IN THE SUPREME COURT OF THE UNITED STATES

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MELVIN T. SMITH, :

Petitioner :

v. : No. 03-8661

MASSACHUSETTS. :

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Washington, D.C.

Wednesday, December 1, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

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CATHRYN A. NEAVES, ESQ., Assistant Attorney General, Boston, Massachusetts; on behalf of the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

JUSTICE STEVENS: We'll hear argument in the case of Smith against Massachusetts.

Mr. Nathanson.

ORAL ARGUMENT OF DAVID J. NATHANSON

ON BEHALF OF THE PETITIONER

MR. NATHANSON: Justice Stevens, and may it please the Court:

The trial judge found Melvin Smith not guilty on the merits and unequivocally so. That acquittal entitled Melvin Smith to repose. Instead, what he got was a moving target. The trial judge's later reconsideration of Smith's acquittal placed him in jeopardy for that same offense twice.

Smith's position on the matter is completely faithful to this Court's precedent, and it makes sense in the real-world practice of criminal law.

The State, on the other hand, asks this Court to make exceptions to the rule, long-held, that acquittals terminate jeopardy.

JUSTICE GINSBURG: No. Just to say that this -- what happened here was not a final determination.

Take an analog -- an analogy to rule 54(b). The judge can say, yes, I've made this ruling and it sticks.

You see, I'm going to give you a separate piece of paper that says judgment, but if I don't give you that separate piece of paper, even though I said judgment granted, it doesn't count until the very end of the case. I can always change my mind. Why shouldn't it operate the same way on the criminal side?

MR. NATHANSON: Well, first of all, obviously, that's a civil case. The Double Jeopardy Clause doesn't apply to civil cases. Second of all -- except with some rare exceptions.

What I think the best way to -- to really define finality here -- and -- and whatever finality is, I really do think we -- we do have it here because this Court has said an acquittal under Martin Linen, a resolution, correct or not, of some or all if the factual elements --

JUSTICE GINSBURG: Yes, but I looked at Martin Linen, and there, there was something labeled judgment of acquittal entered. Here we have an endorsement on a motion, and then we have an entry by the clerk saying -- what does the entry say? Motion granted or something like that.

MR. NATHANSON: Allowed, and it was attested by the clerk.

JUSTICE GINSBURG: Yes. But is there -- this might be significant. Is there in Massachusetts, when a

motion for acquittal is granted and there are other charges still going on, is there a piece of paper that says, judgment, acquitted on count whatever it was?

MR. NATHANSON: No, Your Honor. The -- the formal rule, which is not always observed, but the formal rule is that it must be recorded on -- on the docket and announced in an open courtroom. That happened here.

JUSTICE KENNEDY: Well, suppose you have a State and the State has a statute, and the statute says any motion for acquittal may be granted by the -- the trial court at the close of the prosecution's evidence, but that motion shall not be deemed final and may be reviewed by the district court at any time before -- or by the trial court at any time before the submission of the case to the jury. Then there's no repose element because the -- the defendant is on notice that this may not be final. What would be the -- your position in that case if a statute like that were on the books? And if you say that that's different, then I'll say, well, suppose the supreme court of Massachusetts just makes up this rule as a judicial matter.

MR. NATHANSON: Well, to answer the first question, I think that if -- if such a statute were enacted, I'm willing to grant, for purposes of this case, that it wouldn't be a double jeopardy problem. It may in

a later case -- and you know, I'd be very interested in that -- a problem under a combination of Jackson and Winship because the defendant may have a -- a right to that determination.

JUSTICE KENNEDY: Okay, well, let -- let's just assume that you've conceded that. Now, you've been guarded about it. If we can do that by statute, why can't we do that by a judicial decision by the supreme court of -- Judicial Court of Massachusetts?

MR. NATHANSON: Well, first of all, the Supreme Judicial Court of Massachusetts is the one who promulgated the rules in this case. Rule 25(a) is promulgated by the Supreme Judicial Court of --

JUSTICE KENNEDY: Well, but they put a gloss on the rule by their decision.

MR. NATHANSON: Well, that was the Massachusetts Appeals Court, I might add.

Second of all, the rule itself requires that the motion shall be ruled upon at that time. It says nothing about reconsideration, and clearly --

JUSTICE BREYER: They've held that in this case. We have a Massachusetts decision. It's their law and under their law in Massachusetts, the judge can revise it.

MR. NATHANSON: Actually --

JUSTICE BREYER: Well, if it isn't their law,

then I don't know how -- why they affirmed this conviction rather than reversing it.

MR. NATHANSON: I'm not sure I know either, Your Honor.

JUSTICE BREYER: All right, but I mean, I -- I take it that it is their law, otherwise I'd see reversal, wouldn't I, and not affirmance?

MR. NATHANSON: Actually I think what they did --

JUSTICE BREYER: What?

MR. NATHANSON: -- Your Honor, is they assumed that there was an error in -- in -- when dealing strictly with the rule, at the -- at the end of the section dealing with this, they assume that there was an error and said no prejudice, which I've contended in the brief --

JUSTICE BREYER: So -- so in other words, they're saying that in this case -- how could there not be prejudice? He had another trial. I mean -- how could -- I don't understand this from beginning to end then.

But let me go back to my original question. What rule do you propose?

MR. NATHANSON: As for finality, the rule I propose is, first of all, we have to start with the basic foundation, which is an acquittal, under Martin Linen with a resolution --

JUSTICE BREYER: What I'm saying is, for double jeopardy purposes --

MR. NATHANSON: Yes.

JUSTICE BREYER: -- an acquittal in your view is an acquittal for double jeopardy purposes when?

MR. NATHANSON: There's -- there's three things that I think Court should look at. One, first of all, because we treat acquittals from the bench for double jeopardy purposes the same as acquittals from a jury, a prosecutor can poll a jury immediately after the verdict. A prosecutor clearly --

JUSTICE BREYER: No. I'm asking you for a -- I'd have to write -- if I agreed with you, I'd have to say we have here a judge who changed his mind. Under the clause of the Constitution, a judge cannot change his mind when. Now, go ahead. Now, fill in the blanks.

MR. NATHANSON: Yes.

JUSTICE BREYER: According -- I know what their rule is. Their rule is a judge can change his mind up to the point that the jury is dismissed, something like that. I understand that. Now, I want to know what your rule -- is your rule a judge cannot change his mind once he writes the word acquittal on a piece of paper, even if he says, oh my God, I meant to say no acquittal? Too late. Too late. Okay, now, so I want to know what your rule is. Is

that the rule?

MR. NATHANSON: No, Your Honor.

JUSTICE BREYER: Okay. What is the rule?

MR. NATHANSON: The -- your first question -- the constitutional point of no return, shall we say, is further proceedings. If there is an acquittal and there are further proceedings --

JUSTICE BREYER: There is no further proceeding if he writes the word acquittal, I guess until he changes his mind. So 3 minutes later, he says I change my mind. Now there are further proceedings.

