: It can't mean instantly. What?

8 MR. BUSCH: The -- the rule means that he should
9 decide as promptly as he can is the way I understand --

10 QUESTION: Now, Mr. Busch, may I make this
11 suggestion? It seems to me the rule distinguishes between
12 motions made after the prosecution has rested and motions
13 made after the entire case is in.

14 QUESTION: Yes.

15 QUESTION: It says in the latter case, the judge
16 can reserve, take his time on it.

17 MR. BUSCH: Yes.

18 QUESTION: It seems to -- it strikes me, just
19 reading the thing, that the point of the rule is that
20 before the defense goes forward, the defense has a right
21 to know what the ruling is.

22 QUESTION: That's what I would think.

23 QUESTION: Now, in this case before the defense
24 went forward, it knew what the ruling was because the
25 judge had come in the next morning and said, okay, I --

1 you know, I've -- I'm going to listen to you again. I've
2 listened to you again, and -- and, in point of fact,
3 I'm -- I'm not going to grant the motion. And isn't that
4 enough to satisfy what seems to be the point of the rule,
5 and that is, before a defendant goes forward with a case,
6 he's got to know whether he has to or not? Isn't --
7 don't -- isn't that a fair way of reading this thing?

8 MR. BUSCH: Yes, and I think that happened in
9 this case. This defendant came prepared to try the case
10 on a first degree murder theory, and nothing substantially
11 changed that and he was not prejudiced in any way.

12 QUESTION: No. But before he -- before he went
13 forward with his evidence, the judge had changed his mind
14 or come to a further, more final conclusion, however you
15 want to characterize it, so that before he went forward,
16 he knew the judge was saying, no, I'm not throwing out the
17 first degree murder charge. And isn't that enough under
18 the rule?

19 MR. BUSCH: Yes, Your Honor.

20 QUESTION: Okay.

21 QUESTION: But you would say that if the --

22 MR. BUSCH: May -- can -- can I --

23 QUESTION: -- if the defendant was operating
24 under the impression that the -- if the defendant didn't
25 know before he put on his case, would it be too late for

1 the judge to change his mind at the end of the defense
2 case?

3 MR. BUSCH: Our -- no. Our position would be
4 that he can change his mind anytime up until that jury is
5 discharged.

6 Chief -- Mr. Chief Justice, may I reserve the
7 balance of my time for rebuttal?

8 QUESTION: Yes, you may, Mr. Busch.

9 We'll hear from Mr. Lamken.

10 ORAL ARGUMENT OF JEFFREY A. LAMKEN

11 ON BEHALF OF THE UNITED STATES,

12 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

13 MR. LAMKEN: Mr. Chief Justice, and may it
14 please the Court:

15 It's a long-established background principle
16 that mid-trial rulings are inherently subject to
17 reconsideration by the trial court itself until the end of
18 trial. That is especially so where, as here, a party
19 promptly seeks reconsideration which necessarily renders
20 the initial ruling inconclusive. That rule reflects four
21 important legal and practical considerations.

22 First, trial courts often must rule swiftly
23 without the benefit of extended briefing, argument, or
24 deliberation or even a copy of the trial transcript. They
25 could not operate justly absent the opportunity for

1 reconsideration.

2 Second, the Double Jeopardy Clause affords the
3 government a full and fair opportunity to make its case in
4 the first tribunal. In the context of trial, that full
5 and fair opportunity includes reconsideration. Indeed,
6 reconsideration is particularly important precisely
7 because the government very often cannot appeal.

8 QUESTION: I guess we never reach your -- your
9 argument, do we, if we decide this on the 2254 ground.

10 MR. LAMKEN: That's correct, Justice Scalia.
11 The Court could -- there are many stopping points short of
12 our argument on which the Court could resolve this --

13 QUESTION: Well, we shouldn't reach your ground
14 unless we have to, should we? Because your ground is a
15 constitutional ground.

16 MR. LAMKEN: Well, Your Honor, the Court would
17 have discretion to reach the constitutional ground if it
18 thought it were important enough to resolve the
19 disagreements in the State courts and their -- their
20 rulings that are contrary to --

21 QUESTION: I thought we try to avoid deciding
22 constitutional questions.

23 MR. LAMKEN: Yes. That is -- that is one of the
24 rules the Court follows and it's a general rule, but in
25 important cases, particularly in the qualified immunity

1 context, for example, the Court will -- will sometimes
2 announce the constitutional rule because it's sufficiently
3 important to settle the matter rather than resolving it on
4 statutory grounds or in -- in the context of qualified
5 immunity on reasonableness grounds.

6 QUESTION: Well, that's sort of a special
7 situation because in those situations you could never get
8 the answer if you always decided it on -- on immunity
9 grounds. I mean --

10 MR. LAMKEN: Justice Scalia, the Court would
11 have discretion to reach the constitutional issue if it
12 chose, but it would -- certainly would not be required to
13 do so. For example, the Court decided a double jeopardy
14 issue in *Monge*, but that was 4 years after addressing the
15 exact same issue in -- on *Teague* grounds in an earlier
16 case. And for those 4 years, the lower Federal courts and
17 the courts in the State of California for which it had
18 special applicability suffered through a -- a tremendous
19 amount of uncertainty.

20 And we would urge the Court, given the
21 uncertainty that's out there, to reach the constitutional
22 question. However, the Court would have discretion to
23 resolve this on 2254 grounds --

24 QUESTION: If we follow the position that you're
25 urging and -- and the judge rules, as here, premeditation

1 is out of the case, I'm not going to charge first degree,
2 defendant puts on defendant's case on the assumption first
3 degree is out of the case and then the judge says at the
4 end, oh, sorry, I'm reversing and I'm going to charge.
5 Now, you say the judge can change his mind at any time
6 'til the end of the line. It seems to me that would be
7 grossly unfair to a defendant.

8 MR. LAMKEN: For double jeopardy purposes, but
9 not for due process purposes. That would raise a -- raise
10 a -- a serious due -- excuse me -- due process issue.
11 It's the exact same issue that arises, for example, when a
12 trial court dismisses a count of a complaint, which raises
13 no double jeopardy concerns at all and then, very late in
14 the trial, determines that he had erred in dismissing
15 an -- a count of the indictment. When that happens, the
16 ordinary process is either the court must reopen the
17 evidence to permit the defendant to put on the defense
18 that he didn't have the opportunity to present, or the
19 defendant may be entitled to a mistrial. But that is very
20 much a fairness trial, due process issue, not a question
21 of double jeopardy.

