REMEDYING CRIMINAL TRIAL ERRORS: RETRIAL OR ACQUITTAL IN *SMITH V. UNITED STATES*?*

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The best-known rule of criminal procedure is that the government may not deprive someone of his life, liberty, or property unless and until it has proved his guilt of a crime beyond a reasonable doubt at trial.[1] The question of a party's guilt or innocence is the most fundamental issue in every American criminal trial. Indeed, the entire purpose of a criminal trial is to decide whether the accused is guilty of the charges levelled against him.[2]

If a jury finds the accused guilty, the trial judge may impose whatever punishment is authorized by law.[3] If a jury returns a verdict of "Not Guilty,"

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[1] *See*, *e.g.*, Victor v. Nebraska, 511 U.S. 1, 5 (1994); MCCORMICK ON EVIDENCE § 341 (8th ed. Robert P. Mosteller gen'l ed., & July 2022 update). Ironically, the common law adopted the reasonable doubt standard to make it *easier* for juries to convict the accused by lifting from them the fear that a mistaken judgment would lead to their eternal damnation. *See* JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL (2008); Thomas P. Gallanis, *Reasonable Doubt and the History of the Criminal Trial*, 76 U. CHI. L. REV. 941, 953 (2009) ("The reasonable doubt instruction . . . was designed not to protect the accused but rather to make it easier for jurors to reach a verdict of guilt . . . . Jurors needed the reassurance, for they feared divine vengeance if they condemned improperly. In England, the reasonable doubt instruction became established in the 1780s, because by then transportation to the American colonies was no longer available as a noncapital sanction. This raised the punishment stakes sufficiently that jurors needed more coaxing to convict . . . .") (references and punctuation omitted).

[2] *See* United States v. Nobles, 422 U.S. 225, 230 (1975).

[3] *See* Chapman v. United States, 500 U.S. 453, 465 (1991).

the judge must enter a judgment reflecting that verdict and release the accused from any restraints associated with the charges.[4] If an appellate court finds that the evidence was insufficient for the jury reasonably to convict the defendant, the court must order the entry of a judgment of acquittal.[5] In either case, that judgment and the Fifth Amendment's Double Jeopardy Clause protect a party against a second prosecution for the "same offense"[6] even if the acquittal is "based upon an egregiously erroneous foundation."[7]

Few trials, however, come off perfectly. When a trial or appellate court decides that the defendant was prejudiced[8] by an error that occurred before the case was submitted to the jury or during its deliberations, what is the proper remedy? Should the court merely order a new trial? Or should the court enter a judgment of acquittal (or, in what amounts to essentially the same relief, order a dismissal of the indictment with prejudice) on the theory that the government should be allowed only one chance to convict someone of a crime?[9] That is the remedy awarded when the case should not have been submitted to the jury at all because the government's proof of guilt was

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[4] *See* Fed. R. Crim. P. 32(k)(1).

[5] *See* Burks v. United States, 437 U.S. 1 (1978).

[6] U.S. CONST. amend. V.

[7] Fong Foo v. United States, 369 U.S. 141, 143 (1962); *see also*, *e.g.*, Evans v. Michigan, 568 U.S. 313, 318-30 (2013); Arizona v. Rumsey, 467 U.S. 203, 211 (1984).

[8] Not every error is prejudicial or requires a drastic remedy. The Harmless Error Doctrine requires a federal court to disregard an error that did not affect the "substantial rights" of the accused. See 28 U.S.C. 2111 (2018) ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); United States v. Mechanik, 475 U.S. 66, 69-73 (1986) (finding that allowing two witnesses to testify jointly before the grand jury, in violation of Rule 6(d) of the Federal Rules of Criminal Procedure, does not require reversal of an otherwise valid judgment of conviction); Hobby v. United States, 468 U.S. 339, 343-50 (1984) (holding discrimination in the selection of a grand jury foreperson does not require setting aside an otherwise valid conviction); Kotteakos v. United States, 328 U.S. 750, 764-65 (1946). Most errors, even ones that violate the Constitution, are subject to harmless error analysis. *See*, *e.g.*, United States v. Marcus, 560 U.S. 258, 262-65 (2010) (ruling that a jury instruction allowing a defendant to be convicted for conduct predating enactment of the relevant statute can be harmless); Arizona v. Fulminante, 499 U.S. 279, 282, 303, 288-89, 295, 302 (1991) (holding that the admission of a coerced confession can be a harmless error); *id.* at 307 (collecting examples of potentially harmless constitutional errors).

[9] United States v. Strain, 407 F.3d 379, 379 (5th Cir. 2005); United States v. Greene, 995 F.2d 793 (8th Cir. 1993).

inadequate.[10] The Supreme Court will answer that question this Term in *Smith v. United States*.[11]

The facts of the *Smith* case illustrate a truly modern type of crime.[12] Smith is a software engineer and fisherman. Using his computer and the Internet, Smith accessed information about the location of attractive artificial fishing reefs in the Gulf of Mexico possessed by a Florida business named Strike-Lines. StrikeLines is a private company that offers detailed GPS-enabled high resolution fishing charts on a subscription basis. The government charged Smith with (among other things) the theft of trade secrets,[13] and the trial was held in the Northern District of Florida. Smith objected to that venue, arguing that the locus delicti—or place where an offense was committed—was elsewhere. The case should have been tried, he argued, either in the Middle District of Florida, where StrikeLines' servers were located, or the Southern District of Alabama, where he was at all times relevant to the case. Trial in the Northern District of Florida, he maintained, violated the venue requirements of Article III of the Constitution, the Sixth Amendment's Jury Trial Clause, and Rule 18 of the Federal Rules of Criminal Procedure.[14]

The district court rejected Smith's argument,[15] but the U.S. Court of Appeals for the Eleventh Circuit agreed with him. To remedy that error, the circuit court awarded Smith a new trial on the trade-secret theft count.[16]

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[10] *See* Burks v. United States, 437 U.S. 1, 16-17 (1978) ("The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. . . . Obviously a federal appellate court applies no higher a standard; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision.") (citations omitted).

[11] 2022 WL 17586971 (No. 21-1576) (cert. granted Dec. 13, 2022) (No. 21-1576).

[12] *See* United States v. Smith, 22 F.4th 1236, 1238-40 (11th Cir. 2022).

[13] *See* 18 U.S.C. § 1832(a)(1) (2018). Smith was also charged with extortion, in violation of 18 U.S.C. § 875(d) (2018). Smith was convicted of that count, his conviction was upheld on appeal, and that aspect of the case is not before the Supreme Court.

[14] *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."); *id*. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."); Fed. R. Crim. P. 18 ("[T]he government must prosecute an offense in a district where the offense was committed."). The locus delicti is determined from the nature of the crime alleged, the conduct constituting the offense, and the location of the act or acts constituting it. *See*, *e.g.*, United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999); United States v. Cabrales, 524 U.S. 1, 6–7 (1998).

[15] United States v. Smith, 469 F. Supp. 1249, 1255-57 (N.D. Fla. 2020), *aff'd in part and rev'd in part*, 22 F.4th at 1238-40, *cert. granted*, 2022 WL 17586971 (Dec. 13, 2022) (No. 21-1576).

[16] *Smith*, 22 F.4th at 1242-45.

Relying on circuit court precedent, the court of appeals rejected Smith's argument that the proper remedy was entry of a judgment of acquittal.[17]

Smith petitioned the Supreme Court to decide which of those remedies—retrial or acquittal—is the appropriate relief when a defendant is tried in the wrong court.[18] His argument is two-fold. First, venue is an element of a federal offense, he says, which the federal government cannot try to prove more than once. Second, retrial is not a constitutionally adequate remedy for being tried in the wrong district, he argues, because it cannot rectify the burdens the defendant suffered by the first trial.[19]

In our view, a mistaken choice of trial venue does not require an offender to go scot-free; a new trial is an adequate remedy. That argument will unfold as follows: Part I will discuss the law governing appropriate remedies for cases in which, after a jury's guilty verdict, a trial or appellate court finds that an error prejudiced the offender's ability to defend himself at trial. Part II will explain why the Sixth Amendment's Jury Trial Clause does not create an exception to the rule that a retrial is the appropriate remedy for a trial that went awry. That part will also address the relevance of an 1861 Supreme Court decision, *United States v. Jackalow*, on which Smith relies.[20] Part III explains why the Due Process Clause also does not require the entry of a judgment of acquittal as the remedy for initially trying a defendant in the wrong forum. Indeed, the Supreme Court has quite clearly rejected Smith's argument when it was made in connection with the Fifth Amendment's Double Jeopardy Clause. It fares no better under the alternative theories discussed below.

