IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2011
No. 11-1327

LAMAR EVANS,
Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN
Respondent.

On Petition for Writ of Certiorari
To The Michigan Supreme Court

Answer to Petition For Writ of Certiorari

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Statement Of The Question

I.

A directed verdict—or "judicial acquittal" in a jury trial—is a resolution, correct or not, of one or more of *the elements* of the offense. Did the Michigan Supreme Court correctly hold that no acquittal results—and consequently no double jeopardy bar to retrial obtains—when the trial court, at the urging and argument of the defense and over the opposition of the prosecution, aborts a trial by resolving against the prosecution a fact that is unmistakably *not* one of the elements of the offense?

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Statement of the Case

At trial defense counsel argued that the wrong charge had been brought. He argued that "the burning of real property means to the exclusion of burning an occupied or unoccupied dwelling." (record, III, 86). Because there was some evidence that the owners of the structure were living in the house, there was insufficient proof of burning real property, (record, III, 87), because an element, argued counsel, of burning real property "is that the building was not a dwelling house....the only evidence in this case is that this was an occupied dwelling, or that it was capable of being lived in" (record, III, 88). The trial court noted that the witness had said they were "in the process" of moving in, with small appliances, and that there was no water, gas, or electricity. (record, III, 89). Counsel asked for a directed verdict because "the fourth element is that the building was not a dwelling house....the People have to prove that it was not a building house" (record, III, 89-90). The prosecution argued that the statute (MCL 750.73) does *not* require that the building be or not be a dwelling, the statute itself not so requiring (record, III, 90-91). The prosecutor also noted that the standard criminal jury instructions (which defense counsel cited as to the "fourth element") are only guidelines.

The trial judge held that "there are not optional elements in 31.3. All of them are required. And the instructions are not a guide. They are what is required by law" (record, III, 91). Reading from the commentary to the jury instruction, the court noted that for this offense the "legislature simply

eliminated the element of habitation" (making it a less serious offense than arson of a dwelling) (record, III, 92). The trial judge stated that the statute, MCL 750.73, "Specifically says it cannot be a dwelling" (Appendix page 8; record, III, 92). The trial judge then purported to grant a "directed verdict" (record III, 94).

The Michigan Court of Appeals reversed, finding both that the trial judge's erred as a matter of law in requiring proof, as the defense urged, that the structure was not a dwelling, there being no such element, and that double jeopardy did not bar retrial, there being no "acquittal" of any sort.[1] The Michigan Supreme Court reached the same conclusions: "We hold that when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred."[2] Petitioner has now filed for certiorari.

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[1] *People v Evans*, 288 Mich.App 410, 794 N.W.2d 848 (2010).

[2] *People v Evans*, 491 Mich. 1, __N.W.2d__ (2012).

Reasons the Writ Should Be Denied

I.

A directed verdict or judicial acquittal in a jury trial is a resolution, correct or not, of one or more of the elements of the offense. As a matter of state law, the offense of burning a building or other structure unquestionably does not have as an element that the structure was *not* a dwelling. Double jeopardy does not preclude retrial after a trial court's purported "directed verdict," entered on defendant's motion, which finds that the prosecution has failed to prove a non-element, or, put another way, a "faux" element.

A. Introduction

One thing is clear in this case—no defense wish to have this case determined by the jury was thwarted, the defense seeking—successfully—to *avoid* a jury resolution of the case by having the trial judge take it from the jury. Petitioner had no interest in his "valued right to have his trial completed by a particular tribunal,"[3] but *sought* its termination, and by urging upon the trial court the erroneous enumeration of the elements of the offense that the trial court accepted. The case involves, then, no attempt to harass the defendant through repeated prosecutions, as all the the

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[3] See e.g. *Gori v. United States*, 367 U.S. 364, 371, 81 S.Ct. 1523, 1527 (1961).

People sought and seek is one full and fair opportunity to have the case decided by a jury.

B. "Judicial Acquittals" In Jury Trials and the Protection Against Double Jeopardy

The prohibition in the federal constitution against double jeopardy was, as is commonly understood, derived from the common-law English pleas of autrefois acquit and autrefois convict. Blackstone stated that:

> ...the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once *fairly* found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.[4]

Blackstone also observed that the:

> ...plea of autrefois convict, or a former conviction for the same identical crime...is a good plea in bar to an indictment. And this depends upon

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[4] 4 Blackstone's Commentaries 335.