22 The third point is that double jeopardy --

23 QUESTION: So then in Fong Foo when Judge
24 Wyzanski I think got angry at the prosecution for some
25 reason that escaped the Court and everyone else, directs

1 an acquittal, what the prosecutor should have done is just
2 go back to Judge Wyzanski and say, Judge, you made a
3 mistake here. I haven't been talking to the witness in
4 the hall as you thought, or whatever, and then Judge
5 Wyzanski could have, in fact, taken back the -- the
6 judgment of the directed -- directed verdict of acquittal,
7 although this Court later wouldn't have been able to do it
8 in your view.

9 MR. LAMKEN: In our view that's precisely
10 correct, so long as Judge Wyzanski had not discharged the
11 jury because once you discharge the jury, the -- the
12 defendant's right to trial before his tribunal of choice
13 has been eliminated. The -- so long as the jury hasn't
14 been discharged, the trial court has inherent authority to
15 correct its own mistakes. No double jeopardy purpose is
16 served by giving -- by precluding reconsideration to give
17 the defendant the benefit of acquittal to which no court,
18 and certainly not the jury and not the trial court that
19 putatively granted it, believes the defendant is entitled.
20 Particularly --

21 QUESTION: What's your best authority for that
22 proposition from this Court?

23 MR. LAMKEN: The --

24 QUESTION: Or -- or --

25 MR. LAMKEN: I'd say --

1 QUESTION: Or does that take us somewhat further
2 than we've gone?

3 MR. LAMKEN: Well, I think it would -- our best
4 case would probably be this Court's statements in Arizona
5 versus Washington, in essence that the government --
6 although the government often doesn't get an appeal and it
7 doesn't get a second shot at -- bite of the apple, it does
8 get one full and fair opportunity before the trial court.
9 In our view that full and fair opportunity must include
10 reconsideration precisely because trial courts move so
11 swiftly and because the initial decision by a trial court
12 isn't meant to be a final decision but is, in fact, part
13 of the deliberative process, part of the ongoing dialogue
14 in trial among the judge, among a prosecutor and
15 defendant's counsel.

16 QUESTION: So if you drop the first degree
17 murder charge -- or the judge orders it dismissed and then
18 the defendant testifies thinking, well, at least I'm not
19 going to be tried for first degree, in your view the trial
20 judge can change its ruling and reinstate the first degree
21 murder charges because the defendant shouldn't have
22 relied? He --

23 MR. LAMKEN: No. We think it's --

24 QUESTION: The -- the defendant should know that
25 the judge can change his mind, and so he better not take

1 the stand.

2 MR. LAMKEN: No. The ordinary rule -- and this
3 is the same rule that applies where a court, for example,
4 dismisses a count of the indictment -- is that defendants
5 are entitled to rely on the interlocutory rulings. If
6 they do so to their detriment and to their prejudice and
7 it denies them the opportunity to present their fair
8 defense, that is a significant due process problem and may
9 entitle --

10 QUESTION: What --

11 QUESTION: Well, it wouldn't be if -- excuse me.

12 QUESTION: What -- what if you have a series of
13 defendants in a -- in a case and it's being tried, and at
14 the close of the prosecution's evidence, the judge
15 dismisses the indictment as against one of the defendants,
16 but keeps on so the jury is still there? What happens
17 then? Can the -- the prosecution come back a couple days
18 later and say, you made a mistake?

19 MR. LAMKEN: That's, actually points up a
20 difficult question which is whether or not the dismissal
21 of the -- well, if it's dismissal in the indictment, it
22 certainly isn't a double jeopardy problem, but if it's a
23 judgment of acquittal at that point, the question the
24 court would have to confront --

25 QUESTION: Well, say -- change my hypothetical

1 to a judgment of acquittal.

2 MR. LAMKEN: Right. That's what I assumed you
3 had meant. And if that were the case, the court would
4 have to decide whether or not that there -- there's
5 constructively or through legal fiction the discharge of
6 the jury with respect to that defendant even though the
7 actual jury is still there --

8 QUESTION: But that's --

9 MR. LAMKEN: We believe the actual answer would
10 be --

11 QUESTION: That's an extraordinary doctrine.

12 MR. LAMKEN: Well, I -- I would believe that the
13 proper answer would be that if the jury is still
14 available, the prosecution can seek reconsideration. But
15 one could say that the jury was constructively discharged
16 with respect to that defendant and thereby preclude the
17 prosecution from seeking reconsideration. But the
18 critical moment in all of those cases is what constitutes
19 discharge of the jury, the defendant's chosen trier of
20 fact.

21 QUESTION: But getting back to the earlier
22 point, if a -- if the defendant testifies, thinking
23 there's going to be no first degree charge, and it's later
24 reinstated, under your position I think you would say, he
25 shouldn't have relied. The rule is that he knows the

1 judge can change his mind. Therefore, his reliance was at
2 his peril.

3 MR. LAMKEN: Well, the Constitution --

4 QUESTION: I mean, I don't know why you don't
5 argue -- that's the consequence of your argument it seems.

6 MR. LAMKEN: Well, certainly the Constitution
7 doesn't require there to be mid-trial rulings on judgments
8 for acquittal. In fact, Federal Rule of Criminal
9 Procedure 29(b) specifically allows --

10 QUESTION: No, but the hypothetical is there is
11 one.

12 MR. LAMKEN: Right. And if the defendant relies
13 to his detriment and it prevents him from presenting a
14 fair defense to which due process entitles him, we believe
15 that he might be entitled to a mistrial.

16 But we -- nothing of that sort happened here
17 because defendant not only was on notice that this -- that
18 the ruling was subject to change, but if you look at the
19 point in the joint appendix, which is the penultimate
20 page, where the court announced -- page 46, where the
21 court announces that it has decided to reconsider, there's
22 no objection from the defense saying, wait a minute, we
23 relied. Our whole defense rested on this ruling. There's
24 no statement to that effect.