I. POST-VERDICT REMEDIES IN CRIMINAL CASES

The Anglo-American common law does not provide much assistance in answering the question in *Smith*. English courts could not grant a convicted offender a new trial until the end of the 17th century.[21] Even then, the court could award a new trial only during the term of court in which the judge entered his judgment or enter a reprieve so that the offender could seek royal

[17] *Id*. at 1244-45.

[18] The question presented in *Smith* is "[w]hether the proper remedy for the government's failure to prove venue is an acquittal barring re-prosecution of the offense, as the U.S. Courts of Appeals for the 5th and 8th Circuits have held, or whether instead the government may re-try the defendant for the same offense in a different venue, as the U.S. Courts of Appeals for the 6th, 9th, 10th and 11th Circuits have held." Cert. Pet. i.

[19] Cert. Pet. 5-9, 22-34.

[20] 66 U.S. (1 Black) 484 (1861).

[21] *See* Herrera v. Collins, 506 U.S. 390, 408 (1993).

clemency.[22] There also was no right to appeal a judgment of conviction or sentence at common law.[23] True, habeas corpus was an available remedy to challenge an unlawful pretrial detention, but it did not serve as a basis for seeking relief from a judgment of conviction, however error-filled the trial might have been.[24] A judgment entered by a court with jurisdiction over an offense was a conclusive answer to a claim of illegal detention.[25] In sum, at common law, clemency was the only recourse available to a convicted offender.[26]

The Framers followed that approach.[27] Article III created one Supreme Court of the United States and contemplated that Congress would create lower courts; it gave Congress the freedom to decide whether and how to create a federal judicial system,[28] as well as what authority lower courts should have, including over the adjudication of criminal cases.[29] The First Congress passed two laws creating the original federal judicial system and the criminal code—the Judiciary Act of 1789[30] and the Crimes Act of 1790[31]—but

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[22] *See id*.; United States v. Mayer, 235 U.S. 55, 67 (1914); Paul J. Larkin, Jr., *Guiding Presidential Clemency Decision Making*, 18 GEO. J.L. & PUB. POL'Y 451, 476 & n.142 (2021).

[23] *See* McKane v. Durston, 153 U.S. 684, 687 (1894).

[24] *See* Paul J. Larkin, *The Reasonableness of the "Reasonableness" Standard of Habeas Corpus Review Under the Antiterrorism and Effective Death Penalty Act of 1996*, 72 CASE W. RES. L. REV. 669, 724-27 (2022) (discussing the role of habeas corpus at common law).

[25] *See, e.g.*, Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830); Ex parte Kearney, 20 U.S. (7 Wheat.) 38 (1822); Larkin, *Reasonableness*, *supra* note 24, at 726-27.

[26] *See, e.g.*, DANIEL DEFOE, A HISTORY OF THE CLEMENCY OF OUR ENGLISH MONARCHS, FROM THE REFORMATION, DOWN TO THE PRESENT TIME (London, N. Mist 1717); Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51 (1963); Larkin, *Clemency*, *supra* note 22, at 476-77 & nn.133, 138 & 142.

[27] Larkin, *Reasonableness*, *supra* note 24, at 731-32.

[28] U.S. CONST. art. III, § 1 ("The Judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish.").

[29] For instance, Article III defines the Supreme Court's original jurisdiction, U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."), which Congress cannot enlarge, *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Yet, that jurisdiction does not include "the "Trial of . . . Crimes," U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.").

[30] Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

[31] Act of Apr. 30, 1790, ch. 9, 1 Stat. 112.

neither one gave a defendant the right to appeal a judgment of conviction.[32] In fact, it was not until 1889 that Congress granted convicted offenders a right of appeal, and then only in capital cases.[33] Convicted offenders with lesser punishments had to wait until 1891 for that right.[34] Only then did a convicted offender have an opportunity to seek relief from a judgment of conviction and sentence from a federal court rather than the President.[35]

The new ability of defendants to appeal their convictions posed the question as to the proper relief that an appellate court should award. The Supreme Court answered that question in 1891 in *United States v. Ball*.[36] *Ball* was a murder case. Three defendants were tried; two were convicted, one was acquitted. On the appeal of the convicted defendants, the Supreme Court reversed the trial court's judgment on the ground that the indictment was defective for omitting a statement as to the time and place of the victim's death.[37] Afterwards, the government retried and convicted all three defendants.[38] On its second review of the prosecution, the Court held that the acquitted defendant should not have been retried even under a valid indictment.[39] In his case, "[t]he verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution," the Court reasoned.[40] "However it may be in England, in this country a verdict of acquittal, although not followed

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[32] *See, e.g.*, *Watkins*, 28 U.S. at 201, 202-03 ("A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it."); *Kearney*, 20 U.S. at 42; Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93-94 (1807); United States v. More, 7 U.S. (3 Cranch) 159, 172–74 (1805); United States v. La Vengeance, 3 U.S. (3 Dall.) 297, 299 (1796) ("[I]n all criminal causes, whether the trial is by a jury, or otherwise, the judgment of the District Court is final.").

[33] Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655.

[34] Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 827.

[35] *See, e.g.*, Larkin, *Reasonableness*, *supra* note 24, at 476-77 & nn.133, 138 & 142 (2021). Moreover, the Supreme Court also held that the Fourteenth Amendment Due Process Clause does not grant a convicted offender the right to appeal his conviction, *see* McKane v. Durston, 153 U.S. 684, 687 (1894), even in a capital case, *see* Andrews v. Swartz, 156 U.S. 272 (1895). In fact, despite the revolution in constitutional criminal procedure that took place in the 1960s and 1970s, the Supreme Court has repeatedly said that there is no constitutional right to appeal a judgment of conviction. *See, e.g.*, Goeke v. Branch, 514 U.S. 115 (1995); Kohl v. Lehlback, 160 U.S. 293, 297 (1895).

[36] 163 U.S. 662 (1896) (*Ball II*).

[37] Ball v. United States, 140 U.S. 118 (1891) (*Ball I*).

[38] *Ball II*, 163 U.S. at 663-66.

[39] *Id*. at 666-71.

[40] *Id*. at 671.

by any judgment, is a bar to a subsequent prosecution for the same offense."[41] By contrast, the Court held that the two defendants who had been convicted under a defective indictment could be re-prosecuted under the new one.[42] They could not rely on the Double Jeopardy Clause as a bar to their retrial because they had sought judicial relief from the original judgment:

> How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new indictment against them, need not be considered, because it is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted.[43]

The Court later summarized the teaching of *Ball* in *United States v. Scott*.[44] As then-Associate Justice William Rehnquist explained, *Ball* established "two venerable principles of double jeopardy jurisprudence."[45] One is that "[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict . . . poses no bar to further prosecution on the same charge."[46] By contrast, "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal."[47] The Supreme Court has consistently applied the distinction it first drew in *Ball* between acquittals and reversals on other grounds.[48]

The Supreme Court has made the same point in connection with a Sixth Amendment provision parallel to the one at issue in the *Smith* case: The Counsel Clause. In *United States v. Morrison*, two federal agents interviewed an indicted offender in the absence of her attorney, in violation of the

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[41] *Id.*

[42] *Id.* at 671-74.

[43] *Id.* at 672.

[44] 437 U.S. 82 (1978).

[45] *Id.* at 90.

[46] *Id.* at 90-91.

