No. 11-1327

In The
Supreme Court of the United States

LAMAR EVANS,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. As Petitioner's Case Demonstrates, There Is No Distinction, Much Less a Constitutionally Significant Distinction, Between a Directed Verdict Based On a Misconstruction of an Element and a Directed Verdict Based On the Addition of an Element.

Respondent and the United States recognize that this Court has held repeatedly that a trial court's legal error as to the elements of the offense does not make the decision to grant a directed verdict reviewable. But they insist that the Michigan Supreme Court was correct to draw a distinction between a legal error misinterpreting an element so as to increase the prosecution's burden and a legal error adding an element so as to increase the prosecution's burden.

As Petitioner demonstrated in his brief, this "distinction" is not just unworkable; it is entirely devoid of substance. Elements are nothing more than a set of facts which the prosecution must prove to win a conviction. There is nothing magical or talismanic about how the elements of a particular crime are numbered and organized. But, according to the Michigan Supreme Court, Respondent, and the United States, it is outcome determinative whether a particular fact that the prosecution is not actually required to prove is labeled as a gloss on an existing element or as a separate element.

This approach is directly contrary to this Court's teachings that whether an acquittal has occurred is not to be determined by labels. *See United States v. Martin Linen Supply Co*., 430 U.S. 564, 571 (1977) ("we have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action.") (citations omitted). Instead, the question is whether the trial court "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *Id.* at 572. That is, the question is the substantive one of whether the trial court actually made a ruling on the defendant's innocence, as opposed to a ruling intended to serve some other purpose. *See United States v. Scott*, 437 U.S. 82, 97-101 (1978).

Petitioner will not fully reprise his discussion of the trio of post-*Martin Linen* cases, *Arizona v. Rumsey*, 467 U.S. 203 (1984); *Smalis v. Pennsylvania*, 476 U.S. 140 (1986); and *Smith v. Massachusetts*, 543 U.S. 462 (2005). Petitioner's Brief 16-19, 23-25. In each of these cases, the Court held the trial court ruling was an acquittal even though the ruling could equally well be characterized either as adding an element to the offense or as misconstruing an element. It is telling that Respondent and the United States make no serious effort to explain why the alleged trial court errors in each of these cases could not be considered as adding elements. Instead, the best they can do is to point out that the trial courts in those cases *did not say they were adding elements.*

Rumsey proves the point. The trial court's legally erroneous conclusion – that the "pecuniary gain" aggravating circumstance required the prosecution to prove that a killing was committed pursuant to a contract – indisputably required the prosecution to prove a fact not actually found in the statute. Whether one calls that added fact an "extraneous element" or a "misconstruction of an existing element" is purely a matter of labeling.

Respondent has no answer to this point, so it simply tries to reinforce the labeling by claiming that *Rumsey* "held that the misconstruction of the 'pecuniary gain' aggravating circumstance by the trial judge did not change the fact that the judge, as trier of fact, has 'acquitted' the defendant of this 'element.'" Respondent's Brief 19. But despite Respondent's use of quotation marks, the word "element" never appeared in *Rumsey*; instead, this Court observed that "the trial court relied on a misconstruction of the *statute* defining the pecuniary gain aggravating circumstance." 467 U.S. at 211 (emphasis added).

Exactly so here; the trial court in Petitioner's case relied on the commentary to the standard criminal jury instruction, which misconstrued the *statute* with which Petitioner was charged. Absolutely nothing in *Rumsey* turned on whether the error was labeled as adding an "element" to the aggravating circumstance or as misconstruing an "element" of the aggravating circumstance.

The United States' attempt to distinguish *Rumsey* fares no better. According to the United States, the legal error in *Rumsey* "was not about the existence *vel non* of an 'element' of the crime of capital murder. Instead, as in *Smith* and *Smalis*, it was about what evidence would suffice to prove that the defendant had in fact killed for pecuniary gain." Brief of United States at 20-21.