25 QUESTION: I suppose parties can -- can

1 repudiate a contract, can't they, since there's no -- no
2 involuntary servitude? But the mere fact that one party
3 to a contract knows that the other party can repudiate it,
4 does not mean that the repudiation can be cost-free.

5 MR. LAMKEN: That -- that --

6 QUESTION: The other party is entitled to rely
7 upon the contract despite his knowledge that it can be
8 repudiated.

9 MR. LAMKEN: Right. I -- I think that just
10 points out the general rule, that -- when a trial court
11 issues a mid-trial ruling, the defendant generally has a
12 right to -- to rely on it, and if he relies on it and it
13 denies him his opportunity to present a fair defense, that
14 presents a serious due process problem. But it is not a
15 double jeopardy problem because double jeopardy is
16 concerned with having two trials against the defendant
17 when the prosecution had its full and fair opportunity in
18 the first.

19 The final problem with the contrary rule is that
20 it requires appellate courts to engage in an often
21 unrealistic endeavor to go through and try and determine
22 what the trial court, through its spontaneous and
23 sometimes extemporaneous statements, really meant to do or
24 what it actually did. For example, in this case it seems
25 to come down to the question of whether the words, my

1 impression at this time, is -- suggest sufficient
2 tentativeness and whether the word okay is the functional
3 equivalent of it is so ordered.

4 In addition, under respondent's approach, the
5 trial -- the court of appeals would be required to
6 determine whether the request for reconsideration came
7 promptly enough, whether or not it came in the same
8 breath -- I see I'm out of time.

9 Thank you, Mr. Chief Justice.

10 QUESTION: Thank you, Mr. Lancken.

11 Mr. Moran, we'll hear from you.

12 ORAL ARGUMENT OF DAVID A. MORAN

13 ON BEHALF OF THE RESPONDENT

14 MR. MORAN: Mr. Chief Justice, and may it please
15 the Court:

16 First of all, a brief factual correction. The
17 change in the judge's ruling did not occur before
18 Mr. Vincent testified. The change in the judge's ruling
19 occurred on April 2nd, 1992, 2 days after the ruling had
20 been made after Mr. Vincent had testified. What happened
21 on April 1st, 1992 was the judge indicated that he would
22 reconsider his motion and hold it in abeyance, but he did
23 not, at that time, take back the directed verdict of
24 acquittal.

25 QUESTION: Well, he didn't take it back, but he

1 made it clear that he -- he did not consider it -- he did
2 not consider that he had made a final ruling. At least
3 that was clear. It was clear that no final ruling had
4 been made before the testimony occurred.

5 MR. MORAN: He -- he took the position, Justice
6 Scalia, that he could take back his ruling because he had
7 not informed the jury of it.

8 QUESTION: Right. Right.

9 MR. MORAN: A position that we submit is wrong
10 under this Court's precedent in Sanabria.

11 QUESTION: Can I -- can I ask you, do you
12 believe like Justice Breyer that a judge can enter a final
13 order without meaning to enter a final order?

14 MR. MORAN: What a reviewing court has to do
15 under this precedent in Martin Linen, Justice Scalia, is
16 look at the words and actions of the trial court and
17 decide whether or not it amounts to a ruling.

18 Now, in this case --

19 QUESTION: And -- and you do that just
20 objectively, and even if there's plenty of evidence that
21 the judge didn't intend it to be a final ruling, if he
22 used certain magic words, it's a final -- it's a final
23 ruling.

24 MR. MORAN: Well, actually, Justice Scalia, it's
25 petitioner who's arguing for a magic words approach, or

1 the Michigan Supreme Court at least.

2 QUESTION: No. I -- I don't know who -- who --
3 in whose favor it breaks. I'm just asking what your
4 position on it is, whether -- whether -- because on
5 that -- on that question hinges whether we are dealing
6 here with a question of fact, as we would be in
7 interpreting -- in -- in deciding, you know, what he
8 intended, or a question of law, as we would be in
9 interpreting the words of a contract where indeed it
10 doesn't matter what the parties intended. If they express
11 themselves this way, you -- you take the objective meaning
12 of it. Right? And that's a question of law for the court
13 and not a question of fact for the jury.

14 MR. MORAN: Well, Justice Scalia, our position
15 is, is that the trial judge's intent is a relevant fact,
16 but whether or not what he did amounted to an acquittal --

17 QUESTION: Is a question of law.

18 MR. MORAN: -- is a question of law.

19 QUESTION: Well, in -- in your position here
20 attacking a State judgment, you don't -- you don't
21 immediately get to the constitutional question. You get
22 to the question of whether the Michigan Supreme Court's
23 ruling was either contrary to our precedents or an
24 unreasonable application of them. In other words, the
25 Michigan Supreme Court could have been wrong as a matter

1 of abstract constitutional law and it could still be
2 upheld here.

3 MR. MORAN: Yes. What we attacked in Federal
4 district court on habeas was the Michigan Supreme Court's
5 conclusion that there had never been an acquittal at all,
6 and we persuaded the Federal district judge and the Sixth
7 Circuit that the Michigan Supreme Court's conclusion that
8 there had not been an acquittal was an unreasonable
9 application of this Court's precedents, particularly Ball,
10 Kepner, Green, because the Michigan Supreme Court placed
11 primary emphasis on the absence of formal trappings, and
12 this Court has repeatedly held that even in the absence of
13 any written judgment at all, as in Ball and Kepner, that a
14 final directed -- a verdict of acquittal is final.

15 QUESTION: It could be, but presumably Michigan
16 knows Michigan law, and if they want to say, under the law
17 of Michigan, the events that took place here do not amount
18 to an acquittal, I guess that's their right. Now, is
19 there anything in the cases that you cite which says that
20 Federal law requires Michigan to count these things as an
21 acquittal?

22 MR. MORAN: Well, this Court's precedents,
23 particularly Martin Linen, teach that what the reviewing
24 court is supposed to do is look not to the form of the
25 trial court's ruling but the substance.

1 QUESTION: All right. Now, it happens in
2 Michigan they don't do that. In Michigan, they have the
3 Michigan system. Now, what is it that tells Michigan you
4 have to, as a matter of Federal law, count this as an
5 acquittal? I quite agree with you that there are cases
6 where the Court has said this is an acquittal, but I don't
7 think they're faced in those cases with a State court that
8 says the contrary.