[47] *Id. Scott* and another case decided shortly beforehand, *Burks*, 437 U.S. 1, also make clear that there is no difference in the preclusive effect to be given to a jury's verdict of acquittal, a district court's decision to dismiss a case because of evidentiary sufficiency without submitting it to a jury, and an appellate court's decision that the government's proof was insufficient to convict. *See Scott*, 437 U.S. at 90-91; *Burks*, 437 U.S. at 16–17.

[48] *See*, *e.g.*, Evans v. Michigan, 568 U.S. 313, 318 (2013); *Rumsey*, 467 U.S. at 211; *Burks*, 437 U.S. 1 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); *Fong Foo*, 369 U.S. at 143; Kepner v. United States, 195 U.S. 100, 133 (1904).

clause.[49] The defendant challenged the interview as violating her rights under the Counsel Clause, and the court of appeals agreed. The court of appeals also ruled that the appropriate remedy was dismissal of the indictment. The Supreme Court unanimously reversed.[50]

The Court started from the premise that "the fundamental importance of the right to counsel in criminal cases" was not the only relevant consideration.[51] Also relevant is "the necessity for preserving society's interest in the administration of criminal justice."[52] To protect both interests, the Court said that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."[53] In earlier cases involving a violation of the Counsel Clause, the Court had consistently remedied the violation only by excluding improperly obtained evidence without ordering dismissal of the indictment.[54] The correct approach is "to identify and then neutralize the taint" from a constitutional error, by tailoring relief "appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial."[55] Absent a prejudicial "effect" on the trial, however, "there is no basis for imposing a remedy in that proceeding," let alone one of dismissal.[56] The deliberate nature of the error was irrelevant, the Court decided, absent a prejudicial effect on the proceedings. Citing its precedents discussing the Fourth Amendment and the Fifth Amendment Self-Incrimination Clause, the Court explained that "[t]he remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression."[57] Dismissal of the charges, the Court ruled, is an

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[49] 449 U.S. 361, 362 (1981); *see* Massiah v. United States, 377 U.S. 201 (1964) (barring the government from interviewing a charged defendant in the absence of counsel).

[50] *Morrison*, 449 U.S. at 364-67.

[51] *Id*. at 364.

[52] *Id*.

[53] *Id*.

[54] *Id*. (discussing Moore v. Illinois, 434 U.S. 220 (1977); Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 318 (1967); O'Brien v. United States, 386 U.S. 345 (1967); Black v. United States, 385 U.S. 26 (1966); Gideon v. Wainwright, 373 U.S. 335 (1963); *Massiah*, 377 U.S. 201; and Powell v. Alabama, 287 U.S. 45 (1932)).

[55] *Id*. at 365.

[56] *Id.* 365.

[57] *Id*. at 366; *accord* United States v. Blue, 384 U.S. 251, 255 (1966) ("Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment [Self-Incrimination Clause], Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. . . . Our numerous precedents ordering the exclusion of

unwarranted remedy. "[A]bsent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate."[58] Having shown no prejudice in her case, Morrison was not entitled to have the indictment dismissed.[59]

In sum, the Supreme Court's historic remedy for a trial error that prejudiced the accused is a retrial, not entry of a judgment of acquittal (or, what is the same thing, dismissal of the indictment with prejudice). The government may retry an offender who persuades an appellate court that a prejudicial error before or at trial materially affected the integrity of a judgment of conviction. There is but one exception. Whether before or after the jury returns a guilty verdict, if the trial judge or an appellate court decides that the evidence was insufficient to allow a reasonable jury to convict, then a judgment of acquittal is the only appropriate remedy.[60] Put conversely, if the trial judge should have dismissed the charges for insufficient proof without even submitting the case to the jury, the defendant is entitled to have a judgment of acquittal entered in his favor.[61] Entry of such a judgment engages the protections of the Fifth Amendment Double Jeopardy Clause, barring a retrial for the "same offense." Otherwise, the government may begin the prosecution anew.

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such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.") (footnotes omitted)..

[58] *Morrison*, 449 U.S. at 366.

[59] *Id*. at 366-67.

[60] "The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. . . . Obviously a federal appellate court applies no higher a standard; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." *Burks*, 437 U.S. at 16–17 (citations omitted). The clause bars a retrial even if an acquittal was based on "an egregiously erroneous foundation." *Fong Foo*, 369 U.S. at 143; *see also*, *e.g.*, *Evans*, 568 U.S. at 315; *Rumsey*, 467 U.S. at 211.

[61] *See*, *e.g.*, *id*. at 17-18 ("[W]e hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal.") (quoting 28 U.S.C. § 2106 (2018) ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.")); *see also Evans*, 568 U.S. at 318 ("[O]ur cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense."); *Scott*, 437 U.S. at 90-91.

II. THE SIXTH AMENDMENT JURY TRIAL CLAUSE

Smith maintains that he is entitled to a judgment of acquittal for being forced to stand trial in the wrong district.[62] Pointing to the venue provisions of Article III and the Sixth Amendment, Smith argues that, because the Constitution effectively makes proof of venue an element of every federal offense and because of the importance of trying a defendant in the proper court, the government's failure to try him in the correct district is tantamount to a failure of proof of his guilt, entitling him to an acquittal. That argument is unpersuasive.

Smith is correct that the venue requirement is an important one; indeed, it is expressly granted *twice* in the Constitution. But Smith is mistaken in the role that venue plays in a federal prosecution. Proper venue is but one of several guarantees that the Framers and the First Congress adopted to ensure that no one would be convicted without receiving the type of trial that, even by late 18th-century standards, was deemed necessary for that proceeding to be fundamentally fair. But all of those guarantees are procedural in nature, not substantive. With the one exception of the crime of treason, the Constitution is silent on what conduct should be made a crime and what the elements of that offense should be. Here, the offense for which Smith was convicted does not make venue an element of the actual offense, so requiring him to stand in the dock in the wrong court cannot be deemed a failure of proof that he committed the offense charged against him.

Start with the text of the Constitution. Article III provides in part that "[t]he Trial of all crimes . . . shall be by jury . . . in the State where the said Crimes shall have been committed."[63] The Sixth Amendment contains a similar provision, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[64] Technically speaking, Article III and the Jury Trial Clause could be said to establish two different requirements.[65] The former, which could be denominated a *venue* requirement, demands that a trial be held "in the State where the said

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[62] *See* Br. for Pet. 19-47. Several amici support Smith. Like Smith, each one argues that the Article III and Sixth Amendment venue provisions are so important that the government ought not to be allowed to bring a defendant to trial more than once. *See*, *e.g.*, Br. Amici Curiae of Profs. Drew L. Kershen & Brian C. Kalt 3-22.

[63] U.S. CONST. art. III, § 2, cl. 3.

[64] U.S. CONST. amend. VI.

[65] *See* Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 803 (1976).

Crime shall have been committed." The latter, which could be seen as a *vicinage* requirement, guarantees the accused "an impartial jury of the State and district wherein the crime shall have been committed." Think of the location of the trial versus the location of the jurors.

The critical point, however, is that Article III and the Sixth Amendment fix only the *location* for a trial brought to decide the accused's guilt or innocence of an offense created and defined elsewhere in the law. That was no accidental oversight. The colonists and Framers were familiar with the difference between the substantive law of crimes and the rules of procedure. Murder and robbery were offenses at common law, and the states had criminal codes incorporating those crimes.[66] In fact, the text of the Treason Clause, a companion provision to the Article III Jury Trial requirement, illustrates the difference between the two bodies of law. The Treason Clause is the only constitutional provision defining a crime.[67] Other clauses, such as the Commerce, Coinage, Counterfeiting, Piracy, and Military Regulation Clauses, also illustrate the divide between substance and procedure. They expressly or impliedly authorize Congress to create federal offenses without regulating where those cases may be tried.[68] Accordingly, the text of the Constitution undermines Smith's argument.

The history of the Article III and Sixth Amendment Jury Trial Clauses also does not help Smith. The Framers focused on trial geography in those clauses because of events preceding the Revolutionary War. Colonial juries were known for acquitting colonists charged with criminal violations of the Crown's laws and for convicting of assault Crown officials who arrested local offenders.[69] In response, Parliament authorized a trial for treason to be held

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[66] *See*, *e.g.*, DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776 (1974); HUGH RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA (1965).