MR. NATHANSON: Well, then at that point you look to other indicia of finality that this -- this Court referenced that in -- in Vincent, and that -- that's generally compliance with State procedure. Compliance with State procedures --

JUSTICE BREYER: I need to write a simple rule. All I'm trying to get from you is what is your rule. Is your rule that when a judge writes the word acquittal -- an acquittal, by the way, happens to mean there's nothing left for the jury to do on that charge. That's what it means. When he writes the word acquittal, he cannot change it. Is that your rule?

MR. NATHANSON: No. The rule is that the --

JUSTICE BREYER: Okay. And what is your rule?

MR. NATHANSON: The rule is that the judge cannot change it, as a matter of Federal constitutional law, if there are further proceedings. In a multi-count case, count A is acquitted. We initiate further proceedings on count B and C.

JUSTICE O'CONNOR: But your answer just isn't responsive. When has it become final?

MR. NATHANSON: It ripens at the --

JUSTICE O'CONNOR: When? When the judge says something, when he writes something? When does it become final? At what point in time?

MR. NATHANSON: What I'm suggesting is --

JUSTICE O'CONNOR: What is your proposed rule? You haven't said yet.

MR. NATHANSON: What -- what I'm suggesting is -- is two things.

JUSTICE O'CONNOR: Just one thing. Just when does it become final? Let's limit it to one thing.

MR. NATHANSON: It -- it becomes final when there are further proceedings initiated.

JUSTICE BREYER: Sorry. I don't understand that.

JUSTICE O'CONNOR: That doesn't make sense.

MR. NATHANSON: The -- the -- that is the line drawn by most of the lower courts.

JUSTICE BREYER: You're not understanding my question then. Imagine a case in which a judge writes the word acquittal. Now, half an hour later, he thinks, oh, my God, what have I done. The jury is still sitting there. Of course, they're sitting there because he hasn't had a chance to dismiss them yet. They happened to be having lunch or something. Is it final?

MR. NATHANSON: It is not final --

JUSTICE BREYER: It is not final.

MR. NATHANSON: -- if -- if the defense has not been forced at that point to choose to rest or put on a case. That is the --

JUSTICE BREYER: Say that again.

MR. NATHANSON: If the defense is forced to rest or put on a case.

JUSTICE BREYER: But he wrote the word acquittal. There's nothing more for anybody to do until he changes the word.

MR. NATHANSON: Well, I think we're talking about two separate things. Is Your Honor's question presupposing a single-count case or a multi-count?

JUSTICE BREYER: Let's try single-count. Okay?

MR. NATHANSON: Okay.

JUSTICE BREYER: There he is. He writes the word acquittal and the jury says, oh, what do we do now?

Go home, says the clerk. Now, before they can get out the door or anything else happens, before they get out the door, he says, oh, my God, I made a mistake. Can he do that under your rule?

MR. NATHANSON: I'm not entirely sure of the answer to the question, Your Honor, but I -- I think, first of all, we look at compliance with State procedure.

JUSTICE BREYER: Okay. What I thought from reading your brief, which you're confirming, is your rule -- once the judge says acquittal, that's the end of it. If he decides 3 seconds later, he cannot change his mind. Now, that rule to me is inconsistent with most law.

MR. NATHANSON: If we're talking about a clerical error, Your Honor, the Massachusetts rules and the Federal rules provide for correction of clerical errors. What -- what we're talking about here is not a clerical error, but the judge clearly intended to do what she did.

JUSTICE O'CONNOR: Well, was your client --

JUSTICE GINSBURG: But a very plain error --

JUSTICE O'CONNOR: -- was your client prejudiced in any way by not putting on some evidence that the -- he would have put on?

MR. NATHANSON: May I begin, Your Honor --

JUSTICE O'CONNOR: Just answer the question for

once.

MR. NATHANSON: Yes, Your Honor. There -- there was a defense that he essentially forfeited by not being aware that the judge was going to, at some point --

JUSTICE GINSBURG: But that was a terribly risky defense because his main defense is I wasn't there, I didn't do it, somebody else did it. How could he then turn around and say I missed the opportunity to tell the jury I really was there, but it was okay for me to have the gun? I mean, what -- what defense counsel would do that after having spent his whole effort to say it was the other guy, it wasn't this defendant? And then to make this defense that he had a right to possess this gun because he belonged in the house, that would be extraordinary.

MR. NATHANSON: Your Honor, counsel for co-defendant, Felicia Brown, presented just such a defense and she was acquitted. She presented the defense that Melvin Smith did not shoot Christopher Robinson, but if Melvin --

JUSTICE GINSBURG: Nobody charged her with possessing a gun.

MR. NATHANSON: But what I'm saying is --

JUSTICE GINSBURG: That's -- look, there were a lot of charges in this case, and we're dealing with what

is a relatively lesser offense of this whole string of events so that Brown being acquitted of other offenses doesn't say anything about this offense, which relates to the possession of a gun. That's -- that's all that it is.

MR. NATHANSON: What I'm saying is that it wasn't risky, Your Honor, because the -- this jury was willing to consider an alternative defense that would have otherwise appeared as a concession. They did not take it as a concession.

JUSTICE GINSBURG: But he would be -- the defendant -- you know, he hasn't gone to the jury yet, and the jury would say, my goodness, this is like a common law pleader. I didn't borrow the kettle. It was broken when I got it. Or, I returned it unbroken. To -- to do that, to say I wasn't there, that's my main defense, but then, jury, I'd like you also to consider that if you think that I was there, then -- it -- it really doesn't fly as a criminal defense.

MR. NATHANSON: I'd just respectfully disagree, Your Honor. But -- but the -- the larger point is if we allow this rule in general, we are going to engender serious problems. I'm saying that there -- that there was some reliance here, but we're going to engender much more serious problems in other cases where a defendant perhaps presents a defense that is helpful to the remaining

charges, but damaging on the acquitted charge.

JUSTICE KENNEDY: Well, but if -- if -- you know, we shape the expectation by what we say. If -- if we say that a judge is always free to consider his ruling and as long as the -- there's a right to reopen, then any kind of reliance is -- is misplaced.

MR. NATHANSON: What Massachusetts law says in -- in the Zavala case, they said that there is not a right to reopen where the judge has determined that the evidence is insufficient.

Second of all --

JUSTICE GINSBURG: That is when the case is not ongoing. I mean, here we had a case that was continuing and -- and the judge said, oops, I made a mistake, which is common at the trial level. I mean, these decisions -- she made this decision in a split second. Maybe she was too hasty, and then a trial judge will say, my law clerk went to the library at lunch, there was a Supreme Judicial Court of Massachusetts case going just the other way, so of course, I confess error, but the defendant isn't prejudice.

The defendant hadn't put on a -- well, the -- it came up at closing. Right? So if the defendant was prejudice, anyway he could have said, wait a minute, judge, I want to put on that defense that I really was

there but I had a right to have the gun.

MR. NATHANSON: He didn't say that, Your Honor.

JUSTICE GINSBURG: But he could have. So he -- so I don't see that you have a realistic claim of prejudice.