9 MR. MORAN: Well, Smalis, Your Honor.

10 QUESTION: Yes.

11 MR. MORAN: Smalis came from a State court.

12 QUESTION: Yes, but in Smalis there was no doubt
13 about what the judge had done. I mean, there he expressly
14 found that the State had not proved its case and everybody
15 agreed he had done that, and then the State appealed to
16 the higher courts in Pennsylvania.

17 MR. MORAN: That's right.

18 In this case, however, if you look at the full
19 record, the trial judge himself -- and if we get to the
20 issue of intent, Justice Scalia -- the trial judge himself
21 says over and over, I made a ruling, I came to a
22 conclusion, I made a decision, and even at one point, I
23 granted a motion for a directed verdict. He took the
24 position simply as a matter of law, double jeopardy law,
25 Federal double jeopardy law.

1 QUESTION: Well, under AEDPA, what is it you
2 think that the Michigan Supreme Court did wrong? Was it
3 to misapply our law, or was it a misapplication of the
4 finding of fact?

5 MR. MORAN: It was a -- it was its legal
6 conclusion --

7 QUESTION: Well --

8 MR. MORAN: -- that there had been no --

9 QUESTION: -- but AEDPA doesn't say one way or
10 the other. AEDPA doesn't use the term, legal conclusion.

11 MR. MORAN: No. But it --

12 QUESTION: So what is your answer to my
13 question?

14 MR. MORAN: Mr. Chief Justice, it matters for
15 AEDPA whether it's law or fact because then we're under
16 (d)(1) or (d)(2).

17 QUESTION: Right.

18 MR. MORAN: And so --

19 QUESTION: I'm asking you which one you -- you
20 want to be under, or perhaps you want to be under both.

21 MR. MORAN: Well, it is our position that we win
22 under either because even if it's a finding of fact, it's
23 so unreasonable to say that there was no directed verdict
24 of acquittal here, that we should prevail. But --

25 QUESTION: Anyway, the Michigan Supreme Court

1 didn't find the fact against you, did it? It just -- I --
2 as I understand it, it said it really doesn't -- didn't
3 matter to the Michigan Supreme Court.

4 MR. MORAN: That's right.

5 QUESTION: It said even if he had made a ruling,
6 unless -- unless the jury had been advised, it was
7 ineffective for double jeopardy purposes.

8 MR. MORAN: Oh, that's not quite right, Justice
9 Scalia. What -- what the Michigan Supreme Court ruled or
10 stated was they agreed with the Michigan Court of Appeals
11 and the dissenters in the Michigan Supreme Court that
12 characterizing the trial judge's comments as an acquittal
13 would require us to reverse Mr. Vincent's conviction. The
14 Michigan Supreme Court actually said that. So they -- and
15 that was after a discussion of Smalis.

16 Both the Michigan Court of Appeals and the
17 Michigan Supreme Court, after reviewing this Court's
18 decision in Smalis, like so many other lower courts, have
19 come to the conclusion that what a trial judge may not do,
20 consistent with the Double Jeopardy Clause, is revisit a
21 directed verdict at any point later in the trial.

22 QUESTION: All right. Suppose that what he says
23 is, I direct the verdict. There are two defendants, Smith
24 and Brown, and the judge says, I direct a verdict in favor
25 of Smith. Oh, my goodness. I said the wrong thing.

1 Brown. Okay? That's what happens. Are you saying the
2 Constitution then just means that Smith is home free?
3 Can't try him

4 MR. MORAN: Not at all, Justice Breyer.

5 QUESTION: Because? And the difference between
6 that and this is what? 12 hours?

7 MR. MORAN: No. The difference between that and
8 this is that the ruling is not final. Here the ruling was
9 unquestionably final. The judge --

10 QUESTION: How? Why?

11 MR. MORAN: I'm sorry?

12 QUESTION: Why, how? Explain that.

13 MR. MORAN: Because the judge announced his
14 ruling. All the parties, including the judge, understood
15 that under Michigan court rules, the judge could not
16 reserve his decision, had to make it. He did so. He
17 announced his decision. He said, okay. Is there anything
18 else?

19 QUESTION: Reserve means, I take it, that you
20 have to make a decision prior to the -- the defendant
21 putting on witnesses.

22 MR. MORAN: It -- the -- the court rule doesn't
23 say that. The court rule says --

24 QUESTION: When I read the court rule and then
25 read the Federal rule, the difference in the practice is

1 what they mean by reserve under the Federal rule where you
2 can reserve -- and it happens every day -- is a district
3 judge says, you move at the end of the plaintiff's case.
4 I'm the district judge. I say I'm going to let it go to
5 the jury. If the jury acquits, you're home free. If it
6 convicts, I'll go back to it. That happens all the time.
7 And that, it seems to me, is what the Michigan rule says
8 can't happen in Michigan --

9 QUESTION: Well --

10 QUESTION: Is that -- am I right?

11 MR. MORAN: The Michigan rule -- I -- I don't --
12 frankly, I don't know because the Michigan rule simply
13 says the judge may not reserve his decision.

14 QUESTION: But surely it can't mean that if a --
15 if a motion is made at quarter after 4:00 in the afternoon
16 and the court customarily recesses at 4:30, that he can't
17 wait until the next morning, so no testimony being taken
18 in the meantime.

19 MR. MORAN: In -- in that case that would --
20 that might well be all right because he hasn't made a
21 final decision. The problem here -- we're not --

22 QUESTION: Suppose in that case the -- the
23 arguments by the attorneys end at 4 o'clock. The judge
24 says, well, I'll let you know my order. He enters the --
25 he tells his clerk at 4:30, enter the order dismissing the

1 first degree charge. He then comes back at 8:30 in the
2 morning, after having thought about it overnight. He
3 tells the clerk, put in a new docket entry, order
4 withdrawn, motion to dismiss denied. No one knows about
5 this until quarter to 9:00. Defense doesn't even know
6 about it. What result in that case?