[67] U.S. CONST. art. III, § 3 ("Treason against the United States consists only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."). The Framers went out of their way to define that offense in the constitutional text because they did not trust Congress to protect political dissent. *See*, *e.g.*, Cramer v. United States, 325 U.S. 1, 8–15 (1945); Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395 (1945); Charles Warren, *What Is Giving Aid and Comfort to the Enemy*, 27 YALE L.J. 331 (1918).

[68] *See* U.S. CONST. art. I, § 8, cls. 3, 5-6, 10 & 14 (the Commerce, Coinage, Counterfeiting, Piracy, and Military Regulation Clauses); Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad? Premeditated Murder, Mental Illness, and* Kahler v. Kansas, 43 HARV. J.L. & PUB. POL'Y 85, 97-99 (2020).

[69] Kershen, *supra* note 65, at 805-06; *see* JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION 69-77 (2011); EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763-89, at 14-15 (4th ed. 2013).

wherever the Crown saw fit to designate as the proper forum.[70] The colonists were outraged by the prospect that they could be tried in England for offenses occurring in America. In fact, one of the grievances listed in the Declaration of Independence was that England had "depriv[ed] us in many cases, of the benefits of Trial by Jury" and had "transport[ed] us beyond Seas to be tried for pretended offenses."[71] Article III and the Jury Trial Clause sought to prevent a reoccurrence of those outrages in the new nation by ensuring that trials were held locally.[72]

In his petition, Smith relied heavily on the Supreme Court's 1861 decision in *United States v. Jackalow*.[73] *Jackalow* was an unusual case, in several respects. The government charged a pirate who used the alias "Jackalow" with a capital offense for violating the federal piracy statute[74] because he boarded an American vessel on the high seas, assaulted its owner, and robbed him of merchandise and gold.[75] The evidence indicated that the piracy occurred in Long Island Sound near New York, but the government arrested Jackalow in New Jersey and brought him to trial in that district, as both Article III and

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[70] Kershen, *supra* note 65, at 805-06.

[71] Decl. of Indep. arts. 20-21 (July 4, 1776).

[72] Kershen, *supra* note 65, at 808-09 ("Limitation of venue was considered to be necessary to insure a fair trial for persons accused of crime. By limiting venue, the colonists and constitutional draftsmen apparently intended to insure that an accused would usually be prosecuted for criminal conduct at his place of residence. Hence, the accused would receive the benefit of being known by those who prosecuted and tried him, the benefit of having friends and relatives close at hand to provide legal and moral support, and the benefit of knowing the jurors and thereby being able to challenge jurors intelligently. Additionally, the accused would be better able to produce witnesses, especially character witnesses, and evidence for his defense. Moreover, if the accused were tried at his place of residence, he would know the local attorneys, possibly even have a local attorney who had represented him previously, and thereby be able to have effective counsel in whom he could have confidence.") (footnotes omitted).

[73] 66 U.S. (1 Black) 484 (1861). Interestingly, Smith does not even cite the *Jackalow* decision in his merits brief.

[74] Act of May 15, 1820, ch. 113, 16 Stat. 600, 600 (1820). Section 3 of that act provided as follows:

> *And be it further enacted,* That, if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate: and, being thereof convicted before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death.

[75] *Jackalow*, 66 U.S. (1 Black) at 485.

the piracy statute seemed to permit.[76] The jury convicted Jackalow of having committed piracy, but then uncertainty arose as to precisely where the crime occurred. The issue of venue had not been submitted to the jury at the guilt stage of the case. After the jury returned its guilty verdict, the court held a post-trial arrest-of-judgment hearing to determine the jurisdictional issue, and a special jury verdict indicated that the crime did not occur in the District of New Jersey.[77] The Supreme Court concluded that it was a mistake to try Jackalow in New Jersey.[78] Given Article III and the piracy statute, the Court reasoned, "the indictment and trial must be in a district of the State in which the offence was committed."[79] Because the jury had not been properly instructed on the venue issue, the Court concluded, the judgment could not stand.[80] The Court therefore ordered that Jackalow be retried.[81]

The Supreme Court's opinion in *Jackalow* is both short and (to be honest) opaque.[82] The Court mentioned but did not delve into the relationship

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[76] Article III states that "when [the offense is] not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed," U.S. CONST. art. III, § 2, cl. 3, and the piracy act provided that "on conviction thereof before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found," 16 Stat. at 600 (quoted *supra* note 74).

[77] *Jackalow*, 66 U.S. (1 Black) at 484-85. The question of venue had not initially been submitted to the jury. Instead, the Circuit Court hearing the case decided to try the case to a verdict, and then held a post-trial arrest-of-judgment hearing to determine if the Circuit Court had proper jurisdiction. *The Jackalow Trial*, N.Y. TIMES, Jan. 30, 1861, https://www.nytimes.com/1861/01/30/archives/the-jackalow-trial.html.

[78] *Jackalow*, 66 U.S. (1 Black) at 488 ("We do not think the special verdict in this case furnishes ground for the court to determine whether or not the offence was committed out of the jurisdiction of a State, and shall direct that it be certified to the Circuit Court, to set aside the special verdict, and grant a new trial."). Jackalow did not appeal the case to the Supreme Court. There was no such right of appeal, even in a capital case, until 1891. *See supra* text accompanying notes 29-35. The Supreme Court could review a federal criminal case only if there was a split opinion on a question of law in the circuit court and only if the circuit court, not the offender, issued a certificate of division. Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159; *Scott*, 437 U.S. at 88. The two circuit court judges split on the correct answer to the proper district for trial. *Jackalow*, 66 U.S. (1 Black) at 485 ("This case comes before us on a division of opinion of the judges of the Circuit Court of the United States for the district of New Jersey.").

[79] *Jackalow*, 66 U.S. (1 Black) at 487.

[80] *Id*. at 487-88.

[81] *Id*. at 488.

[82] The Court's entire discussion was the following: "We have not referred to this boundary of New York for the purpose of determining it, or even expressing an opinion upon it, but for the purpose of saying that the boundary of a State, when a material fact in the determination of the extent of the jurisdiction of a court, is not a simple question of law. The description of a boundary may be a matter of construction, which belongs to the court; but the application of the evidence in the ascertainment of it as thus described and interpreted, with a view to its location and settlement,

between the trial judge's authority to decide issues of law and the jury's authority to decide pure questions of fact and mixed questions of fact and law. The Court also conflated issues of jurisdiction, venue, and substantive criminal law in the course of its brief treatment of the issue. The Court did not fully explicate the respective duties of trial judges and juries for several more decades. It was not until 1895, when the Court decided *Sparf v. United States*, that the Court clearly distinguished between a court's responsibility to decide questions of law and a jury's responsibility to decide questions of fact.[83] And it was not until 1995, when the Court decided *United States v. Gaudin*, that it made clear that juries must decide mixed questions of fact and law in accordance with the trial court's jury instructions.[84] Unlike *Jackalow*, *Sparf* and *Gaudin* justified in detail the separate responsibilities of the trial judge and petit jury. The latter two decisions state the contemporary law; *Jackalow* does not. In short, *Jackalow* did not survive the Court's later rulings in *Sparf* and *Gaudin*. Whatever the precise holding of *Jackalow* might be, it is not the law today that a jury must decide a venue issue along with the factual elements of a charged substantive offense.[85]

There is one aspect of the *Jackalow* opinion, however, that is quite clear. The remedy for trying a defendant found guilty in the wrong court is a new

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belongs to the jury. All the testimony bearing upon this question, whether of maps, surveys, practical location, and the like, should be submitted to them under proper instructions to find the fact." *Id.* at 487-88. One reason why the *Jackalow* opinion is somewhat inscrutable might be that no attorney appeared for Jackalow in the Supreme Court. *Id.* at 485.

[83] 156 U.S. 51, 59-103 (1895). That is why Smith reliance on some of the Supreme Court's and lower federal courts' pre-1895 decisions is mistaken. *See* Br. for Pet. 31-36. *Sparf* made clear that questions of law, like venue, are the for court to resolve, not the jury. Pre-*Sparf* case law is irrelevant.