> the same principle as the former, that no man out to be twice brought in danger of his life for one and the same crime....[5]

These pleas in bar were a reaction to generations of multiple prosecutions, which were "so commonplace that the only people to escape such a fate were those capable of surviving the tortuous physical battles of trial by ordeal."[6]

This tradition of the pleas in bar of autrefois acquit and autrefois convict, each of which required a judgment by the jury in a prior proceeding as a necessary prerequisite, was carried over to the legal tradition of the colonists.[7] New Hampshire was the first colony to specifically recognize the jeopardy bar in its post-revolutionary constitution, providing that "No subject shall be liable to be tried, after an acquittal, for the same crime or offence."[8] Courts in other states also recognized this form of plea in bar.[9] This rich history was thus before the First Congress which proposed the Bill of

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[5] 4 Blackstone's Commentaries at 329-331.

[6] See "The Double Jeopardy Clause of the Fifth Amendment," 26 Am Crim L Rev 1477, 1479 (1989).

[7] See e.g. the Massachusetts Body of Liberties of 1641.

[8] N.H. Const, art I, sec. 16 (1784).

[9] See 26 Am Crim L Rev at 1480-1481.

rights, including the double jeopardy prohibition. As originally proposed by Madison, the clause simply stated: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence...."[10] The original amendments submitted to the House for consideration included an amendment to prohibit a "second trial after acquittal." The language which evolved prohibiting more than "one trial" was roundly debated, as concern was expressed that this language might prevent a second trial even where sought by the defendant on a claim of error after a conviction, whereas the common law was to the contrary. The result was the language now appearing in the Fifth Amendment jeopardy clause, referring, significantly, to *one jeopardy*, rather than *one trial*.[11]

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[10] 1 Annals of Cong 434.

[11] Indeed, for this reason—the use of "jeopardy" rather than "trial"—no less a luminary than Justice Oliver Wendell Holmes believed that acquittals were reviewable for error. See Holmes, dissenting, in *Kepner v. United States,* 195 U.S. 100, 134-135, 24 S.Ct. 797, 806 - 807 (1904): "At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny.. . . it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of the cause. Everybody agrees that the principle in

Thus, our jeopardy clause is an amalgam of common law pleas in bar, which required an actual judgment in a prior proceeding before the bar could be effectively pled. As stated by Justice Story at a time very much closer to the ratification of the Bill of Rights, the double jeopardy clause was understood to mean "that a party shall not be tried a second time for the same offense, after he has once been convicted, or acquitted of the offense charged, by the *verdict of a jury, and judgment passed thereon for or against him*."[12] The historical underpinning of the jeopardy protection, then, with regard to acquittals, is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of

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its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. . . . If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm."

[12] Story, 3 *Commentaries on the Constitution* (1833) § 1781, p. 659 (emphasis added).

anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[13]

The development of the modern doctrine of "judicial acquittals" began in the early 1960's with *Fong Foo v United States*.[14] There a corporation and two of its employees were brought to trial for conspiracy, as well as a substantive offense. After seven days of trial, and the promise of many more, and while the fourth government witness was testifying, the district judge directed the jury to return verdicts of acquittal as to all respondents, and a formal judgment of acquittal was entered. The trial judge's action was based on alleged misconduct of the assistant United States Attorney, and a supposed lack of credibility of the witnesses to that point. The government appealed, and the Circuit Court of Appeals reversed, holding that the district court had no authority to grant the directed verdict of acquittal under the circumstances of the case. The Supreme Court, though agreeing with the Court of Appeals that the "acquittal was based upon an egregiously erroneous foundation," nonetheless held that the verdict of acquittal was "final and could not be reviewed." In its per curium opinion, which stretches to amount to a page and one half, the Court reached this conclusion without any analysis of whether a "judgment of acquittal" either entered or ordered by the trial judge, rather

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[13] *Green v United States*, 355 US 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

[14] *Fong Foo v United States*, 369 US 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962).

than reached by the jury through its own deliberations, falls within the protections of the double jeopardy clause as the scope and purpose of that clause are revealed in history.

Fong Foo was followed and elaborated upon in what is now the lead case, *United States v Martin Linen Supply*,[15] central to the question here. A judgment of acquittal was entered on defense motion after the jury had been discharged because of an inability to agree. Focusing on the jeopardy interest against the prevention of multiple trials, the Court found jeopardy offended by the prosecution's appeal because a successful government appeal would result in "another trial." 51 L Ed 2d at 650. Though certainly second trials are permissible in some circumstances, continued the Court, this is not so after an acquittal, which the Court then defined as "a resolution, correct or not, of some or all of the factual elements of the offense charged"(in the context of what might be called a "judicial acquittal" by the entry of a directed verdict of acquittal).[16]

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[15] *United States v. Martin Linen Supply Co*, 430 U.S. 564, 571, 97 S Ct 1349, 51 L.Ed.2d 642 (1977).