MR. NATHANSON: Well, I -- I don't think prejudice is a factor in double jeopardy jurisprudence. Either the defendant has been placed twice in jeopardy or he has not.

JUSTICE GINSBURG: Yes, but you have to set a -- a point in time, and your point is -- well, it's not exactly clear, but there's one point that says when the jury is discharged. Then there may be other reasons why there's unfairness to the defendant so that you wouldn't permit it, other than double jeopardy. But if -- why isn't that a sensible place to draw the line?

MR. NATHANSON: Because if -- if discharge of the jury is the rule, then the judge can reconsider an acquittal at any point in a defendant's case. 2 weeks into a defense case, the judge could reconsider an acquittal.

JUSTICE GINSBURG: The question -- we're talking about a Federal constitutional rule, and suppose -- you pointed out this went only to an intermediate appellate court. Suppose the Massachusetts Supreme Judicial Court

interpreted its rule at 25(a) and it says, that rule allows some leeway for the judge to say I got it wrong as long as there's no prejudice to the defense. That's what our rule means.

MR. NATHANSON: I don't think that's permissible, Your Honor. It -- it is -- granted, for purposes of this argument, that it's permissible for States to order judges to withhold rulings, that there shall be no ruling on the sufficiency of the evidence prior to the return of a jury verdict. Louisiana, for example, does that, and I think Oklahoma.

But for the Supreme Judicial -- Judicial Court of Massachusetts to say that an acquittal has no force is simply straight contravening what this Court has said. It's -- it's essentially a continuing jeopardy argument.

JUSTICE SOUTER: But you do agree, I take it, that if the judge says, yes, I agree with you, there isn't a scintilla of evidence, and -- and at some point I'm -- I'm going to enter an acquittal, but I'm not going to do it now just in case I have a second thought, but at least by the -- the end of the trial, I'll take care of it, you, I take it, concede that that is permissible.

MR. NATHANSON: I think that is permissible because --

JUSTICE SOUTER: Well, if that -- if that's

permissible, if you win this case, isn't that going to be the way trials are conducted when -- when there are mid-trial motions like yours? Every judge is going to say, yes, looks as though you -- you got them there, but I'll -- I'll just hold onto this until things are over, and then I'll rule. That's -- that's the way they're all going to respond, isn't it?

MR. NATHANSON: No, I don't think so, Your Honor. I think judges are -- are intelligent people. They read the pleadings beforehand. Justice Donovan clearly read the pleading beforehand in this case, and she -- she was prepared to ask for argument on it. I don't think that judges do these things so precipitously that they are not going to be confident in their ruling.

JUSTICE SOUTER: No, but every judge knows he drops a catch once in a while, and -- and if he wants to guard against wrecking the whole trial or -- or creating an appellate issue later, he's just going to be cautious and hold onto it.

MR. NATHANSON: And judges should be cautious, Your Honor.

JUSTICE STEVENS: But isn't it also important to know, though, whether the defendant has to put on a case or not? So he can't just reserve judgment. I'll tell you after the trial is over whether you should put a case on

or not.

MR. NATHANSON: That -- that is, in fact, the point, Justice Stevens. The Double Jeopardy Clause is a constitutional policy of finality for the defendant's benefit. He -- that's what this Court said in Jorn. The defendant has to know whether he -- he's defending a case.

JUSTICE SOUTER: But does -- does --

JUSTICE KENNEDY: Did the defendant here ask to be -- to have the right to reopen?

MR. NATHANSON: He did not.

JUSTICE O'CONNOR: May I ask --

JUSTICE SOUTER: Did he --

JUSTICE O'CONNOR: -- you another question here? There -- there were three charges against your client, as I understand it. Unlawful possession of a firearm. That's the one we're talking about.

MR. NATHANSON: Yes, Your Honor.

JUSTICE O'CONNOR: Assault with intent to murder.

MR. NATHANSON: Yes.

JUSTICE O'CONNOR: Assault and battery by means of a dangerous weapon.

MR. NATHANSON: Yes.

JUSTICE O'CONNOR: The jury convicted on all three.

MR. NATHANSON: Yes.

JUSTICE O'CONNOR: Now, he was given concurrent sentences.

MR. NATHANSON: Yes, Your Honor.

JUSTICE O'CONNOR: Is that correct?

MR. NATHANSON: Yes, Your Honor.

JUSTICE O'CONNOR: So would you explain to me if there's any practical effect to your winning in this case?

MR. NATHANSON: There is a practical effect.

JUSTICE O'CONNOR: What is it?

MR. NATHANSON: Firearm possession offenses in Massachusetts have restrictions as to parole and good time deductions that the other offenses do not have. So there is a practical effect, aside from the fact that it's a -- it's a conviction on his record, Your Honor.

Moving on, Justice Breyer, just to address the question that you were asking me, I think perhaps a good way to phrase it is -- is if the first factual resolution of the elements of -- of the offense results in acquittal, there can be no further proceedings.

JUSTICE BREYER: What I was thinking is -- I mean, here a judge -- I guess she was harried in the trial, she's thinking to herself, well, let's see, is there any evidence here that this was less than the shotgun -- this was not a shotgun. You know, it had to be

a barrel less than 16 inches. So is there any evidence here of the shotgun? And she, I guess, forgot that there was a lot of evidence that it was a pistol. Now, there aren't many pistols that are 16 inches long. So she's thinking, something may be missing here. She's a little uncertain, but she writes acquittal, and then a few minutes later, she thinks, let's say, oh, my God, there was all that evidence about the pistol. So I shouldn't have done that.

I mean, how -- how is a judge like that, a hypothetical -- what's she supposed to do? Is she supposed to say, I better not enter anything, because after all, I don't care if the defendant has to produce a case? Or is she supposed to enter something and think, well, I could change my mind before it's over? Or what is she supposed to do? She just thinks she made a mistake.

MR. NATHANSON: So your hypothetical is that there's evidence of two guns?

JUSTICE BREYER: I thought here there was evidence there was a pistol, but maybe I'm wrong.

MR. NATHANSON: I'm sorry. Yes, in this case --

JUSTICE BREYER: There was evidence it was a pistol. So I -- I would have thought, reading this, that there was evidence. That's beside the point, but I'm -- I'm just using it as an example where a judge might think

she made a mistake. She thought there was no evidence that it wasn't a shotgun, and I guess she forgot that there was evidence it was a pistol and a pistol is not a shotgun.

MR. NATHANSON: She -- she clearly didn't forget. The prosecutor said to her the evidence was testified to that it was a pistol, it was a revolver, it was a .32 --

JUSTICE BREYER: Well, I'm quite sure -- not quite sure then why she wrote down there was no evidence it wasn't a shotgun, but she had some reason. And now a few minutes later, she thinks, boy, whatever my reason is, it couldn't have been that good. Or maybe she thinks that that's a reason an hour from now or maybe a day from now. What's the line? Suppose she thinks of it a second from now. Suppose she thinks the instant she writes acquittal, she thought, oh, my God, a pistol is not a shotgun. Of course, it isn't. I know that. I better change it. Is it a second from now? Is it she can never change it no matter what once the pen leaves the paper? What's your rule?