7 MR. MORAN: That's very similar to *Lowe v. State*
8 in the Kansas case in which the Kansas Supreme Court,
9 after this Court's decision in *Smalis*, concluded that a
10 judge couldn't do that even though there had been no
11 intervening proceedings. The judge had --

12 QUESTION: What interest is served by such a
13 rule?

14 MR. MORAN: An acquittal is final. That is the
15 most fundamental rule of this Court's double jeopardy --

16 QUESTION: Well, but what -- no one -- no one
17 relies on it. No one knew about it.

18 MR. MORAN: But, Your Honor, this Court has said
19 over and over again that an acquittal by a judge, in the
20 context of a directed verdict, is equivalent to an
21 acquittal by a jury. And the same --

22 QUESTION: But he -- he didn't say, I acquit.
23 The judge himself said this at the trial, he said, I
24 didn't enter a directed verdict. I granted a motion.

25 MR. MORAN: Yes.

1 QUESTION: In the judge's own mind, he didn't
2 acquit.

3 And what you're urging is so different from how
4 we approach trial rulings generally, and the point was
5 made that in a trial, things go fast, judge -- judges make
6 rulings. It's very common, is it not, for a judge to make
7 a ruling and then go home that night, maybe read over the
8 daily transcript, maybe have her law clerk check a few
9 authorities, and say, oh, my goodness, I made a mistake,
10 the next morning. You couldn't run trials -- I mean, the
11 trial judges don't have the luxury that appellate judges
12 do in that regard. They have to make rulings on the spot,
13 and they can revisit them. You -- you are suggesting that
14 this rule, like no other, is -- once the judge utters the
15 words, motion granted, that's the end of it.

16 MR. MORAN: I'm not arguing that, Justice
17 Ginsburg. I am taking the position that if the judge
18 immediately corrects a mistake, as happened in *People v.*
19 *Vilt*, a case relied upon by the petitioner, that's
20 different.

21 QUESTION: Well, what's different between --

22 QUESTION: Why?

23 QUESTION: -- saying at 4 o'clock in the
24 afternoon, I grant your motion, and then overnight -- and
25 then they come back the next morning and the judge says,

1 I'm not so sure. Prosecutor, tell me more about this.
2 What's the difference of the overnight interval? Nothing
3 has happened. The trial hasn't gone on. No witnesses
4 have appeared.

5 MR. MORAN: But, Your Honor, if that was the
6 law, then *Smalis v. Pennsylvania* is impossible to
7 understand because in *Smalis* the prosecution there could
8 have taken some sort of emergency appeal to the
9 Pennsylvania Supreme -- Pennsylvania Superior Court, got a
10 ruling late that afternoon, and come back the next morning
11 and resumed the trial. And in fact, the prosecution tried
12 exactly that in a Tenth Circuit case, *United States versus*
13 *Eliason*.

14 QUESTION: I'm sorry. I don't follow you
15 because I thought the judge in *Smalis* was firm throughout,
16 that he never equivocated about what his ruling was.

17 MR. MORAN: Actually the judge in *Smalis* agreed
18 to a reconsideration motion --

19 QUESTION: But then he came up just where he was
20 the first time.

21 MR. MORAN: Yes, that's -- that's right.

22 What I'm saying is, is that if double jeopardy
23 doesn't protect -- if there's no double jeopardy
24 violation, if it can be revisited quickly, then *Smalis* is
25 impossible to understand because *Smalis* then would simply

1 come down to if you can do it quickly, if you can get an
2 appeal to a higher court and a reversal quickly --

3 QUESTION: Well, being -- being revisited on
4 appeal is different from being revisited at the trial by
5 the trial judge. That's -- that's the distinction that's
6 being drawn by your opponent here.

7 MR. MORAN: Yes, Justice Scalia. And -- and the
8 point of that argument is that it makes it completely
9 dispositive as to whether there are other defendants
10 remaining, as I believe Mr. Chief Justice --

11 QUESTION: You don't have to go that far at all.
12 I mean, Smalis is not a case where the judge changed his
13 mind, I take it. And this is a case where the judge
14 changed his mind.

15 MR. MORAN: Yes.

16 QUESTION: So I'm back to my first question.
17 The judge says, Smith, you're acquitted. And 10 minutes
18 later he says, oh, my goodness, I used the wrong name. It
19 was Brown. Now, you're saying they can't retry Smith?

20 MR. MORAN: If --

21 QUESTION: My goodness, nothing at all happened
22 in those 10 minutes. They were out drinking some water.

23 MR. MORAN: If no further proceedings have
24 occurred, and that is the line that almost all --

25 QUESTION: All right. What -- what proceeding

1 occurred? No proceeding occurred. They adjourned for the
2 evening. He comes back the next day and, at best, he says
3 for you, well, I misspoke. I -- I didn't grant the
4 motion. So what's the difference whether -- we're back to
5 Justice Ginsburg. We're all pursuing exactly same thing
6 which I'm having trouble with, and --

7 MR. MORAN: First of all, Justice Breyer, he
8 said, I granted the motion. He took the position as a
9 matter --

10 QUESTION: So does -- so does my judge. I grant
11 the motion. Smith -- Smith is acquitted.

12 MR. MORAN: And he came back the next morning
13 and said I granted your motion. He took the position that
14 it didn't count --

15 QUESTION: And he says, I say I granted the
16 motion. I acquitted Smith, but I misspoke. It was Brown
17 I meant.

18 MR. MORAN: Yes.

19 QUESTION: You're saying that in my case too
20 Smith is home free.

21 MR. MORAN: If further proceedings have
22 occurred, which unquestionably occurred here, then
23 followed by an overnight recess, during a trial a
24 defendant --

25 QUESTION: Which were the further proceedings?

1 MR. MORAN: There were five pages of proceedings
2 that are --

3 QUESTION: What? You mean they spoke some more.

4 MR. MORAN: No. On -- on joint appendix pages
5 13 through 18, the parties litigated a number of other
6 matters, including in which order will --

7 QUESTION: But they were all --

8 QUESTION: But no -- no evidence -- no -- no
9 witnesses testified, did they?

10 MR. MORAN: Not at that point, no. But what --

11 QUESTION: There was nothing that -- that was
12 done to the defendant that the defendant himself did to
13 his detriment.