[84] 515 U.S. 506, 501-15 (1995).

[85] The federal courts of appeals have held that venue is not an element of an offense like the actus reus or mens rea elements. *See*, *e.g.*, United States v. Lanoue, 137 F.3d 656, 661 (1st Cir. 1998); United States v. Rommy, 506 F.3d 108, 119 (2d Cir. 2007); United States v. Perez, 280 F.3d 318, 330 (3d Cir. 2002); United States v. Lee, 966 F.3d 310, 320 n.2 (5th Cir. 2020) (stating that venue is not "an element of the offense or an issue that goes to guilt"); United States v. Griley, 814 F.2d 967, 973 (4th Cir. 1987); United States v. Muhammad, 502 F.3d 646, 652 (7th Cir. 2007); United States v. Kaytso, 868 F.2d 1020, 1021 (9th Cir. 1989); United States v. Stickle, 454 F.3d 1265, 1271-1272 (11th Cir. 2006). Those courts have also concluded that the government need not prove venue beyond a reasonable doubt. *See*, *e.g.*, United States v. Salinas, 373 F.3d 161, 163 (1st Cir. 2004); *Rommy*, 506 F.3d at 119; *Perez*, 280 F.3d at 330; United States v. Robinson, 275 F.3d 371, 378 (4th Cir. 2001); United States v. Lee, 966 F.3d 310, 320 & n.2 (5th Cir. 2020); United States v. Crozier, 259 F.3d 503, 519 (6th Cir. 2001); *Muhammad*, 502 F.3d at 652; United States v. Johnson, 462 F.3d 815, 819 (8th Cir. 2006); United States v. Pace, 314 F.3d 344, 349 (9th Cir. 2002); United States v. Cryar, 232 F.3d 1318, 1323 (10th Cir. 2000); United States v. Little, 864 F.3d 1283, 1287 (11th Cir. 2017); United States v. Morgan, 393 F.3d 192, 195 (D.C. Cir. 2004).

trial, not an acquittal. The last line of the Court's opinion directed the circuit court on receipt of the Court's opinion "to set aside the special verdict, and grant a new trial."[86] On that point, at least, the Court's opinion is pellucid. Jackalow was not entitled to be set free just because he was tried in New Jersey, rather than another district. At the end of the day, therefore, *Jackalow* denies Smith the relief that he seeks.

Jackalow is also but one decision. The Supreme Court has discussed the venue guarantee in a host of additional cases, and none of them requires entry of a judgment of acquittal for a trial initially held in the wrong court.[87]

Venue, Justice Felix Frankfurter wrote, "touch[es] closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests."[88] Those factors are "important" ones "in any consideration of the effective enforcement of the criminal law" raising "deep issues of public policy," rather than "merely matters of formal legal procedure."[89] Nonetheless, when the Supreme Court concluded that a defendant had been charged in the wrong district, the Court did not direct the district court to enter a judgment of acquittal, dismiss the charges with prejudice, or otherwise treat a defendant as if he had been acquitted of the charged offense. The Court merely ordered that the offender be retried.[90]

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[86] *Jackalow*, 66 U.S. (1 Black) at 488.

[87] *See*, *e.g.*, United States v. Rodriguez-Moreno, 526 U.S. 275 (1999); United States v. Cabrales, 524 U.S. 1 (1998); Platt v. Minnesota Min. & Mfg. Co., 376 U.S. 240 (1964); Travis v. United States, 364 U.S. 631 (1961); United States v. Cores, 356 U.S. 405 (1958); Johnston v. United States, 351 U.S. 215 (1956); United States v. Anderson, 328 U.S. 699 (1946); United States v. Johnson, 323 U.S. 273 (1944); United States v. Midstate Horticultural Co., 306 U.S. 161 (1939); United States v. Lombardo, 241 U.S. 73 (1916); Brown v. Elliott, 225 U.S. 392 (1912); Hyde v. United States, 225 U.S. 347 (1912); Haas v. Henkel, 216 U.S. 462 (1910); Armour Packing Co. v. United States, 209 U.S. 56 (1908); Burton v. United States, 202 U.S. 344 (1906); Hyde v. Shine, 199 U.S. 62 (1905); Benson v. Henkel, 198 U.S. 1 (1905); Horner v. United States, 143 U.S. 207 (1892); Palliser v. United States, 136 U.S. 257 (1890).

[88] *Johnson*, 323 U.S. at 276.

[89] *Id.*

[90] *See*, *e.g.*, *Travis*, 364 U.S. at 637 (saying, "since our holding in the main case is that venue was improperly laid in Colorado, the judgment of conviction must be set aside," but without ordering the indictment dismissed with prejudice); *Johnston*, 351 U.S. at 220-23 (affirming one district court order dismissing an indictment and reversing another judgment rejecting a venue challenge without ordering the indictments dismissed with prejudice in either case); *Johnson*, 323 U.S. at 278 (upholding a district court order granting a demurrer that the charges were brought in the wrong jurisdiction); *Midstate Horticultural Co.*, 306 U.S. at 165-67 (same); *Lombardo*, 241 U.S. at 77-79 (upholding district court's grant of defendant's demurrer without ordering the indictment dismissed with prejudice. A demurrer admits the alleged facts but argues that they do not state a claim for relief. As such, the demurrers granted in *Midstate Horticultural Co*. and *Johnson* did not resolve an element of the factual elements of the charges in the defendant's favor, *see* BLACK'S LAW

The same is true when we consider the Supreme Court's other jury trial decisions. The Jury Trial Clauses protect against governmental oppression by interposing a jury of one's peers between the prosecution and a defendant.[91] Nonetheless, the Court has never held that a violation of the jury trial right can be remedied only by entry of a judgment of acquittal or dismissal of the charges rather than awarding the offender a new trial. The Court has not ordered an acquittal or dismissal when the government unconstitutionally excluded potential grand or petit jurors because of their race or sex;[92] when the jury panel contained too few members (viz., five) to qualify as a "jury";[93] when a six-person jury was not unanimous;[94] when adverse publicity, before or during trial, prejudiced the jury's consideration of guilt or innocence;[95] or

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DICTIONARY 498 (9th ed. Bryan A. Garner, Editor-in-Chief, 2009), which is necessary for those orders to have been tantamount to an acquittal, *see*, *e.g.*, *Evans*, 568 U.S. at 318; *Martin Linen Supply Co.*, 430 U.S. at 571.

[91] *See*, *e.g.*, Singer v. United States, 380- U.S. 24, 31 (1965) ("The clause was clearly intended to protect the accused from oppression by the Government . . . ."); 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 101 (2018) (1911) (James Wilson); *id*. at 221-222 (Luther Martin).

[92] *See*, *e.g.*, Taylor v. Louisiana, 419 U.S. 522, 526-38 (1975) (ruling that a state cannot require only women to file an affidavit stating a desire to be subject to jury service); Hernandez v. Texas, 347 U.S. 475, 477-82 (1954) (reversing conviction for discrimination in the selections of grand and petit jurors); Ballard v. United States, 329 U.S. 187, 189-96 (1946) (exercising its supervisory power to set a aside a judgment of conviction where women had been intentionally and systematically excluded from jury service in the defendant's case); Pierre v. Louisiana, 306 U.S. 354 (1939) (reversing conviction for discrimination in the selections of grand and petit jurors); Norris v. Alabama, 294 U.S. 587, 589 (1935) (same); Martin v. Texas, 200 U.S. 319 (1906); Bush v. Kentucky, 107 U.S. 110, 117 (1883); Neal v. Delaware, 103 U.S. 370, 386-98 (1880); Strauder v. West Virginia, 100 U.S. 303, 305 (1879) (setting aside a judgment of conviction when state law disallowed blacks to sit as petit jurors; "There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed, as also in overruling his challenge to the array of the jury, and in refusing to quash the panel."). The Court also has not ordered dismissal with prejudice of an indictment returned by an illegally constituted grand jury. *See*, *e.g.*, Castaneda v. Partida, 430 U.S. 482, 492-501 (1977) (collecting cases); *Hernandez*, 347 U.S. at 477-82; Hill v. Texas, 316 U.S. 400, 405-06 (1942); Smith v. Texas, 311 U.S. 128, 130-32 (1940); Pierre v. Louisiana, 306 U.S. 354 (1939); *Norris*, 294 U.S. at 589; Carter v. Texas, 177 U.S. 442, 447-49 (1900); Gibson v. Missouri, 162 U.S. 555 (18); Neal v. Delaware, 103 U.S. 370, 397 (18); Strauder v. West Virginia, 100 U.S. 303 (1879).