MR. NATHANSON: In a single-count case, Your Honor --

JUSTICE BREYER: Whether it's single-count or double-count or triple-count. I want to know what -- how

you see it, not how I see it.

MR. NATHANSON: It -- compliance with State procedure informs the inquiry and once -- once we have what is determined to be a resolution --

JUSTICE SCALIA: Once it's final under State procedure, right? And you also would add once there's no clerical error. She didn't mistakenly say, you know, affirm when she meant to write deny. Leaving that aside, once it's final under State procedure, it's final.

MR. NATHANSON: That's correct, Your Honor.

JUSTICE SCALIA: And sometimes it's wrong.

MR. NATHANSON: That's correct.

JUSTICE SCALIA: But it'd be sometimes wrong no matter how you define final. I mean, you know, she let's --

JUSTICE BREYER: That's excellent.

JUSTICE SCALIA: -- let's all the evidence on and -- and does it after all the evidence is there, and then she -- and then at the close of all the evidence, she gives a directed verdict for -- for the defendant, and then discharges the jury, and as soon as the jury walks out, oh, my God, what a mistake I made. Too bad. Right? I mean, we say double jeopardy.

MR. NATHANSON: Correct, Your Honor. That's what --

JUSTICE BREYER: Excellent. That was an excellent answer.

(Laughter.)

JUSTICE BREYER: Now, I would like to know, given that answer, why is this final under State procedure because it seems as if the State courts of Massachusetts have said, no, it is not a constitutional error to go and look into this again. She can change her mind. And that's what I'd like you to focus on because I agree that that was a good explanation of the rule.

MR. NATHANSON: If -- if State procedure, as in this --

JUSTICE BREYER: I'm thinking of this case.

MR. NATHANSON: Yes.

JUSTICE BREYER: Suppose I took Justice Scalia's rule and I said, that's the rule. Now, I would say that's the rule of a Federal law. Very well. That turns on your decision here being final as a matter of State law, but it seems to me we have State courts here saying, at least for double jeopardy purposes, it isn't final as a matter of State law. And therefore, I want to know how we reach your conclusion here.

MR. NATHANSON: Well, there's -- there clearly is a line beyond which the State cannot go, and that's what Justice Brennan was talking about in his concurrence

in Lydon. He said the -- the State cannot fashion a procedure whereby the judge never discharges the jury, and in -- in Kepner, this Court held that the Philippine procedure of withholding finality from an acquittal in a bench trial also violated the Constitution. So State procedure does not control. It is sufficient but not necessary.

If -- if you comply with State procedure to say this is -- this is an acquittal, okay, it's an acquittal. If you do not comply with State procedure, it can still be an acquittal under Federal law.

JUSTICE SCALIA: Does the State have the power to say whether -- whether an acquittal under State law constitutes an acquittal for purposes of Federal constitutional double jeopardy purposes? Is that a State law question or a Federal question?

MR. NATHANSON: No. It -- it is a Federal question, Your Honor. This Court --

JUSTICE SCALIA: I thought it was.

MR. NATHANSON: -- this Court said that in Smalis quite clearly.

If I -- if I may, two things and then I'd like to reserve. But the -- the State would have this Court draw a distinction between acquittals by a judge and acquittals by a jury. That simply has been rejected by

this Court numerous times. Sanabria, Rumsey. An acquittal is an acquittal.

Again, the -- the State would have this Court draw distinctions between acquittals based on law and acquittals based on fact. Sanabria unequivocally rejected that. Sanabria says that in fact sufficiency of the evidence is not a legal defense. An acquittal is an acquittal.

If there are no further questions, I'd like to reserve the balance of my time.

JUSTICE STEVENS: Yes.

Ms. Neaves.

ORAL ARGUMENT OF CATHRYN A. NEAVES

ON BEHALF OF THE RESPONDENT

MS. NEAVES: Justice Stevens, and may it please the Court:

I'd like to start with where the Court left off on the notion of reconsideration and finality. The Massachusetts Appeals Court here specifically stated that a judge's right to reconsider his or her legal rulings is firmly rooted in the common law and permitted Judge Donovan in this case to reconsider her legal ruling that the evidence was insufficient. Certainly that common law right of reconsideration could not run afoul of this Court's double jeopardy jurisprudence, but the appeals

court specifically stated that the Double Jeopardy Clause was not violated because there was no second proceeding and that the judge in this case, therefore, was permitted to reconsider her ruling.

JUSTICE SCALIA: What if -- what if this had been the sole count, the gun possession count had been the sole count, and -- and the same ruling had been made by the judge? Would you say that there was double jeopardy attaching or not?

MS. NEAVES: Not so long as the jury was still there. If the prosecutor had the opportunity to say, Judge Donovan, give me 10 minutes, I know there's a Supreme Judicial Court case on the point that I'm arguing to you, which is that you did not need a witness to directly testify that the gun barrel length was less than 16 inches, I know there's a case, give me 10 minutes, take a recess, and if the judge agreed to do that and the prosecutor came back and gave the case to the judge and the judge said, absolutely, you're -- you're correct, I'm going to send the charge to the jury, there's no double jeopardy violation there.

JUSTICE SCALIA: And what if it's a bench trial?

MS. NEAVES: A bench trial is a very difficult situation. And the Smalis case certainly seems to be the hardest case here, but bench trials present different -- a

different situation because the judge is both the fact-finder and the law-giver. And in that context, it's much more difficult --

JUSTICE SCALIA: I know it's difficult. What's your answer?

MS. NEAVES: My answer to that is I believe that if the judge stated the evidence is insufficient, as -- as the judge did in Smalis, as the trier of fact and law, I find the evidence --

JUSTICE SCALIA: It's over.

MS. NEAVES: It's over. It's over.

JUSTICE KENNEDY: The minute --

JUSTICE STEVENS: What if in the case --

JUSTICE KENNEDY: -- the minute he --

JUSTICE STEVENS: -- we have before us the State allowed an interlocutory appeal on behalf of the prosecution right after the judge's ruling?

MS. NEAVES: In a jury case, Your Honor?

JUSTICE STEVENS: Yes.

MS. NEAVES: I think --

JUSTICE STEVENS: Conceivably they could allow an interlocutory appeal from a judgment of acquittal at the close of the prosecution's case.

MS. NEAVES: If such a -- if such a process could be put in place where there was an appellate panel

that would be willing and available to hear that while the jury remained empaneled, I don't think it would run afoul of the Double Jeopardy Clause.

JUSTICE SOUTER: Well --

JUSTICE BREYER: But is that necessary? I -- I mean, that's what I think is the difficult question here. Can you say that it's final for purposes of the decision-maker outside that courtroom, namely an appellate court, but it's not final in respect to the judge having a right to change his mind within the court? That -- that makes a lot of sense to me, but I don't know if it's possible to get there.

Why not? I -- I think, well, the reason is that you want judges to be able to reconsider things and you don't have that problem when you're talking about an appeal.