So, according to the United States, *Rumsey* would have been an entirely different case if the trial judge, instead of ruling that the statutes "are intended to apply to a contract-type killing situation and not to a robbery, burglary, etc.," *Rumsey*, 467 U.S. at 206, had ruled, "The pecuniary gain aggravating circumstance contains an element that the killing must be committed pursuant to contract and I find no contract here." According to the United States, if the judge had made the latter ruling instead of the former, Rumsey could have been retried even though the two rulings mean precisely the same thing. That argument thus runs directly contrary to the bedrock Double Jeopardy Clause principle "that the trial judge's characterization of his own action cannot control the classification of the action." *Scott*, 437 U.S. at 96 (quotation marks and citation omitted).

The United States' argument illustrates, perhaps better than Petitioner ever has, that the Michigan Supreme Court's "distinction" is nothing but a game of wordplay. The Double Jeopardy Clause bar does not turn on labels and it does not turn on clever semantics.

It is even more telling that Respondent and the United States have no real answer to the point that *Petitioner's case* could just as easily have been treated as a "misconstrued element" case as an "added element" case. All that Respondent and the United States can do is stress that trial counsel and the trial court *labeled* the extra fact as a "fifth element." But as Petitioner has already demonstrated, Petitioner's Brief 27, the trial judge could have made precisely the same ruling by misconstruing the second element (that "the property that was burned was a building or any of its contents") to require proof that the "building" be something other than a dwelling house.

Once again, the Double Jeopardy Clause bar on post-acquittal proceedings turns on substance, not on labels. The "distinction" the Michigan Supreme Court drew is illusory.

Respondent and the United States labor to defend that "distinction" as necessarily flowing from the Court's definition of judicial acquittal in *Martin Linen*, as a "ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 571. But that reading of *Martin Linen* is hopelessly myopic given the Court's decisions in *Rumsey*, *Smalis,* and *Smith*, all of which turned on the trial courts' alleged addition of extra facts to the elements of the offenses. And that reading is even more myopic given *Scott*, in which this Court stressed repeatedly that the line drawn in *Martin Linen* is between a decision terminating trial proceedings

because of a finding, correct or not, that the defendant is not guilty and a decision terminating trial proceedings for other reasons.

If any more proof were needed that the Michigan Supreme Court's reading of *Martin Linen* is unsustainable, *Burks v. United States*, 437 U.S. 1 (1978), cited by both Respondent and the United States, supplies it. In *Burks*, the defendant, on trial for armed bank robbery, moved for a judgment of acquittal on the ground that the Government had failed to overcome his affirmative insanity defense. *Id.* at 3. The trial court denied the motion but the appellate court held that the Government had, in fact, failed to overcome Burks' insanity defense. *Id.* at 3-4. This Court found that the Double Jeopardy Clause barred a retrial because it was "unquestionably true that the Court of Appeals' decision 'represente[d] a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id*. at 10 (quoting *Martin Linen*, 430 U.S. at 571).

Under Respondent's and the United States' reading of *Martin Linen*, the decision in *Burks* makes no sense because the Government's failure to disprove Burks' *affirmative* insanity defense did not literally establish the absence of any of the "elements" of armed bank robbery. But *Burks*, which was decided the same day as *Scott*, makes perfect sense because both *Burks* and *Scott* recognize that the *Martin Linen* test is not dependent on the way a jurisdiction happens to group and label the elements of its offenses. Instead, the test is designed to identify those rulings

terminating proceedings because of a finding that the defendant is innocent. More precisely, the test is designed to identify those cases where "it is plain that the [trial court] evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *Scott*, 437 U.S. at 97 (quoting *Martin Linen*, 430 U.S. at 572). Or as the Court put the distinction between reviewable and non-reviewable rulings in *Burks*, "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant." 437 U.S. at 15.

If this Court were to hold that a prosecutor may appeal an acquittal so long as he or she could make an argument that the trial judge effectively added an element to the charged offense, there is no question that such appeals would routinely be filed following directed verdicts. Many defendants would be forced to live in a state of continuing anxiety throughout the appellate process, even if the acquittals were ultimately affirmed. *See Green v. United States*, 355 U.S. 184, 187-88 (1957).