[93] *See* Ballew v. Georgia, 435 U.S. 223 (1978) (holding that a five-member jury is insufficient to qualify as the "jury" required by the Jury Trial Clause).

[94] *See* Burch v. Louisiana, 441 U.S. 130 (1979) (holding that a conviction by a nonunanimous six-member jury violates the Jury Trial Clause).

[95] *See*, *e.g.*, *Pena-Rodriguez*, 580 U.S. 206, 223-30 (2017) (ruling that a defendant was entitled to prove that racial discrimination infected the jury's deliberations in his case); Groppi v. Wisconsin, 400 U.S. 505 (1971) (holding unconstitutional a state law forbidding change of venue in misdemeanor cases as potentially violating the Jury Clause guarantee of an "impartial" jury); Sheppard v.

when a defendant was mistakenly denied the right to any jury trial at all.[96] The Court has not ordered a trial court to enter a judgment of acquittal, or dismissal with prejudice of an indictment, where there was a constitution-based error in the selection of petit jurors, whether that error was based on the Jury Trial Clause or the Equal Protection Clause.[97] In each case, the Court's opinion contemplates that there will be a new trial on the offender's guilt or innocence.

Two cases stand out in that regard. One is *Hill v. Texas*.[98] After being convicted of rape, Hill challenged the indictment against him on the ground that African Americans had been systematically excluded from the pool of potential grand jurors. After reviewing the evidence, the Supreme Court agreed with him.[99] The Court made clear, however, that its ruling in Hill's favor did not bar a re-prosecution. As Chief Justice Harlan Fisk Stone wrote, "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for Texas may indict and try him again by the procedure which conforms to constitutional requirements."[100] The rationale in *Hill* is fully consistent with the one that the Court offered in *Ball* for allowing a retrial when an offender persuades a court that he was prejudiced by a pre-verdict error in his case. The second case is a federal criminal prosecution, *Ballard v. United States*.[101] There, the Court exercised its supervisory power to set aside a judgment of conviction where women had been intentionally and systematically excluded from jury service in the defendant's case. The majority also ordered the indictment to be dismissed because it was returned by a grand jury that suffered from the same infirmity.[102] Nonetheless, the Court again made it clear that the government could seek a new indictment and re-prosecute the defendants for fraud.[103] *Hill* and *Ballard* prove that

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Maxwell, 384 U.S. 333 (1966) (finding that the defendant had been denied a fair trial due to adverse pretrial publicity); Rideau v. Louisiana, 373 U.S. 723, 727 (1963) (when a defendant's confession was videotaped and played on television for the local community, ruling that a change of venue was necessary to ensure that the defendant received a fair trial).

[96] *See*, *e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (ruling that the defendant was entitled to a jury trial for the charge of simple assault).

[97] *See*, *e.g.*, *Taylor*, 419 U.S. at 537-38.

[98] 316 U.S. 400.

[99] *Id*. at 404-05.

[100] *Id*. at 406.

[101] 329 U.S. 187 (1946).

[102] *Id*. at 195-96.

[103] *Id*. at 196 ("In disposing of the case on this ground we do not reach all the issues urged and it is suggested that in so limiting our opinion we prolong an already lengthy proceeding. We are told

errors in the selection of the parties who will decide whether someone should be charged with or convicted of a crime do not immunize a defendant against a second trial.

Relying on the Supreme Court's decision in *Strunk v. United States*,[104] Smith argues that the Supreme Court should adopt the same remedy for venue errors that it has already endorsed for speedy trial shortcomings: dismissal of the indictment.[105] *Strunk* was a short opinion decided before the Court came to focus on the remedial aspects of a ruling in the defendant's favor.[106] *Strunk* concluded that the proper remedy for a Speedy Trial Clause violation is dismissal of the indictment because no remedy other than dismissal can cure the flaw in the trial process.[107] But the Court in *Strunk* expressly distinguished Speedy Trial Clause violations from all others, such as the "failure to afford a public trial, an impartial jury, notice of charges, or compulsory service," all of which can be remedied by a new trial, the Court wrote.[108] *Strunk* therefore does not assist Smith. If trying the accused before a *secret or biased* jury can be remedied by a new trial, surely trying a defendant before the *wrong* jury can be remedied in the same way.

Moreover, it is not clear that the Supreme Court would decide that dismissal is the only available remedy if the issue in *Strunk* were to arise today. The Speedy Trial Clause protects three interests: (1) freedom from unduly prolonged pretrial detention, (2) freedom from the trials and tribulations of a pending criminal charge, and (3) freedom from the potentially prejudicial effect that delay could have on the accused's ability to defend himself at

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that these petitioners will again be before us for the determination of questions now left undecided. But we cannot know that this is so, and to assume it would be speculative. The United States may or may not present new charges framed within the limits of our earlier opinion. A properly constituted grand jury may or may not return new indictments. Petitioners may or may not be convicted a second time.").

[104] 412 U.S. 434 (1973).

[105] It is unclear whether the judgment in Strunk requires dismissal of an indictment *with prejudice*. *Strunk* did not order the indictment dismissed with prejudice, only that it be dismissed. *Id*. at 439 ("Given the unchallenged determination that petitioner was denied a speedy trial, the District Court judgment of conviction must be set aside; the judgment is therefore reversed and the case remanded to the Court of Appeals to direct the District Court to set aside its judgment, vacate the sentence, and dismiss the indictment.") (footnote omitted). If the statute of limitations had not expired, the government could have retried Strunk under a new indictment consistent with the Supreme Court's judgment in *Strunk*.

[106] That began with the Court's 1981 decision in *United States v. Morrison*, discussed *supra* at notes 49-59.

[107] *Strunk*, 412 U.S. at 438-39.

[108] *Id*. at 439.

trial.[109] The Court did not consider in *Strunk* whether other forms of relief would rectify the harms from an unduly delayed trial. The only alternative that the Court considered in *Strunk* was crediting the offender's federal term of imprisonment against the state period of incarceration that he was then serving.[110] Discounting one sentence against another, however, would remedy none of the three harms caused by an unduly delayed trial.

Finally, the Court's statement in *Strunk* that "dismissal must remain 'the only possible remedy'"[111] is implausible. As Stanford Law School Professor Anthony Amsterdam explained:

> On its face, this proposition is incredible. Anglo-American law has long provided remedies for denial of a speedy trial other than dismissal of the prosecution with prejudice. State and lower federal courts enforcing subconstitutional speedy-trial guarantees have frequently found other remedies appropriate; and both lower courts and the Supreme Court have enforced the sixth amendment by other means. Surely, the primary form of judicial relief against denial of a speedy trial should be to expedite the trial, not to abort it. Where expedition is impracticable for some reason, the Supreme Court's repeated recognition of the several distinct interests protected by a right to speedy trial suggests the propriety of fashioning various remedies responsive to the particular interest invaded in any particular case. If the sole wrong done by delay is undue and oppressive incarceration prior to trial, the remedy ought to be release from pretrial confinement; if prolongation of the 'anxiety' and other vicissitudes 'accompanying public accusation' is sufficiently extensive, the remedy ought to be dismissal of the accusation without prejudice; and it is only when delay gives rise to 'possibilities [of impairment of] . . . the ability of an accused to defend himself,' or when a powerful sanction is needed to compel prosecutorial obedience to norms of speedy trial which judges cannot otherwise enforce, that dismissal of a prosecution with prejudice is warranted.[112]

The Court's later decision in *United States v. Montalvo-Murillo* illustrates why dismissal is not the only available remedy.[113] *Montalvo-Murillo* involved a parallel type of issue. The Bail Reform Act of 1984 requires a court to hold a hearing on whether a person should be detained pending trial "immediately

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[109] *See*, *e.g.*, Klopfer v. North Carolina, 386 U.S. 213, 222 (1967); Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 532-33 (1975).

