

## EXAMINERS' ANALYSIS OF QUESTION NO. 12

The Fifth Amendment to the United States Constitution states in pertinent part: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ." Known as the double jeopardy clause, it provides various protections to the criminally accused. One of those protections --at issue here--is to be free from successive prosecutions for the same offense. *People v Smith*, 478 Mich 292, 299 (2002).

Without question, the protection against successive prosecutions embraces precluding retrial after a jury acquits the accused. *Ball v United States*, 163 US 662, 671 (1896). Similarly, where a trial court enters a directed verdict of acquittal, the accused is nonetheless acquitted and double jeopardy principles apply. *Fong Foo v United States*, 369 US 141 (1962). Therefore, whether acquitted by judge or jury, the accused has been nevertheless acquitted, the prosecution has been terminated, and retrial is barred by the clause. See *Smith v Massachusetts*, 543 US 462, 467 (2005).

The issue presented here is whether an "erroneous" acquittal stands in the same shoes for double jeopardy purposes as an acquittal without attendant shortcomings. The facts here indicate the trial judge erroneously added an element of proof to the prosecutor's burden. Then, having established that "element" as necessary, the court found the factual support of that element wanting. The trial court reasoned that, without proof of that element, the prosecution of David was fatally flawed and the trial court terminated the case before submission to the jury.

The question becomes, given the language and purpose of the clause, whether any of the surrounding circumstances prompting the trial court's decision matter for double jeopardy purposes.

*Michigan v Evans*, US ; 133 S Ct 1069; 185 LEd 2d 124 (2013), answers this question in the negative. The Court based its decision in part on prior precedent which held that a judicial acquittal premised on a misconstruction of a criminal statute is an acquittal on the merits, barring retrial of the same offense. *Arizona v Rumsey*, 467 US 203, 211 (1984). *Fong*

*Foo, supra.* As *Evans* indicates, there is no meaningful distinction between a misconstruction of a criminal statute and the improper addition of a required element of proof. In the end, a finding of evidentiary deficiency by the Court was neither a procedural flaw nor a strictly legal determination.

Rather, the crux of the decision in *Evans* is that the trial court made a decision on the merits of the prosecution's proof and found the proof factually insufficient. Because evidentiary insufficiency was found as to David's guilt, this determination, despite wrongfully made, was nonetheless a binding determination, not subject to review or re-litigation.

Proper application of double jeopardy principles bars retrial of David on the charge of burning other real property. His counsel's motion should be granted.