[16] Westen and Drubel, in "Toward A General Theory of Double Jeopardy," 1978 Sup Ct Rev 81 (1979) take the view that when a trial judge rules as a matter of law that the evidence and inferences therefrom, viewed in the light most favorable to the government, would not support a finding of guilt beyond a reasonable doubt, that ruling should be "freely reviewable on appeal because, by

In the present case, the offense of burning a building or other structure does not have as an element that the structure was *not* a dwelling. When defendant moved for a directed verdict on this ground the prosecution argued that the statute (MCL 750.73) does not require that the building be proven to be other than a dwelling. (III, 90-91). The prosecutor also noted that the standard criminal jury instructions (which defense counsel cited as to the "fourth element") are only guidelines. The trial judge held that "there are not optional elements in 31.3. All of them are required. And the instructions are not a guide. They are what is required by law" (III, 91). Reading from the commentary to the jury instruction, the court noted that for this offense the "legislature simply eliminated the element of habitation" (making it a less serious offense than arson of a dwelling) (III,

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hypothesis, it does not depend on an assessment of credibility or weight of evidence," those questions by definition being resolved in favor of the Government. Current doctrine "tends to distort the trial process," as a judge may rule in a respondent's favor and shield his ruling from review, by making it before the jury returns a verdict, thereby not only causing an "acquittal" that "might not otherwise occur," but also "guaranteeing that his ruling will never be reviewed." Westen and Drubel, at 155. Respondent agrees that a directed verdict of acquittal is a ruling of law—and one which plainly might be mistaken, as if entered after a jury verdict of guilty the government may appeal and an appellate court may set aside the "judicial acquittal" as erroneous, restoring the jury verdict.

92). The trial judge stated that the statute, MCL 750.73, "Specifically says it cannot be a dwelling" (III, 92). The trial judge then granted a purported "directed verdict" (III, 94).

What occurred here, then, was *not* a directed verdict, as the Michigan Supreme Court properly held. "The trial court's characterization of its ruling is not dispositive, and what constitutes 'an acquittal' is not controlled by the form of the action."[17] A directed verdict constitutes a "judicial acquittal" when it is a determination that as to one or more of the *elements* of the offense, no rational jury could, on the evidence, find guilt proven beyond a reasonable doubt. The trial judge here put the burden of proof on the People on something that is *not* an element, and thus her decision could not have constituted a directed verdict as defined in *Martin Linen.*

Several cases from other jurisdictions illustrate the point. In *Commonwealth v Hosmer*,[18] a decision of the Massachusetts Court of Appeals, during the examination of the Commonwealth's first witness the prosecutor moved to amend the to reflect that the offense charged had occurred a day earlier than stated in the charging document. Defense counsel objected, and the judge denied the motion and terminated the trial. The Commonwealth acknowledged on appeal that the judge uttered, "not guilty," as he left the bench, and

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[17] *People v. Mehall*, 454 Mich. 1, 5 (1997).

[18] *Commonwealth v Hosmer*, 727 NE2d 537 (Mass App, 2000).

the District Court docket, by a check mark, recorded a finding of not guilty.[19]

The Court of Appeals agreed that "If there was a finding of not guilty, principles of double jeopardy prevent a retrial of the defendant on the same charge." But, said the court, "[i]n considering 'the exact nature of the action taken by the District Court judge,'. . . we are not bound by labels or checkmarks on a form, but we inquire whether there was a resolution of any of the facts that make up the offense charged. We conclude that the judge dismissed the Commonwealth's complaint, and that this was an abuse of discretion" for the "date is not an essential ingredient of the offense. . . ."[20] The court concluded that the trial judge, despite his characterization of his actions as an acquittal, had aborted the trial because "he thought there was a fatal variance between the facts and the complaint and he had determined not to permit an amendment of the complaint. The true nature of the judge's action, therefore, was to dismiss the complaint with prejudice in light of the defense objection,"[21] a dismissal the court found inappropriate given that there was "not even a hint of prejudice to the defendant flowing from a one-day change of date in the complaint."[22] Also, in

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[19] *Hosmer*, at 538.

[20] *Hosmer*, at 538, 539.

[21] *Hosmer*, at 539.

[22] *Hosmer*, at 539.