[110] That was the remedy chosen by the federal circuit court. *See* United States v. Strunk, 467 F.2d 969, 972 (7th Cir. 1972), *rev'd*, 412 U.S. 434 (1973).

[111] *Strunk*, 412 U.S. at 440 (quoting Barker v. Wingo, 407 U.S. 514, 522 (1972)).

[112] Amsterdam, *supra* note 109, at 534-35 (footnotes omitted).

[113] 495 U.S. 711 (1990).

upon the person's first appearance before" a judicial officer.[114] In that case, the release hearing was held later, and both the district court and federal court of appeals held that the delay required the offender's release.[115] The Supreme Court reversed, ruling that "a failure to comply with the first appearance requirement does not defeat the government's authority to seek detention of the person charged.[116] "Although the duty" to hold a release hearing at an offender's first appearance is "mandatory," the failure to do so should not deprive the government "of all later powers to act";[117] a more "realistic and practical" approach was preferable[118] given the hustle-bustle that can occur during the pretrial stage of a case.[119] Moreover, a dismissal of the charges "has neither causal nor proportional relation to any harm caused by the delay in holding the hearing" because "a defendant subject to detention already will have suffered whatever inconvenience and uncertainty a timely hearing would have spared him," harms that an order of release cannot remedy.[120] A prompt hearing on the motion of the defendant or government is an adequate remedy.[121] The same rationale would apply to a Speedy Trial Clause claim. The proper remedy is for the defendant (or government) to demand a trial, not to wait until one is held and then seek dismissal of the charges. In sum, post-*Strunk* decisions like *Montalvo-Murillo* illustrate not only that the Court's remedy in *Strunk* was overbroad, but also that the Court would not likely endorse it today.[122]

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[114] 18 U.S.C. § 3142(f) (2018).

[115] United States v. Montalvo-Murillo, 713 F. Supp. 1407 (D.N.M. 1989), *aff'd*, 876 F.2d 826 (10th Cir. 1989).

[116] *Montalvo-Murillo*, 495 U.S. at 717.

[117] *Id*. at 718.

[118] *Id*. at 719, 720.

[119] *Id*. at 710.

[120] *Id*. at 721; Amsterdam, *supra* note 109, at 536 ("Denials of the right to a speedy trial—or, at least those denials which occur (as in *Strunk*) during the court phase of a criminal prosecution—are judicially controllable by other methods than dismissing the prosecution; and it seems intolerable that '[t]he criminal is to go free because [a judge, or the court system] . . . has blundered,' if there are any other satisfactory methods of controlling the blunderers.") (quoting People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.); footnote omitted).

[121] *Montalvo-Murillo*, 495 U.S. at 722.

[122] Several other post-*Strunk* decisions are also relevant. *Morrison*, 449 U.S. 361 (1981), and *United States v. Mechanik*, 475 U.S. 66 (1986), held that, because remedies in criminal cases should be tailored to the injury a defendant suffers, dismissal of an indictment is inappropriate when an error has no prejudicial effect on the trial. Other cases are *California v. Trombetta*, 467 U.S. 479 (1984), and *Arizona v. Youngblood*, 488 U.S. 51 (1988). *Trombetta* and *Youngblood* held that the government's destruction of potentially exculpatory evidence does not violate the Due Process Clause absent evidence that the government acted in bad faith, which effectively serves as a proxy

Finally, there is no good reason to construe Article III or the Sixth Amendment to require the government to prove venue as an element of every federal offense. Any such rule would be irreconcilable with the Supreme Court's decision in *Jackson v. Virginia*.[123] *Jackson* interpreted the Due Process Clause to forbid a conviction if "no rational trier of fact could have found proof beyond a reasonable doubt" from "the record evidence adduced at the trial."[124] In response to the concern that this standard would "invite intrusions upon the power of the States to define criminal offenses," the Court responded that any such fear was unfounded because "the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law."[125] Perhaps, some criminal statutes require proof that a particular offense occurred at a site certain, and those statutes might raise a different issue. But that is not generally the case. Criminal laws are generally concerned with *what* a person did, not *where* he did it. By focusing on the *what* elements of a criminal offense, the clear implication of *Jackson* is that venue is not a necessary element of every criminal offense.

III. THE FIFTH AMENDMENT DUE PROCESS CLAUSE

The final question is whether the Due Process Clause should play a role in this case atop the one played by the Jury Trial Clause.[126] The Supreme Court has occasionally used that clause as an all-purpose backstop forbidding fundamentally unfair pretrial and trial procedures that do not violate a specific constitutional guarantee, but that the Court finds constitutionally unacceptable. The cases in which the Court has followed that approach are ones in which a state deprived a defendant of any semblance of a fair trial or deeply corrupted the fact-finding process. For example, in *Frank v. Mangum*, the Court held that a mob-dominated proceeding was, in effect, a slow-motion lynching rather than the "trial" that due process requires.[127] Similarly, in

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for proof that the evidence would have been exculpatory. *See Youngblood*, 488 U.S. at 57-59. Those cases hold that dismissal of an indictment would be an inappropriate remedy for a Due Process Clause violation that does not prejudice the accused's ability to defend himself. That rationale applies here too.

[123] 443 U.S. 307 (1979).

[124] *Id*. at 324 (footnote omitted).

[125] *Id*. at 324 n.16.

[126] U.S. CONST. amend. XIV, § 1 ("No State . . . shall deprive any person of life, liberty, or property, without due process of law . . . .").

[127] 237 U.S. 309, 335 (1915) ("We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference

Tumey v. Ohio, the Court ruled that paying a trial judge by the number of convictions obtained in his court is impermissible because it is inherently likely to bias a judge in the government's favor.[128] Since *Frank* and *Tumey*, the Court has condemned a host of other state practices that effectively denied a defendant a fair trial. Those now-forbidden practices include using perjured testimony or a coerced confession to establish a defendant's guilt;[129] trying a defendant who, because of a mental disease or defect, is incapable of understanding what a trial is (or that he is on trial) or from consulting with defense counsel;[130] and trying a defendant under circumstances that, due to adverse pretrial publicity or in-court media coverage, corrupt the integrity of the proceedings.[131] The question that the Court decided to review in *Smith* is not limited to the Jury Trial Clause, so the Justices could address the relevance of the Due Process Clause.[132] If they do, the issue would be whether that clause should bar a retrial of an offender when neither the Double

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with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."); *see also*, *e.g.*, Moore v. Dempsey, 261 U.S. 86, 88-90 (2013) (ruling that the defendant was entitled to a hearing on his claim that he was the victim of a mob-dominated trial).

[128] 273 U.S. 510, 531 (1927) (holding unconstitutional a state law basing a judge's salary on the penalties imposed following a conviction); *cf.* Connally v. Georgia, 429 U.S. 245 (1977) (same, the number of search warrants that a magistrate issues).

[129] *See*, *e.g.*, Pyle v. Kansas, 317 U.S. 213, 215–16 (1942) (ruling that due process forbids a prosecutor from intentionally using perjured testimony to convict a defendant); Brown v. Mississippi, 297 U.S. 278, 286–87 (1936) (same, using a defendant's coerced confession); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (same, proving a defendant's guilt entirely through perjured testimony); *cf.* Brady v. Maryland, 373 U.S. 83, 86–87 (1963) (ruling that due process forbids the prosecution from not disclosing to the defense exculpatory evidence on the issues of guilt or innocence). That rule includes knowingly allowing perjured testimony to go uncorrected. Napue v. Illinois, 360 U.S. 264, 265, 269–70 (1959) (ruling that due process forbids a prosecutor from knowingly allowing a witness's perjury to go uncorrected at trial).