14 MR. MORAN: We don't know because all we know --

15 QUESTION: Well, have we any reason to believe?

16 MR. MORAN: We know that his attorney made
17 decisions on matters such as who is going to go first,
18 will the defendants be present for each other's juries,
19 will witnesses be allowed in the courtroom, a
20 sequestration order. He made those decisions at a point
21 when his client had been acquitted of first degree murder.

22 QUESTION: No, but is there any reason to
23 believe that those decisions would have been different if
24 he had understood that first degree murder was going to be
25 in the case?

1 MR. MORAN: We simply don't know, Justice
2 Souter. It's a --

3 QUESTION: Well, we don't -- we don't know in
4 the sense that there -- there hasn't apparently been
5 specific litigation to that effect, but is there any
6 reason to suspect that the decisions would have been
7 different? In other words, is there any reason whatever
8 to -- to think that there may have been detrimental
9 reliance here?

10 MR. MORAN: Yes.

11 QUESTION: Maybe there is, but what -- what is
12 it then?

13 MR. MORAN: Yes. Well, first of all, on those
14 particular decisions, we don't know and it's impossible to
15 reconstruct that at this point. What we do know is that
16 during the overnight recess, Mr. Vincent and his
17 attorney -- as this Court noted in Geders versus the
18 United States, an overnight recess during a trial is a
19 critical time to make crucial decisions --

20 QUESTION: No. I -- I realize that, but by the
21 time he departed for the overnight recess, he knew that
22 the judge was going to take the matter up again the next
23 morning. The judge had said so.

24 MR. MORAN: That's actually not quite true as to
25 Mr. Vincent. Mr. Vincent was removed from the courtroom

1 before the prosecutor said I would like to make a brief
2 restatement on first degree --

3 QUESTION: But his lawyer knew.

4 QUESTION: But his -- his counsel knew. His
5 counsel knew.

6 MR. MORAN: His lawyer was still there. That's
7 right.

8 QUESTION: Yes. So -- so if -- if he -- if he
9 relied upon there being no change in the ruling, he was
10 doing so at his peril, was he not?

11 MR. MORAN: The ruling had not been taken back,
12 though, Justice Souter. All --

13 QUESTION: No, the ruling had not been taken
14 back, but the -- the judge said, sure, I'll hear you,
15 prosecutor, in the morning. I'm always glad to hear
16 people. He made it -- he couldn't have made it more clear
17 that he did not understand that he had come to a final
18 conclusion on that motion, could he?

19 MR. MORAN: What -- all he agreed to do is hear
20 more argument. He did -- in no way indicate --

21 QUESTION: But surely that -- that suggests that
22 he has not finally made up his mind.

23 MR. MORAN: It suggests it, but it -- he
24 certainly doesn't say it.

25 QUESTION: No.

1 MR. MORAN: All -- he makes a general
2 statement --

3 QUESTION: Well, as a betting man, would --
4 (Laughter.)

5 QUESTION: -- would you not assume that there
6 might be a change as a result of what he had said before
7 they recessed?

8 MR. MORAN: If I had been in trial counsel's
9 position, I wouldn't have known what to do because we have
10 a --

11 QUESTION: Yes, you would. You would have
12 defended your client as best you could, and you would know
13 that you could not treat with security what the judge had
14 said. If you did, you were endangering your client --

15 MR. MORAN: But --

16 QUESTION: -- because the judge had signaled
17 that he might reverse his ruling --

18 MR. MORAN: But --

19 QUESTION: -- the next morning.

20 MR. MORAN: As trial counsel stated the next
21 morning, it was my impression that you made a firm ruling,
22 judge. So --

23 QUESTION: Then at trial the next morning, if
24 what you say about the overnight being so critical to the
25 strategic planning, then counsel could say, judge, we

1 plotted all this thing out, give me a recess so we can
2 reshuffle the thing. At that point, if there was any
3 detrimental reliance, the way to do it was to give back
4 the hours that had been lost. Isn't that so?

5 MR. MORAN: I don't know if that would be
6 possible with a -- with two juries. There were actually
7 two juries in this case sitting around waiting for
8 the defense to --

9 QUESTION: It wasn't requested, though.

10 MR. MORAN: It -- it wasn't requested because at
11 the end of the hearing, in which the prosecution made his
12 improved closing argument to the judge, there was no
13 ruling. The judge simply said, I'm going to think about
14 it. I'm going to take it under advisement. He didn't
15 make the ruling until after Mr. Vincent testified.

16 QUESTION: These are due process problems that
17 you're raising now, and I suppose we could always leave
18 them to be resolved by further proceedings below, inquiry
19 into whether there was any prejudice or not. But that
20 doesn't go to the point that's before us here which is
21 whether for purposes of double jeopardy, this -- this
22 terminates the matter.

23 MR. MORAN: I agree. This Court's precedents --

24 QUESTION: So it's -- it's no use arguing, well,
25 he could have been prejudiced. Okay, he's prejudiced.

1 We -- we can take care of that.

2 MR. MORAN: And --

3 QUESTION: But that doesn't got to the double
4 jeopardy question.

5 MR. MORAN: And I've taken the position in the
6 brief that we don't have to show prejudice. Under double
7 jeopardy, the prejudice is --

8 QUESTION: Right. Absolutely.

9 MR. MORAN: -- is inherent in being subjected to
10 post-acquittal fact-finding proceedings.

11 QUESTION: Not only do you not have to, it does
12 you no good to.

13 MR. MORAN: I agree.

14 QUESTION: Right, okay.

15 QUESTION: But we still have good old lucky
16 Smith who -- who got off because --

17 (Laughter.)

18 QUESTION: -- five pages -- of five pages of
19 extraneous conversation went on with the -- the judge and
20 counsel. And I take it now you're going to say, yes, he
21 got off.

22 MR. MORAN: Justice Breyer, yes. And -- and the
23 reason --

24 QUESTION: Okay, okay. That's what I thought
25 you would say. That's all right. That's fine.

1 MR. MORAN: The rule from the Solicitor
2 General's position would make it completely dispositive as
3 to whether there happened to be other charges remaining,
4 as in Smalis itself, and whether or not there happened to
5 be other defendants.