MS. NEAVES: That is --

JUSTICE BREYER: Or is there any -- is there any, in other words, to reconcile our case that you're talking about, Smalis?

MS. NEAVES: The Smalis case?

JUSTICE BREYER: Yes, yes.

MS. NEAVES: I think there are a number of ways to reconcile it. Certainly Massachusetts' position is that it's the difference between a bench trial and a jury

trial, but there is also no doubt that the case left the trial court and went up on appeal. I think both of those factors are significant.

JUSTICE SOUTER: No, but isn't -- isn't the significance supposedly the existence or nonexistence of our continuation of the jury panel, going back to Justice Stevens' question? And what if the -- what if the State had a procedure whereby the trial judge would simply decline to discharge the jury panel if an appeal were taken from the acquittal motion so that if he was tipped over, it could come right back to the same jury panel? Would -- would the -- would the answer have to be different?

MS. NEAVES: I don't think it would.

JUSTICE SOUTER: Why?

MS. NEAVES: I think -- I think for a -- I think for my -- to my way of thinking about the cases, the jury is what matters and it's the defendant's right to his particular tribunal, and that's the first jury that's empaneled --

JUSTICE SOUTER: No, but on my hypothesis he's going to get the same jury.

MS. NEAVES: Exactly.

JUSTICE SOUTER: They have not been discharged.

MS. NEAVES: Exactly. So I would say that it

would not be a violation of the Double Jeopardy Clause, and that's why --

JUSTICE SCALIA: Wow. It goes all the way up on appeal and the jury -- I -- I don't know what the -- I guess he lets the jury go home for a couple of months or while the appeal is pending and then when the decision is overturned by the court of appeals, he comes back and recommences the trial? Wow.

JUSTICE SOUTER: All right. If that's so, then why shouldn't Smalis have gone the other way? Because they can send it right back to exactly the same judge.

MS. NEAVES: Because he -- he is the trier of fact, and I think at that point --

JUSTICE SOUTER: Well, the jury is the trier of fact.

MS. NEAVES: That's --

JUSTICE SOUTER: I mean, on the hypothesis before, you're saying if they don't discharge the jury and it can go back to them, no double jeopardy problem. In Smalis, it's going to be the same judge. It was a bench trial. It should have come out the other way.

MS. NEAVES: Well, I think the difference is the -- the judge in Smalis was the trier of fact. He made a rule -- he is both the trier of fact and the law-giver. He's decided that the evidence is insufficient. If that

case goes up on appeal, that is -- that is factual -- that is oversight of his factual determination in essence.

JUSTICE GINSBURG: Isn't it ordinarily true --

JUSTICE KENNEDY: Is -- is another -- is another difference -- and I don't know if this -- is another difference that in the hypothetical case with the jury, the jury has not yet deliberated --

MS. NEAVES: Thank you.

JUSTICE KENNEDY: -- in order to consider the facts.

MS. NEAVES: Yes.

JUSTICE KENNEDY: Whereas in your --

JUSTICE STEVENS: Yes, but --

JUSTICE KENNEDY: -- your case, the -- the judge is -- is --

JUSTICE STEVENS: May I ask this?

JUSTICE KENNEDY: -- apparently deliberating --

JUSTICE STEVENS: Is it not true that in this --

MS. NEAVES: That's where I was headed.

JUSTICE STEVENS: -- in this case the judge did not reconsider until the end of the defense case?

MS. NEAVES: That is correct, Justice Stevens.

JUSTICE STEVENS: But, during that period, did the defense lawyer have the right to rely on the acquittal in deciding whether or not to put in defensive evidence on

the count from which he thought his client had been acquitted?

MS. NEAVES: Well, he certainly had some sense of reliance, but it wasn't a double jeopardy reliance. And I would -- I would point the Court to --

JUSTICE STEVENS: Of course, if the Double Jeopardy Clause did apply, if it were treated as a true acquittal, he could just say, well, we can forget about that, send your witnesses home, we won't have to worry about it.

I understand under your view they could send the witnesses home, and a week -- a week later the judge could say, well, we haven't submitted it to the jury, I've decided to change my mind. You could bring all those witnesses back. That's the way you think it should work.

MS. NEAVES: Absolutely, Justice Stevens. And I think --

JUSTICE BREYER: What -- what about a judge who thinks -- should the judge -- should a judge in trial be able to change his mind as long as the jury is still there? Yes.

MS. NEAVES: Yes.

JUSTICE BREYER: Should you be able to take an appeal in the same circumstance while the jury is still there? No.

Now, suppose a judge thinks both those things. Is that judge, like me, for example, hopelessly confused?

(Laughter.)

JUSTICE BREYER: Is the judge thinking contradictory things or is there a way of reconciling those two instincts?

MS. NEAVES: I -- Justice Breyer, I -- I certainly believe that the -- that the double jeopardy rule that we're -- we're advocating would permit that, but I -- I think that most trial judges would not be very pleased about doing something like that. And practically speaking, there's --

JUSTICE BREYER: By the way, if it's constitutional, it's pretty easy to see a State might well say, let's do that, what a good idea. I mean, they might think it's a good idea. I don't know what people think is a good idea. We'll provide for interlocutory appeals right in the middle of cases because the prosecution can never appeal at the end of the case. That's really unfair. And we'll do this little thing here, and that way we give the prosecutor a chance.

MS. NEAVES: I -- I have to stick with the rule that -- that --

JUSTICE BREYER: All right. You think it's -- I'm just inconsistent.

MS. NEAVES: I think it -- I -- well, it's -- it's -- I think if -- I think if you accept the notion that jury discharge is what matters for purposes of the Double Jeopardy Clause and permitting a trial judge to reconsider a legal ruling up to that point, then if a State court could fashion an interlocutory review process of that legal ruling, that would not violate the Double Jeopardy Clause.

JUSTICE SCALIA: What is the conceptual basis for saying that jury discharge makes the difference? Why is that the touchstone?

MS. NEAVES: I think this Court has said over and over again that it is the jury -- the defendant's right to hold onto his chosen jury that matters in a number of different contexts in the double jeopardy area. This Court has drawn the line at attachment of jeopardy when the jury is empaneled and sworn based on the historical value of a defendant having that particular jury resolve the government's case against him. And so I think that it matters, particularly where a motion for a required finding is not constitutionally mandated. It's a tool that --

JUSTICE O'CONNOR: I would think prejudice to the defendant should be a factor, and if the defendant is misled by what the judge says into not putting on part of

the case that otherwise would have been put on, that's a pretty serious matter.

MS. NEAVES: That is a very serious matter, and it is the sort of prejudice that falls within the rubric of due process and -- and --

JUSTICE SCALIA: No, but we usually don't use --

MS. NEAVES: -- would grant you a retrial.

JUSTICE SCALIA: -- we don't use the -- I mean, you could use the Due Process Clause for everything, for double jeopardy, for all of the other protections in the Constitution. I think our cases say if -- if there's a problem that has been created by ignoring the double jeopardy rules, you don't solve that problem by -- by the deus ex machina of the Due Process Clause.