[130] *See*, *e.g.*, Drope v. Missouri, 420 U.S. 162, 171–72 (1975) (ruling that a defendant has a right not to be tried if he is mentally incompetent and cannot understand the nature of the proceedings or assist in his defense); Pate v. Robinson, 383 U.S. 375, 385–86 (1966) (discussing procedures necessary at a hearing held to determine whether a defendant should be psychiatrically examined for his competency to stand trial); Dusky v. United States, 362 U.S. 402, 402 (1960) (adopting a standard to determine whether a defendant is competent to stand trial)

[131] *See* Estes v. Texas, 381 U.S. 532 (1965) (holding that a defendant was denied a fair trial in that case because of the televised proceedings) (limited by Chandler v. Florida, 449 U.S. 560, 570-74 (1981)); Sheppard, 384 U.S. at 335 (same, due to massive and prejudicial pretrial publicity).

[132] *See supra* note 18.

Jeopardy Clause nor the Jury Trial Clause require such relief. We think not, for three reasons.

The first one is that, in the due process cases just discussed, the Supreme Court did not rule that a judgment of acquittal was the necessary or an appropriate remedy for the errors that occurred. In fact, the Court did not establish a new law of remedies for the due process violations that the Court found in those cases. In each case, the Supreme Court relied on the Due Process Clause only as a means of defining the substantive right that a defendant is entitled to receive as a component of a fundamentally fair trial. The Court did not say, let alone hold, that an acquittal is the only remedy that could both remedy the flaw and prevent a state from repeating its mistake in other cases. Even in cases like *Moore v. Dempsey*,[133] where the integrity of the proceedings was so despoiled by a mob's demand for the defendant's blood that "the whole proceeding" was but "a mask" for a lynching,[134] the Court did not order the charges to be dismissed, only that, if the trial happened as the habeas petitioners averred, they would have been denied a fair trial. The Court's 1966 decision in *Sheppard v. Maxwell* makes that point well.[135] There, the Court determined that the defendant was denied a fair trial due to adverse pretrial and in-trial publicity,[136] along with disruptive courtroom influences.[137] The Court only ordered the defendant to be released from custody

[133] 261 U.S. 86 (1923).

[134] *Id*. at 91.

[135] 384 U.S. 333 (1966).

[136] "For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl." *Id*. at 354-55 (footnote omitted).

[137] "The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the

"unless the State puts him to its charges again within a reasonable time."[138] *Sheppard* therefore expressly contemplated that the denial of a fair trial did not require the accused to be acquitted of the crime. Accordingly, the Court's due process decisions cited above cannot justify disregarding the rule stated in *Ball*, *Scott*, and *Morrison* that an adequate remedy for a flawed trial is a new trial.

The second reason is that the Supreme Court has twice held that, in connection with the violation of parallel Bill of Rights provisions, dismissal of the indictment is an overbroad remedy. In *United States v. Blue*[139] and *United States v. Morrison*,[140] the Court ruled that violations of the Fifth Amendment Self-Incrimination Clause and Sixth Amendment Counsel Clause, respectively, do not justify dismissal of an indictment merely because an error occurred.[141] Those decisions are directly relevant here because the remedy that Smith seeks—entry of a judgment of acquittal—is not materially different from the relief that the Court found inappropriate in those cases. To be sure, the Court did not expressly discuss the option of entering a judgment of acquittal as an alternative to dismissal of an indictment in either *Blue* or *Morrison*. But the Court's Double Jeopardy Clause decisions in the *Ball* and *Scott* cases make clear that a judgment of acquittal is appropriate only when a court finds the evidence insufficient to convict.[142] It makes no sense to assume that the Court was ignorant of its Double Jeopardy Clause precedent when it decided *Blue* and *Morrison*.

The third reason is that there is no justification for creating an entirely new acquittal right beyond what the Double Jeopardy Clause already provides. That is the lesson from the Supreme Court's decision in *Graham v. Connor*.[143] The question there was whether the police had used excessive force when arresting Graham. Traditionally, the lower federal courts had treated that claim as a matter of substantive due process.[144] The Supreme Court found that approach misconceived. As the Court explained:

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privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation." *Id*. at 355.

[138] *Id*. at 362.

[139] 384 U.S. 251 (1966).

[140] 449 U.S. 361 (1981).

[141] *See supra* text accompanying notes 51-59 (discussing *Blue* and *Morrison*).

[142] *See supra* text accompanying notes 36-48 (discussing *Ball* and *Scott*).

[143] 490 U.S. 386 (1989).

[144] *Id*. at 392-95; *see*, *e.g.*, Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973).

> Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons . . . against unreasonable . . . seizures" of the person. . . . Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.[145]

That approach makes sense here, too. The only difference is that here the Double Jeopardy Clause—rather than the Fourth Amendment—supplies "the explicit textual source of constitutional protection" against the conduct that Smith challenges: a retrial. But that clause, as explained above, allows Smith to be retried. As the Supreme Court made clear in *Ball*, *Scott*, and other cases, the Double Jeopardy Clause balances the competing interests and clearly defines different consequences for the two materially different judgments that (1) the jury should never have been allowed to deliberate on the charges because the proof of guilt was deficient, and (2) a prejudicial error occurred at the trial of an otherwise guilty defendant. The former is tantamount to an acquittal and must be treated as such, thereby raising a shield against a second prosecution on the indictment. The latter means that an evidentiary or procedural mistake was made that requires correction before we can be confident that only a guilty person was convicted. There is no room left for the Due Process Clause to ensure that no innocent person is convicted and punished. Indeed, some trial errors—the denial of a public trial, for example—might not raise any concern that an innocent person was found guilty. Nonetheless, the criminal justice system's systemic interest in guaranteeing public trials is sufficiently weighty to overcome our general reluctance to treat every trial error as fatal and requires that the defendant be afforded a new trial even if he is indisputably as guilty as sin.[146] Unless every trial error requires an appellate court to enter a judgment of acquittal, there is no good reason why errors like the one in *Smith* case should receive a favored status, leading to acquittal whenever they occur.

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[145] *Graham*, 490 U.S. at 394-95 (footnote omitted).

[146] *See* Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984) (stating that the denial of the right to a public trial cannot be harmless).

IV. CONCLUSION

The *Smith* case is proof that not every case that the Supreme Court reviews poses a difficult issue of constitutional law. More than a century ago, the Supreme Court held in *Ball* that, if an appellate court finds that the defendant was prejudiced by an error that occurred at his trial, the court must set aside a judgment of conviction and order a retrial. That proposition governs this case. The circuit court of appeals held that Smith was tried in the wrong federal district court and awarded him a new trial. The only exception to that rule exists when an appellate court concludes that the evidence was insufficient to support the jury's verdict. In that event, the court must not only set aside the conviction but also order the entry of a judgment of acquittal, which bars a retrial. Unfortunately for Smith, his case does not fit into that exception. Whether considered as a matter of law or logic, trying a defendant in the wrong zip code is not tantamount to failing to prove his guilt of a crime. Smith is entitled to receive the new trial that the court of appeals awarded him, but he is not entitled to go scot-free, at least not yet.

Other Views:

- Brief for Petitioner, Smith v. United States, 2022 WL 17586971 (No. 21-1576), *available at* https://www.supremecourt.gov/DocketPDF/21/21-1576/253367/20230127165939742_2023-01-27%20No.%2021-1576%20-%20Smith%20Merits%20Brief.pdf.
- Brief of Professor Drew L. Kershen & Professor Brian C. Kalt as Amici Curiae in Support of Petitioner, *Smith* (No. 21-1576), *available at* https://www.supremecourt.gov/DocketPDF/21/21-1576/253972/20230203145310122_Smith%20v.%20US--Amicus%20Brief.pdf.
- Brief for the Rutherford Institute, the Cato Institute, & the National Association for Public Defense as Amici Curiae in Support of Petitioner, *Smith* (No. 21-1576), *available at* https://www.supremecourt.gov/DocketPDF/21/21-1576/253969/20230203144740733_Smith%20v.%20United%20States%20--%20Merits-Stage%20Amicus%20Brief.pdf.
- Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, *Smith* (No. 21-1576), *available at* https://www.supremecourt.gov/DocketPDF/21/21-1576/253998/20230203155838040_NACDL%20Smith%20Amicus%20Brief%20AS_FILED.pdf.