6 QUESTION: That's -- that may be true. That's
7 why I'm nervous about the position. But still, you from
8 your point of view, unfortunately, lose as long as
9 Michigan was -- was at least within the discretion that
10 Federal law grants them in characterizing what happened
11 here as not an acquittal. I'm right about that.

12 MR. MORAN: If they're correct that it was not
13 an acquittal.

14 QUESTION: Well, not correct. They -- they have
15 a degree of -- even under the law, that's -- I mean, under
16 the law section too.

17 MR. MORAN: I agree. But if you look at the
18 trial judge's comments, he consistently maintains that
19 he -- he made a ruling. And ruling is actually the exact
20 word from Martin Linen, that this Court has to decide
21 whether or not the trial judge made a ruling.

22 QUESTION: Mr. Moran, I'd like to get back to an
23 AEDPA question, and that is, as I understand it, there is
24 a division among lower courts on just how much leeway a
25 trial judge has to take back a directed verdict. And if

1 there is disarray in the lower courts, how can we say
2 there's clearly established law in your favor?

3 MR. MORAN: Because what -- what AEDPA requires
4 is not to look at the decisions of the lower courts, but
5 to look to see whether the decision of the Michigan
6 Supreme Court was a clearly unreasonable application.

7 Now, I should point out, first of all, on that
8 issue whether a judge can take back a directed verdict,
9 the Michigan Supreme Court did not rule against us, in
10 fact indicated that it agreed with our position that a
11 judge may not take back a directed verdict if he had -- if
12 he has actually rendered one. And the Michigan Court of
13 Appeals ruled the same way.

14 But if you look at the split of authority, it's
15 a very striking split of authority. The cases that cite
16 and rely upon *Smalis* on very similar situations where
17 there is a directed verdict, a partial directed verdict
18 during an ongoing trial, so the trial continues, and then
19 the judge attempts to take back the directed verdict at
20 some point later in the trial, those courts that have
21 applied *Smalis* have, with one exception, held that the
22 judge cannot do it. Those courts that have gone the other
23 way have almost uniformly relied on a Second Circuit
24 decision, *United States versus LoRusso*, which says that
25 there is no problem with doing that because it does not

1 result in a second trial.

2 And what this Court could not have been more
3 clear about in *Smalis* is that a double jeopardy is
4 violated not only if a reversal of a directed verdict
5 would result in a second trial, but if it would result in
6 a continuation of the same trial.

7 And that is why this case is constitutionally
8 indistinguishable from *Smalis*. The only difference
9 between this case and *Smalis* is that instead of going to a
10 higher court, as was attempted by -- in the Tenth Circuit
11 in *United States versus Ellison*, what happened there is
12 that the prosecution -- there was a partial directed
13 verdict, exactly as in this case. The prosecution ran
14 across --

15 QUESTION: But you -- that's assuming the --
16 assuming the whole factual point at issue here, that there
17 was a partial directed verdict.

18 MR. MORAN: Yes.

19 QUESTION: And in *Smalis*, there was no doubt
20 about that.

21 MR. MORAN: Well, there was doubt as to what the
22 judge had done. The Pennsylvania Supreme Court said it
23 wasn't a directed verdict because it was a legal ruling
24 and not a -- not --

25 QUESTION: Well, but that -- that was a very

1 theoretical thing, whether as a matter of -- when you're
2 saying there's no evidence as a matter of law, that's a
3 factual ruling or a legal ruling.

4 MR. MORAN: Yes.

5 QUESTION: I -- I don't think that bears on our
6 case.

7 MR. MORAN: No, and that is -- and that is a
8 distinction. That's why we have an issue one, Mr. Chief
9 Justice, is -- is, of course, we have to get past the
10 issue of was there a directed verdict. Then we get to
11 issue two. If there was a directed verdict, can the judge
12 take it back? And that is where I maintain that this case
13 is constitutionally indistinguishable from *Smalis*.

14 On -- on issue one, I -- I just wanted to make a
15 further point about whether this is fact finding or a
16 legal finding. The Michigan Supreme Court itself did not
17 regard what it was doing as fact finding. There was not
18 the slightest indication in the Michigan Supreme Court's
19 opinion that it thought it was engaged in fact finding.
20 Nor did this Court think that it was engaged in fact
21 finding in several cases in which this Court has examined
22 arguably ambiguous district court transcripts to determine
23 whether or not an acquittal had been granted, for example,
24 *Scott* and even more clearly, *Sanabria*.

25 In *Sanabria*, this Court had to wade through a

1 difficult record to determine whether or not the district
2 court had, in fact, granted a directed verdict on both
3 theories, numbers theory and horse betting theory.

4 QUESTION: Well, let me follow up on an earlier
5 question of Justice Breyer's. Do you think that if this
6 is true under the Federal system that it was a directed
7 verdict, it must therefore be true under the -- under
8 an -- under any State system?

9 MR. MORAN: Yes. I believe that follows
10 immediately, well, first of all, from Maryland v. Benton
11 which applies Double Jeopardy Clause to the States, but
12 also from Crist --

13 QUESTION: Well, but the fact that -- that that
14 case applies double jeopardy to the States I don't think
15 necessarily settles whether a particular State procedure
16 is or is not a directed verdict.

17 MR. MORAN: No. But it also follows from
18 Crist v. Bretz in which this Court rejected a -- Montana's
19 attempt to declare that jeopardy doesn't attach until the
20 first witness is sworn in a jury trial. And this Court
21 said, no. Where -- where jeopardy attaches and terminates
22 is a matter of Federal constitutional law, and it
23 concluded, therefore, that Montana must follow the Federal
24 rule to that point which is that jeopardy attaches when
25 the jury is sworn. And so this Court has consistently

1 applied the same principles about jeopardy-attaching and
2 jeopardy-terminating events whether the cases arise in
3 State or Federal court.