MS. NEAVES: No. That's -- that's exactly correct.

JUSTICE BREYER: What about --

JUSTICE SCALIA: So this a problem created by the judge's dismissal, and which this defendant had every reason to rely upon as being the end of that part of the case. I'm inclined to say if -- if that is a problem, in fairness it's a -- it's a double jeopardy problem, not a due process problem.

MS. NEAVES: Well, with respect, Justice Scalia, I would say it is the sort of reliance that a -- that a

defendant may have, as for example the case in Sanabria, where a -- where a judge excludes certain evidence, and the case goes forward. And as a result of that -- a result of that decision, the judge in that case granted a motion for acquittal. And at the end of the case, the prosecution asked for reconsideration of the exclusion of the evidence, and the judge ultimately determined not to go ahead and let that evidence back in, but specifically said if I had let it back in, I would have vacated my motion for required finding and allowed the case to go to the jury. So that sort of prejudice -- a defendant has an expectation of certain things that may or may not happen at trial, but the remedy outside of the double jeopardy context, if the defendant is acquitted, is a retrial.

The drastic remedy of double jeopardy is -- is used when a defendant has been subjected twice to a trial before a second trier of fact. This -- this Court has been consistent that when the government subjects the defendant over and over again before a second --

JUSTICE STEVENS: I understand you correctly to say that if the defendant is acquitted, the remedy is a retrial?

MS. NEAVES: No, no, no. I'm sorry, Justice Stevens. No. Only if the defendant is convicted is the remedy a retrial because, indeed, if the jury acquits him,

there is no harm at all.

JUSTICE BREYER: What is the reason you didn't want a fairly simple rule that I was thinking of? I'll tell you what it is and you'll tell me honestly why you don't.

It's final. The word acquittal is -- is final if the jury has been discharged or the decision is sent to another body for review. One or the other.

MS. NEAVES: I could live with that rule.

JUSTICE BREYER: Now, so you haven't found something in your research that suggests that -- that --

MS. NEAVES: No, no. Our position has been consistent.

JUSTICE KENNEDY: Well, under -- under that view of things, suppose in this -- in this case there's a motion for acquittal and the judge says, yes, I -- I think there's no evidence on the gun. Then the prosecutor says I want 10 minutes because I think there's a case on it. Then he says, you know, there's a case and I think it covers this, and the judge says, well, I think you may be wrong. I'll let you reopen to put on evidence of -- of the gun. What would -- what would be the result in that case?

MS. NEAVES: I think that because if it's a jury trial and the case is still -- and the jury is still

there, it could be done without violating the Double Jeopardy Clause.

JUSTICE KENNEDY: I think you have to say that under your view.

MS. NEAVES: I think so. I think honing -- what this Court has talked about in honing is -- is refining a case before a second trier of fact. And as a matter of Massachusetts' procedures, certainly the prosecution may be able to reopen if there's good faith or mistake, but for purposes of --

JUSTICE GINSBURG: Then why did the Massachusetts Supreme Court say -- and I thought it did say this in its rules -- trial judge, you rule on the spot when a motion to acquit is made? We will not allow you to reserve judgment. Because the normal thing would be a trial judge would say, why should I decide this definitively now? I'll wait till the end of the case. But as I understand the Massachusetts rules, it says, judge, you can't reserve on a motion to acquit. You must rule immediately.

MS. NEAVES: That is correct, Justice Ginsburg, and if I misunderstood the hypothetical, that -- that was my mistake. As a matter of Massachusetts law, a trial judge does not have that option. She must rule on the motion before the defendant decides to put on the case,

and that is what happened here.

JUSTICE GINSBURG: So -- so part of Justice Breyer's question needs editing because it would not be possible under Massachusetts law for the judge to say --

MS. NEAVES: That is correct.

JUSTICE GINSBURG: -- I reserve.

MS. NEAVES: That is correct. She could not.

And -- and if I could just highlight a couple of points to -- to demonstrate the significance of -- of permitting trial judges the ability to reconsider legal rulings. In Massachusetts, the fact that there's a written motion here is quite unusual. These motions are made orally generally. The prosecution is not given an opportunity -- does not -- there's no requirement that he be given advance notice ever. There's no requirement of that. The prosecution argues in opposition to the motion on the spot, and the judge rules on the spot.

And -- and I think that -- that procedure is demonstrated quite clearly here. The -- the defendant filed the motion. The prosecution did, indeed, argue the correct response, legal response, did not have a case at hand and as --

JUSTICE STEVENS: Your position would be the same if the -- if the Massachusetts law provided that the motions at the end of the prosecution's case shall not be

ruled on unless -- after they're written briefs filed by both sides and they have 3 days of argument. You'd still have the same position.

MS. NEAVES: That's true.

JUSTICE SCALIA: And in fact, the -- the quick and dirty procedure you describe is probably a boon to prosecutors because a judge is -- is not likely to take the serious step of dismissing a charge on the basis of -- of such a procedure and is more likely to say, well, we'll let the trial go ahead and see what the evidence discloses. I mean, I can't imagine that this is not a boon to the prosecutor rather than, as you -- as you seem to paint it here, a disadvantage.

MS. NEAVES: I -- I wouldn't want to characterize --

JUSTICE SCALIA: This is a very unusual judge I would think to --

MS. NEAVES: Yes.

JUSTICE SCALIA: -- to whip it out like that and -- and enter an acquittal without -- without letting it go forward.

MS. NEAVES: I would say it is unusual, but it happens where -- and I think the trial judge certainly in this case who believes that if she's mistaken, can -- can correct her ruling and send it to the jury, then feels

somewhat free to -- to do what the defendant asks, if it seems reasonable, and -- and knows that if -- if it can be corrected --

JUSTICE SCALIA: You may -- you may regret what you've asked for.

MS. NEAVES: I hope not, Justice Scalia. I hope not.

I think --

JUSTICE GINSBURG: What would happen -- I think one of the briefs suggested that suppose you have a multi-defendant case and the judge says, after the prosecution case is done, defendant A, I'm going to grant a motion to acquit. He's out of it, but there was enough evidence to require the -- the defense to go on for B and C. And then after hearing B and C's defense, the judge said, I think I was wrong about acquitting A, so I'm -- I'm going to withdraw it. Would there be -- could that be done without any -- any double jeopardy bar? The jury hasn't been discharged.

MS. NEAVES: Justice Ginsburg, I don't think it presents a double jeopardy bar, but a defendant has a right to be present at his trial, and so it certainly would be a reversible error if -- if a trial judge --

JUSTICE GINSBURG: Well, the -- the -- he's sitting there. Defendant A is sitting there throughout

the whole trial.

MS. NEAVES: Then there's certainly no double jeopardy bar to that.

JUSTICE BREYER: There could be a problem that you have to have a fair chance to present evidence and so forth.

MS. NEAVES: Absolutely, Justice Breyer, and -- and --

JUSTICE BREYER: I guess there are a lot of rules in Massachusetts that deal with that. They can't -- you have to be fair to the defendant in -- is that right?

