IN THE SUPREME COURT OF THE UNITED STATES

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JANETTE PRICE, WARDEN, :

Petitioner :

v. : No. 02-524

DUYONN ANDRE VINCENT. :

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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.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Busch.

ORAL ARGUMENT OF ARTHUR A. BUSCH

ON BEHALF OF THE PETITIONER

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

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

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

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

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

Second, the trial judge's --

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

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

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

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

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

judgment.

MR. BUSCH: Yes, that's correct.

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

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

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

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

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

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

MR. BUSCH: Well --

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

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

QUESTION: What page?

MR. BUSCH: Page 12 of the --

QUESTION: Page 12 of what?

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

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

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

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

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

Lastly --

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

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

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

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

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

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

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

MR. BUSCH: That's correct.

QUESTION: Okay.

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

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

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

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

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

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

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

MR. BUSCH: They --

QUESTION: -- you can't reserve decision.

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

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

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

MR. BUSCH: Yes.

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

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

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

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

QUESTION: I don't understand that.

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

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

QUESTION: A motion can be made, but --

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

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

MR. BUSCH: The --

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

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

QUESTION: Is it quoted there too?

QUESTION: What does it say?

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

QUESTION: Well --

QUESTION: What is --

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

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

MR. BUSCH: Yes.

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

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

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

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

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

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

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

MR. BUSCH: Yes, that --

QUESTION: Do those words appear in the rule?

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

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

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

QUESTION: Wow.

MR. BUSCH: -- Chief Justice --

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

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

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

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

QUESTION: 29 of the --

QUESTION: Of what?

MR. BUSCH: Of our brief.

QUESTION: 29?

MR. BUSCH: Excuse me. Of the joint appendix. Petition's appendix --

QUESTION: 29.

MR. BUSCH: -- petitioner's appendix.

QUESTION: Petitioner's appendix?

QUESTION: The cert petition.

QUESTION: In the cert petition.

QUESTION: Yes, and footnoted.

QUESTION: Yes. It -- it says after the prosecution's case has rested.

MR. BUSCH: Yes, that's right.

QUESTION: It's a little hard to understand that. Anyway, they said it was harmless error. The -- the court -- the courts -- the Michigan court said it's harmless error, all right. But it's a little hard to understand.

It says you -- you -- the prosecution finishes the case. The defendant then says, judge, I move for a directed verdict. All right? Or a failure of proof, whatever the words are. Then it says the judge could give his reasons in writing -- I mean, that's one way -- or orally. How is the judge supposed to do this without taking some time? What does reserve there mean? Does it

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

MR. BUSCH: Your Honor, I --

QUESTION: It can't mean instantly. What?

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

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

QUESTION: Yes.

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

MR. BUSCH: Yes.

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

QUESTION: That's what I would think.

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

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

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

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

MR. BUSCH: Yes, Your Honor.

QUESTION: Okay.

QUESTION: But you would say that if the --

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

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

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

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

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

QUESTION: Yes, you may, Mr. Busch.

We'll hear from Mr. Lamken.

ORAL ARGUMENT OF JEFFREY A. LAMKEN

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

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

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

reconsideration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The third point is that double jeopardy --

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

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

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

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

MR. LAMKEN: The --

QUESTION: Or -- or --

MR. LAMKEN: I'd say --

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

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

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

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

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

the stand.

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

QUESTION: What --

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

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

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

QUESTION: Well, say -- change my hypothetical

to a judgment of acquittal.

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

QUESTION: But that's --

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

QUESTION: That's an extraordinary doctrine.

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

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

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

MR. LAMKEN: Well, the Constitution --

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

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

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

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

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

QUESTION: I suppose parties can -- can

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

MR. LAMKEN: That -- that --

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

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

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

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

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

Thank you, Mr. Chief Justice.

QUESTION: Thank you, Mr. Lamken.

Mr. Moran, we'll hear from you.

ORAL ARGUMENT OF DAVID A. MORAN

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

QUESTION: Right. Right.

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

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

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

Now, in this case --

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

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

the Michigan Supreme Court at least.

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

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

QUESTION: Is a question of law.

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

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

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

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

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

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

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

MR. MORAN: Well, Smalis, Your Honor.

QUESTION: Yes.

MR. MORAN: Smalis came from a State court.

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

MR. MORAN: That's right.

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

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

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

QUESTION: Well --

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

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

MR. MORAN: No. But it --

QUESTION: So what is your answer to my question?

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

QUESTION: Right.

MR. MORAN: And so --

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

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

QUESTION: Anyway, the Michigan Supreme Court

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

MR. MORAN: That's right.

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

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

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

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

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

MR. MORAN: Not at all, Justice Breyer.

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

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

QUESTION: How? Why?

MR. MORAN: I'm sorry?

QUESTION: Why, how? Explain that.

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

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

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

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

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

QUESTION: Well --

QUESTION: Is that -- am I right?

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

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

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

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

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

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

QUESTION: What interest is served by such a rule?

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

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

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

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

MR. MORAN: Yes.

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

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

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

QUESTION: Well, what's different between --

QUESTION: Why?

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

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

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

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

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

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

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

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

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

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

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

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

MR. MORAN: Yes.

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

MR. MORAN: If --

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

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

QUESTION: All right. What -- what proceeding

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

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

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

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

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

MR. MORAN: Yes.

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

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

QUESTION: Which were the further proceedings?

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

QUESTION: What? You mean they spoke some more.

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

QUESTION: But they were all --

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

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

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

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

QUESTION: Well, have we any reason to believe?

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

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

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

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

MR. MORAN: Yes.

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

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

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

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

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

QUESTION: But his lawyer knew.

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

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

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

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

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

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

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

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

QUESTION: No.

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

QUESTION: Well, as a betting man, would --

(Laughter.)

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

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

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

MR. MORAN: But --

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

MR. MORAN: But --

QUESTION: -- the next morning.

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

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

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

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

QUESTION: It wasn't requested, though.

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

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

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

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

We -- we can take care of that.

MR. MORAN: And --

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

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

QUESTION: Right. Absolutely.

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

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

MR. MORAN: I agree.

QUESTION: Right, okay.

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

result in a second trial.

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

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

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

MR. MORAN: Yes.

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

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

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

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

MR. MORAN: Yes.

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

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

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

In Sanabria, this Court had to wade through a

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

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

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

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

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

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

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

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

QUESTION: -- there's nothing incompatible there.

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

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

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

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

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

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

The Michigan Supreme Court's conclusion was

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

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

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

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

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

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

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

traditionally treated as a discretionary matter under Michigan law.

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

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

QUESTION: Yes.

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

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

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

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

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

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

QUESTION: Thank you, Mr. Moran.

Mr. Busch, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF ARTHUR A. BUSCH

ON BEHALF OF THE PETITIONER

MR. BUSCH: Thank you, Your Honor.

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

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

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

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

QUESTION: Thank you, Mr. Busch.

MR. BUSCH: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

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