4 QUESTION: Well, so the Federal rule is that it
5 attaches when there's been a directed verdict, but it's up
6 to State law when -- when there's been a directed verdict.
7 I mean --

8 MR. MORAN: Your Honor, I find that --

9 QUESTION: -- there's nothing incompatible
10 there.

11 MR. MORAN: Justice Scalia, I find that hard to
12 square with Martin Linen which teaches us that what a
13 reviewing court must do is putting aside form, looking at
14 substance to decide whether the trial court has found an
15 essential element of the offense is missing. And here,
16 the trial judge clearly stated that there is no
17 premeditation been shown, that therefore second degree
18 murder is the appropriate charge, that a docket entry that
19 could not have been more clear was made to that effect on
20 that day, March 31st, 1992, and then followed by at least
21 five statements by the trial judge over the next 2 days
22 explaining that he had made a ruling, that he had directed
23 a verdict, come to a conclusion and made a decision --

24 QUESTION: He kept saying I didn't direct a
25 verdict. He was distinguishing as between granting a

1 motion. He says, I granted a motion, but I didn't direct
2 a verdict.

3 MR. MORAN: Excuse me, Justice Ginsburg. You're
4 quite correct. He said, I granted a motion. I didn't
5 direct a verdict. And his distinction was clearly one of
6 law. He clearly believed that so long as the jury was not
7 told, there was a distinction between granting a motion
8 and directing a verdict.

9 And that position is untenable after Sanabria
10 versus United States and also Martin Linen where the --
11 the United States made the same argument in Martin Linen,
12 that as long as it's the judge after the hung jury
13 declaring a -- an acquittal, if it doesn't involve the
14 jury in some way, it doesn't count. The same argument was
15 apparently made in Sanabria and dismissed in a footnote
16 that it was so obviously -- so obviously contrary to
17 Martin Linen.

18 And so the judge never said as a fact -- as a
19 fact -- I did not find absence of premeditation. He
20 clearly found absence of premeditation, consistently
21 admitted that that's what he had done, but simply
22 believed, as a matter of double jeopardy law, wrong as a
23 matter of double jeopardy law, that he could take back
24 that decision.

25 The Michigan Supreme Court's conclusion was

1 contrary even under the criteria that the Michigan Supreme
2 Court adopted, wanting to see certain formalities before
3 they would conclude that a acquittal has been granted.
4 That standard was met here. The Michigan Supreme Court
5 itself acknowledged that a docket entry is exactly the
6 sort of formality that they were looking for but then
7 inexplicably failed to notice that there had been such a
8 docket entry made in this case. Not inexplicably the
9 State failed to include the docket entry in its appendix
10 in violation of the Michigan court rules. That's why the
11 Michigan Supreme Court was apparently unaware of the
12 dispositive docket entry.

13 QUESTION: Wasn't that called to their attention
14 in rehearing, though?

15 MR. MORAN: There was a motion for
16 reconsideration filed, yes, Justice Stevens.

17 QUESTION: How do you explain their failure to
18 grant rehearing?

19 MR. MORAN: Like this Court's denial of
20 certiorari there --

21 QUESTION: That's not a discretionary matter, I
22 wouldn't think, in a criminal case.

23 MR. MORAN: I -- I believe it is. An appeal to
24 the Michigan Supreme Court is a discretionary matter in
25 the first place. And the denial of reconsideration is

1 traditionally treated as a discretionary matter under
2 Michigan law.

3 QUESTION: Even when there was an error of law
4 called to their attention.

5 MR. MORAN: Well, it's an error in the record I
6 believe.

7 QUESTION: Yes.

8 MR. MORAN: I -- I can't explain it. It was a
9 5 to 2 vote for denial of reconsideration. I simply can't
10 explain how they came to that conclusion.

11 The bottom line here was, was Mr. Vincent
12 subjected to post-acquittal fact-finding proceedings in
13 violation of the Double Jeopardy Clause? Exactly as in
14 Smalis, he was. Smalis -- there would have been
15 post-acquittal fact-finding proceedings -- .

16 QUESTION: May I ask you another question?
17 Assume it would have been an acquittal as a matter of
18 Michigan law because of the -- the docket entry. Would it
19 necessarily follow that it was also an acquittal for
20 purposes of Federal law?

21 MR. MORAN: Yes, Your Honor. I don't believe
22 that there has been any case distinguishing an acquittal,
23 in quotation marks, for purposes of the Double Jeopardy
24 Clause from any other sort of an acquittal. An acquittal
25 is defined in Martin Linen and this Court's --

1 QUESTION: So your syllogism is that if he was
2 acquitted as a matter of Michigan law, a fortiori the
3 Double Jeopardy Clause applies as a matter of Federal law.

4 MR. MORAN: I believe he was acquitted for all
5 purposes, Justice Stevens. I -- I don't believe that one
6 can profitably draw a distinction between being acquitted
7 for one purpose or another.

8 QUESTION: Thank you, Mr. Moran.

9 Mr. Busch, you have 2 minutes remaining.

10 REBUTTAL ARGUMENT OF ARTHUR A. BUSCH

11 ON BEHALF OF THE PETITIONER

12 MR. BUSCH: Thank you, Your Honor.

13 The respondent here has stated that the Michigan
14 Supreme Court agrees with his position with respect to the
15 second prong of AEDPA. In fact, the Michigan Supreme
16 Court stated in its opinion at footnote 4 -- it made
17 reference to the fact that it was actually not reaching
18 the conclusion. It wasn't reaching a decision as to
19 whether the judge could change his mind.

20 The respondent's position essentially requires
21 the people to forfeit the second prong of AEDPA. Even if
22 the Court was wrong on its factual finding or
23 unreasonable, the result of this case must be viewed
24 within the filter of that statute which says that the law
25 that they applied was reasonable.

1 There are -- he has cited several cases and we
2 have several cases in the other direction, interestingly
3 enough, including one, United States versus Baggett, which
4 comes out of the Sixth Circuit itself, which says -- in
5 that case there were -- three times the judge announced a
6 ruling and then agreed to hold it in abeyance. In -- in
7 that case the Court said that -- that -- the appeal court
8 said that they were free to change their mind -- the judge
9 was free to change their mind any time prior to the entry
10 of judgment.

11 So the courts -- there is -- there is no
12 established precedent with respect to reconsideration, and
13 we would respectfully say that alternatively this Court
14 ought to find a rule that trial courts can reconsider
15 where there has been no appeal and also -- and we would
16 argue that the --

17 QUESTION: Thank you, Mr. Busch.

18 MR. BUSCH: Thank you.

19 CHIEF JUSTICE REHNQUIST: The case is submitted.

20 (Whereupon, at 11:03 a.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

25