The United States claims, however, that such appeals would be rare and cites as proof the dearth of such appeals in the Third Circuit following *United States v. Maker*, 751 F.2d 614 (3d Cir. 1984), cert. denied, 472 U.S. 1017 (1985). Brief of United States 25-26. But the absence of such appeals more likely proves that the federal prosecutors within the Third

Circuit have recognized that *Maker*'s interpretation of *Martin Linen* is untenable given this Court's subsequent decisions in *Scott*, *Burks*, *Rumsey*, *Smalis*, and *Smith*. By contrast, even though the Michigan Supreme Court's decision in Petitioner's case was issued only seven months ago, the Michigan Court of Appeals has already relied on it at least once to reverse a midtrial directed verdict and order a retrial.[1]

The United States denies that a ruling in its favor would permit appeals from jury acquittals, but provides no reason for this denial other than the "special solicitude" given to jury verdicts and the desire of courts to "avoid impugning the legitimacy" of such verdicts. Brief of United States 26 (internal quotation marks, brackets, and citation omitted). But given the established equivalence between jury acquittals and judicial acquittals for double jeopardy purposes, *Smith*, 543 U.S. at 467, there is no *constitutional* reason that such an appeal would not be

[1] *See People v. Pointer*, No. 302795, 2012 WL 4840590 (Mich. Ct. App. Oct. 11, 2012). The appellate court in *Pointer* relied on the Michigan Supreme Court's decision in this case to hold that the trial court's ruling that the prosecutor had failed to overcome the defendant's *affirmative* defense under the Michigan Medical Marijuana Act was "based on an error of law that did not resolve any factual element of the crime charged." Slip Op. at 3. In other words, the Michigan Supreme Court's reading of *Martin Linen* has now led to an appellate decision directly contrary to *Burks*. Because the Michigan Court of Appeals often resolves "interlocutory" appeals with orders not posted to electronic databases, Petitioner cannot be certain that *Pointer* is the only decision so far to rely on the decision in his case to reverse a directed verdict grant.

allowed if Respondent prevails. In any case in which the prosecution can claim that the jury was effectively instructed to find an "extraneous element" and the trial record arguably shows that the "extraneous element" was the only fact in real dispute, *cf. Ashe v. Swenson*, 397 U.S. 436, 445 (1970) ("The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers."), it follows immediately that the prosecution must be allowed to claim, as Respondent does here, that the defendant was not really acquitted.

The United States cites several outlandish hypothetical examples to support its point that a defendant is not really acquitted if the judge grants a directed verdict because the prosecution failed to prove facts not found in the offense. The United States argues that a defendant would not really be acquitted of robbery if the judge ruled that no one had died in the crime, or of burning other real property based on the judge's finding that the burned building was or was not blue. Brief of United States 15.

The most obvious response to these hypotheticals is that they have nothing to do with the "distinction" Respondent and the United States attempt to defend. If we assume a hypothetical judge is determined to acquit defendants on nonsensical grounds and shield those acquittals from appellate review, the Michigan "added element" rule will not prevent that judge from doing so. This hypothetical judge would acquit the robbery defendant by *misconstruing* the "placed in

fear" element of robbery so as to require that the victim died. And the hypothetical judge would acquit the defendant charged with burning other real property by *misconstruing* the second element of the offense (that the property burned be a building) so as to require the building be blue or not blue. The United States' hypotheticals therefore serve only to further prove that there is no real distinction between misconstruing elements of an offense so as to increase the prosecution's burden and adding elements to an offense so as to increase the prosecution's burden.[2]

The United States further complains, relying on *Lee v. United States*, 432 U.S. 23 (1977), that Petitioner should have moved for a pretrial determination of the facts necessary to establish the offense with which he was charged. Brief of United States 22-23. Therefore, the United States reasons, his midtrial directed verdict motion should not result in a double jeopardy bar. *Id*. at 23.

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[2] The United States' hypotheticals are just that. Neither Respondent nor the United States has provided any evidence, anecdotal or otherwise, that the nation suffers from an epidemic of devious or incompetent judges granting directed verdicts to defendants because the prosecution failed to prove facts completely irrelevant to the charged offenses. Petitioner's case is certainly not such a case; the trial judge here relied on the official commentary to the standard jury instruction which clearly stated that the prosecution was required to prove that the building burned was not a dwelling house. That commentary was not corrected until seven months after Petitioner's trial.