MS. NEAVES: Well, certainly. Rule 25 itself specifically states that the defendant shall have the opportunity to present evidence after the motion is denied or allowed in part without reserving that right. So certainly that option is available.

Unless the Court has further questions.

JUSTICE STEVENS: Thank you, Ms. Neaves.

MS. NEAVES: Thank you.

JUSTICE STEVENS: Mr. -- Mr. Srinivasan.

ORAL ARGUMENT OF SRI SRINIVASAN

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

MR. SRINIVASAN: Thank you, Justice Stevens, and may it please the Court:

The trial court in this case was permitted to correct its erroneous ruling in favor of the defendant on the motion for judgment of acquittal. Because the prosecution is entitled to a full and fair opportunity to prove its case, that's a value --

JUSTICE STEVENS: May I ask you the same question I asked your -- your colleague? Supposing we're not in Massachusetts, but we're in another State that provided for an interlocutory appeal immediately after the judge's ruling in this case. Would -- would you have the same appraisal of the case on those facts?

MR. SRINIVASAN: Would we have the same appraisal as the State? We don't --

JUSTICE STEVENS: Yes. Would you still say it was not final, even though it was sufficiently final for appellate purposes?

MR. SRINIVASAN: No. We -- we think that the Court's holding in Smalis applies equally to jury trials and to bench trials such that an appeal, an interlocutory appeal, in the midst of a jury trial would not be permissible. But we also think that there is a sound basis for drawing a distinction between --

JUSTICE STEVENS: But my question is assuming a State procedure in which the interlocutory appeal was permissible, you -- you would say Double Jeopardy Clause

would bar that appeal.

MR. SRINIVASAN: Right, because we read that to be the holding of Smalis.

But we think there's a basis for distinguishing between appeals on one hand and continuing proceedings before the initial tribunal on the other hand. First of all, this Court has drawn that distinction in Swisher v. Brady where it initially said that the two-stage system of adjudication is -- in Maryland that was at issue in that case was permissible because it entailed continued proceedings before the initial tribunal rather than an appeal to a second tribunal. And the Court specifically distinguished its prior decisions in Jenkins v. the United States and Kepner, both of which involved appellate review.

And the other basis for drawing a distinction between appeals on one hand and reconsiderations by the trial court on the other is historical tradition. I think the Court could look to history and history would show that on one hand trial courts have always had inherent authority to reconsider their mid-trial rulings because the practical exigencies of trial are such that trial courts inevitably will err on occasion, and the ends of justice require trial courts to have the authority to revisit their mid-trial rulings.

JUSTICE KENNEDY: Would -- would you allow a trial judge to reopen -- to -- to permit the prosecution to reopen the case?

MR. SRINIVASAN: We would, Justice Kennedy, but it raises a distinct problem because one value that's served by the Double Jeopardy Clause is the defendant's interest in preventing the prosecution from honing its evidentiary case by repeated efforts. And if the trial judge were permitted to reopen the case to give the prosecution that opportunity, it at least would implicate that interest.

Now, we still think that the proper line is jury discharge, but we understand that that hypothetical would present a distinct interest.

Now, with respect to historical tradition on appeals, the historical tradition is clear that the government has lacked authority at common law to take an appeal in a criminal proceeding. This Court relied on that common law tradition as early as Sanges v. the United States and it's repeated that understanding in Carroll v. the United States and Arizona v. Manypenny, and that's why the Court construes statutory grants of authority to the government to take an appeal in criminal cases quite narrowly. And so I think the Court could draw a distinction between reconsiderations by the trial court

and appeals by looking to historical tradition, and the Court often looks at history to shape the contours of double jeopardy protections. And that would afford the case -- the Court a basis for saying that in Smalis, while appeals were forbidden, in this case trial court reconsideration should be permitted.

And I think the lens through which the Court would do that under the Double Jeopardy Clause is the valued interest in giving the prosecution one full and fair opportunity to prove its case in the sense that while that full and fair opportunity may exclude an appeal, because the Court held as much in Smalis, it doesn't exclude reconsiderations.

JUSTICE SOUTER: Why -- why doesn't the -- the prosecution gets its full and fair opportunity if we have a rule that says to trial judges, when you make a ruling on acquittal, you better be serious and you better not make a snap judgment, think it over, because once you've done it, it sticks? Why -- why doesn't the prosecution have a perfectly fair opportunity under that rule? Everybody knows where he stands and judges, we hope, are going to be careful.

MR. SRINIVASAN: Justice Souter, we think a constitutional rule that would turn on the definitiveness of a trial court ruling would be flawed in three respects.

First, the line between a definitive ruling and a tentative ruling is not altogether clear, and we've outlined in our brief at page 24 in a lengthy footnote a variety of factual scenarios that come from real cases where trial judges, as they often do, rendered a ruling on a motion for acquittal orally, and whether you think that ruling was definitive or tentative might depend on which page of the transcript you happen to be looking at.

But even if we're dealing with a situation in which the ruling clearly falls on the definitive side of the line, you'd still have the problem that a trial court might be convinced that it's correct and rule definitively but still be incorrect. Trial courts make mistakes. That's why this issue comes up as often as it does. For example, in this case --

JUSTICE STEVENS: All these cases -- we've had several, not too many over the -- the whole line of cases -- and the trial judge has always committed a rather plain error. And we all have the case where if you just try to decide whether it's a just result, you'd always say no. A case just like this. The judge made a mistake, but we've always said that's not something we -- we look at.

MR. SRINIVASAN: I don't -- I'm not quite sure I'm following what you're saying, Justice Stevens, because --

JUSTICE STEVENS: I say as a typical matter these double jeopardy claims arise in cases in which the judge made a rather plain error, and when you look at it later, you say, gee, he goofed. And so I'm not sure we should consider the plainness of the error or the fact that they -- they do mistakes because they do.

MR. SRINIVASAN: But -- but I don't -- but the reason why the Court accepts errors in some situations is because there's some other value under the Double Jeopardy Clause.

JUSTICE STEVENS: The value of finality is what is really at stake here.

MR. SRINIVASAN: Well, it's not just the value of finality. It's that, for example, if the judge makes an error and then the jury is discharged, it's the value that the defendant has in obtaining a result from the particular tribunal. In the circumstances of this case, where the trial judge can correct her error within the -- within a matter of minutes, at least in some situations, there would be no double jeopardy purpose served --

JUSTICE STEVENS: But here it was not a matter of minutes.

MR. SRINIVASAN: In this --

JUSTICE STEVENS: Here it was --

MR. SRINIVASAN: No. I acknowledge in this case

it wasn't, but it might well be in some cases. For example, we cite a decision of the Washington Supreme Court, State v. Collins, which involves essentially the same scenario as this case, but the only distinction was that after the trial judge initially announced her ruling, the prosecution had the precedent in hand and within a span of 10 minutes, the trial judge was able to realize her error and to correct her ruling and reinstate the charge.