United States v Maker[23] the third circuit, pointing to several *post-Martin Linen Supply* decisions,[24] found that it was "generally understood" that the test to require an acquittal is "only when, in terminating the proceeding, the trial court actually resolves in favor of the defendant a factual element necessary for a criminal conviction." Thus the appeal of the government in the case before it, the court concluded, was "barred only if the district court's legal determination about the elements of a single scheme conviction is correct."[25] Because that ruling was incorrect, the trial court misunderstanding the actual elements of the offense, the government appeal, and retrial, were not precluded by jeopardy.[26]

Similarly, in *State v. Korsen*[27] the State appealed a directed verdict of acquittal, and the Idaho Supreme Court framed the issues as first, "Did the magistrate err by granting Korsen's Rule

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[23] *United States v Maker*, 751 F.2d 614, 622 (CA 3, 1984).

[24] *Carter v. Estelle,* 677 F.2d 427, 452-53 (CA 5, 1982); *United States v. Dahlstrum,* 655 F.2d 971, 974 (CA 9, 1981); *United States v. Moore,* 613 F.2d 1029, 1037 (CA DC,1979); *Sedgwick v. Superior Court for the District of Columbia,* 584 F.2d 1044, 1049 (CA DC, 1978).

[25] *Maker*, at 622.

[26] *Maker*, at 623-624.

[27] *State v. Korsen* 69 P.3d 126 (Idaho,2003).

29 motion for acquittal based upon the State's failure to prove a legitimate reason for asking Korsen to leave the premises, when the statute has no such requirement as one of its elements?"; and second, "Is Korsen protected by double jeopardy principles from a retrial on the trespass charge?"[28] The court, citing the test of *Martin Linen Supply,* found that the lower court "as a result of legal error, determined that the government could not prove a fact that is not necessary to support a conviction," so that what had occurred was not an acquittal, and appeal and retrial were thus not barred.[29]

C. Conclusion

Petitioner argues that in *Maker* and in the Michigan Supreme Court decision here is created an "extra element exception" to the rule of *Martin Linen Supply* that cannot "withstand scrutiny." But it is petitioner's reading that cannot withstand scrutiny, as it makes the language employed in *Martin Linen Supply* utterly meaningless. This Court defined an acquittal with reference to the factual "elements" of the offense. Petitioner would have jeopardy bar retrial if the trial court resolves *any* fact against the People so as to abort the trial, whether that fact is an element under the statute of the offense or not; thus, if the defense argued that the offense must be proven to have been committed on a Tuesday and there was no such

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[28] *Korsen*, at 131.

[29] *Korsen*, at 137.

proof in the case, and the statute in fact contained no such element, if the trial judge concurred and aborted the trial, under petitioner's view double jeopardy would bar retrial. This converts the protection of the double jeopardy clause into a parlor trick. But *Martin Linen*'s analysis is *necessarily* tied to the elements of the offense, for an offense can only be "resolved" in any fashion with reference to its elements.[30] *Maker* and the Michigan Supreme Court here are correct.

Indeed, Respondent would urge that *Martin Linen* itself goes too far, and that to call a modern directed verdict an "acquittal" for jeopardy purposes is not compelled by either the text or history of the jeopardy clause. A judge granting a motion for directed verdict does not "resolve" an element (correctly or incorrectly), as the judge is not the factfinder, and is prohibited from weighing the evidence or assessing the credibility of witnesses, essential tasks of the resolution of the elements by the jury. The trial judge, rather, decides whether, as *a matter of law*, any rational factfinder *could* find guilt on an element or elements, taking the proofs in the light most favorable to the prosecution, and can most

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[30] When this court referred in *Martin Linen* to a "resolution, correct or not, of some or all of the factual elements of the offense charged" it was referring to an evidentiary resolution of the proofs on the element, even if mistaken, and even if a lack of proof was caused by an erroneous evidentiary ruling; it plainly was *not* referring to a legal determination as to *what* elements the statute demands be proven.

assuredly be mistaken (even under current law, a post-guilty verdict judgment notwithstanding the verdict, or judgment of acquittal, may be set aside and the jury verdict reinstated, as may a finding of insufficiency of the evidence by an appellate court). Justice would be served, and principles of jeopardy not offended, if erroneous directed verdicts of acquittal could be reviewed and set aside, and a full and fair opportunity to persuade the jury had in these circumstances.[31]

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[31] See *Kepner*, supra, and Westen and Drubel, "Toward A General Theory of Double Jeopardy," supra.

Relief

WHEREFORE, the People of the State of Michigan request that the petition for certiorari be denied.

Respectfully submitted,

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