JUSTICE O'CONNOR: Does it matter if the -- if the ruling is conveyed to the jury even though the jury isn't discharged?

MR. SRINIVASAN: It would matter, Justice O'Connor, but I don't think it would necessarily preclude the prosecution from going forward on the charge under the Double Jeopardy Clause. The question would be one of due process and prejudice to the defendant.

JUSTICE KENNEDY: You had three -- three reasons you were going to give Justice Souter. One is it's not clear always that it's definitive. The other is that trial judges do make mistakes, and the third is?

MR. SRINIVASAN: And the third is -- it's an issue that you raised earlier, Justice Kennedy. It's that this case might look different as an atmospheric matter if the trial judge at the time she rendered her ruling had

said, I'm ruling in the defendant's favor, but I may reconsider this decision at a later point in the proceedings. Now, that might be seen to fall on the tentative side of the line, but that's exactly the effect of this -- of the trial judge's ruling as a matter of Massachusetts law. And we don't think there's a constitutionally significant distinction between a trial judge explicitly saying that a ruling can be reconsidered and State law saying that the ruling can be reconsidered.

JUSTICE SOUTER: Why isn't the distinction the right to rely?

MR. SRINIVASAN: It -- there -- there -- that would be the basis of a claim, Justice Souter, but the right to rely is, in essence, a notice prejudice sort of claim and that could be handled in the way that trial courts typically handle claims by the defendant that they've detrimentally relied on an initial ruling the trial court has subsequently reconsidered.

It would be equally the case, for example, as the State mentioned with respect to an evidentiary ruling that barred the prosecution from introducing a category of evidence, but then the trial judge, later in the proceedings, wanted to revisit that ruling. The question would be whether revisiting the ruling resulted in prejudice to the defendant because the defendant had

detrimentally relied on the trial judge's initial determination. And we don't think that prejudice inquiry is meaningfully different when you're dealing with evidentiary rulings as when you're -- as when you're dealing with the reinstatement of a previously acquitted charge.

JUSTICE SCALIA: Why -- why shouldn't you have -- what's magic about the jury? Why shouldn't you have the same rule on a bench trial? A judge in a bench trial makes a ruling, thinks about it, and says, you know, I shouldn't have ruled that way. Why shouldn't that judge be able to change? Just because there's no jury to discharge.

MR. SRINIVASAN: Well, it would depend. If -- if the bench trial judge were making a mid-trial ruling, as -- as in this case, then the judge could change his or her mind. But if the bench trial judge were resolving the entire case and entered --

JUSTICE SCALIA: What -- what is the line? I mean, is there -- there no point at which he can't change? I mean --

MR. SRINIVASAN: No. The -- the -- I think the Constitution would step in and impose a line at some point, and probably the best indicator is a rule --

JUSTICE SCALIA: But it's not dismissal of the

jury. We'll have to make up some other line. Right?

MR. SRINIVASAN: It can't be discharge of the jury, but I think where the Court would look, first and foremost, in defining a line for bench trials, if the issue would ever arise, would be a ruling that would essentially have resulted in discharge of the jury if the trial were before a jury. And for example, the Federal Rules of Criminal Procedure --

JUSTICE O'CONNOR: But how do we -- how does Smalis fit into this discussion? I thought in Smalis in a bench trial, we said it was final.

MR. SRINIVASAN: It was, Justice O'Connor, for purposes of an appeal, and that's why I think the critical distinction between Smalis and this case is that where the prosecution might not have authority to take an appeal from a ruling on the insufficiency of the evidence.

JUSTICE KENNEDY: Your line would be something like if it -- if -- from all of the transcript, it appears that the judge is -- is giving consideration to the entire case or something like that in a bench trial.

MR. SRINIVASAN: In a bench trial, that -- that would be part of the inquiry, Justice Kennedy, and I would also point, by the way, to -- can I just finish the thought, Justice Stevens? To Federal Rule of Criminal Procedure 32(k)(1), which says that when a bench trial --

when a judge sitting in a bench trial issues a ruling that finds a defendant not guilty, that ruling will discharge the defendant. And I think a discharge of the defendant would be one of critical consideration.

Thank you.

JUSTICE STEVENS: Thank you.

Mr. Nathanson, you have about 3 minutes left.

REBUTTAL ARGUMENT OF DAVID J. NATHANSON

ON BEHALF OF THE PETITIONER

MR. NATHANSON: Justice Stevens, may it please the Court:

I'll try to be as brief as I can.

The argument about inherent authority to reconsider an acquittal really has it backwards. Inherent authority bends to the Constitution. The Constitution does not bend to a judge's inherent authority.

Second, the -- the Government is trying to substitute a standard here of a second proceeding, which is not this Court's standard. This Court's standard is further proceedings after an acquittal, including resumption of the same trial. That's what this Court said in Smalis.

The Government is also trying to move this case into the particular tribunal analysis. That comes from cases that are mistrials. This is an acquittal. This is

not a particular tribunal case.

As to the judge resolving all the issues in a bench trial and -- and that's why that -- that acquittal would be more final than a motion for a directed verdict, it was a motion for a directed verdict. It was a demurrer in Smalis. It was the exact same standard that the judge applied in that case.

As to prejudice, prejudice has never been a factor in this Court's double jeopardy analysis. As a matter of fact, in -- in one of the really classical statements, Ex parte Lange, if you look at the facts of that case, that looks like complete gamesmanship. The defendant was sentenced to a jail term and a fine when the -- the statute only authorized a jail term or a fine. He said, oh, I'll pay -- I'll pay the fine. It's a get-out-of-jail-free card. There's complete gamesmanship, but prejudice was not a factor. And in fact, this Court has said prejudice is not open to judicial examination in double jeopardy cases.

As to honing, in -- in fact, in Rumsey --

JUSTICE SCALIA: Honing?

MR. NATHANSON: Honing. Not the name of a case, Your Honor. But whether or not the Government has honed its cased through -- and -- and they would say evidentiary honing. But it's not evidentiary honing. In Rumsey, it

was only argument that was presented at -- at the remand after acquittal.

Justice Souter, I want to heartily endorse the -- the way you phrased what the rule should be, which is, trial judges, you ought to take this seriously. Pretermitting the prosecution's case is a very serious matter. You cannot take it back. So think about it. Do it right the first time.

As to -- to rule 25 itself, it's true that the -- the judges can't reserve. So what they do as -- as a matter of practice in Massachusetts is they simply deny, and -- and they deny the first one and they have two more opportunities, one at the close of the defendant's case and they have an opportunity at the close of -- after the jury has returned a verdict. At each of those steps, they can make a motion for acquittal.

As to the full and fair opportunity, this Court said in Martin Linen that the Government has a right to try the case. They do not have a right to have it proceed to verdict. I'm just taking that straight from Martin Linen.

As to, finally, whether or not State law sort of insulates this from Federal -- I see my time is up. Thank you.

JUSTICE STEVENS: Mr. Nathanson, thank you.

The case is submitted.

(Whereupon, at 12:01 p.m., the case in the above-entitled matter was submitted.)