Lee is inapposite for many reasons, the most fundamental of which was that Lee's motion to dismiss was granted because the information was defective, not because the trial court found evidence of his guilt lacking. As the Court put it, "The dismissal clearly was not predicated on any judgment that Lee could never be prosecuted for or convicted of the theft of the two wallets. To the contrary, the District Court stressed that the only obstacle to a conviction was that the fact that the information had been drawn improperly." 432 U.S. at 30. If *Lee* actually stood for the proposition that a defendant cannot make a midtrial directed verdict motion based on a disputed interpretation of a statute and then rely on the double jeopardy bar to prevent review of a favorable ruling, it would be impossible to explain many of this Court's decisions, including *Smalis* and *Smith*.[3]

If a State is concerned that a judge might erroneously grant a directed verdict based on a misunderstanding of a statute, that State can "craft procedural rules that allow trial judges 'the maximum opportunity to consider with care a pending acquittal motion,' including the option of deferring consideration until after the verdict." *Smith*, 543 U.S. at 474 (quoting

[3] *Lee* is also inapposite as Petitioner had no way of knowing before trial that the prosecution's proofs would establish that the burned building was actually a dwelling house. In *Lee*, by contrast, the defective information was drafted long before trial but Lee's counsel waited until after the prosecution's opening statement to raise the matter. 432 U.S. at 25.

Martin Linen, 430 U.S. at 574). Or the State can simply prohibit judges from granting directed verdicts in the middle of a trial. *See id.* ("At least one State has altogether precluded midtrial acquittals by the court. *See* Nev. Rev. Stat. Ann. § 175.381(1) (2001)").

The point is simple. Nothing requires a State to grant its judges the power to acquit midtrial. But if a State does choose to authorize its judges to grant midtrial acquittals, it must accept that "the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict." *Smith*, 543 U.S. at 467. And this Court's precedents teach that such reexamination is forbidden even for "a preverdict acquittal that is patently wrong in law." *Id*. at 473.

If a State chooses to vest acquittal power in its judges (or any other state actor), the Double Jeopardy Clause allocates the risk of an acquittal based on legal or factual error to that State, not to the citizen the State has hauled into its courts. Since Michigan grants its judges the power to acquit midtrial, *see* Mich. Ct. R. 6.419(A), it must accept the risk that some of those acquittals might be erroneous.

The trial judge here acquitted Petitioner when she evaluated the prosecution's evidence and "determined that it was legally insufficient to sustain a conviction." *Martin Linen*, 430 U.S. at 572. It is in no way Petitioner's fault that the commentary to the standard Michigan jury instructions in use at the

time of Petitioner's trial stated that the prosecution must prove that the building burned was not a dwelling house, and it is in no way Petitioner's fault that the trial judge relied on that commentary.

Having authorized its judges to grant midtrial directed verdict motions, Michigan must accept that such an acquittal is final even if it turned out to be legally erroneous. And it does not matter whether that error is labeled as an erroneous construction of an established element of the crime or as an erroneous addition of an element to the crime.

II. This Court Should Decline the Invitation to Revisit More Than a Century of Precedent Holding Acquittals Unreviewable If Reversal Would Require Further Trial Proceedings.

Perhaps recognizing the difficulty in defending the "distinction" the Michigan Supreme Court drew in this case, Respondent devotes nearly half of its argument to a wide-ranging attack on this Court's Double Jeopardy Clause precedents. Respondent's Brief 34-56. Petitioner is not certain how many of its cases Respondents would have the Court overrule, but the number appears to be large. In particular, Respondent appears to urge the Court to adopt Justice Holmes' dissent from *Kepner v. United States*, 195 U.S. 100 (1904), Respondent's Brief 35-37, a step that would require this Court to abandon or at least reformulate every Double Jeopardy Clause acquittal

case decided over the past century. Somewhat more modestly, the United States urges the Court to reconsider *Martin Linen* and the decisions flowing from it (including, of course, *Rumsey*, *Smalis*, and *Smith*), if those cases require reversal here. Brief of United States 27-32. Both Respondent and the United States thus invite the Court to hold that midtrial acquittals are generally reviewable.

The United States acknowledges that it made precisely such an invitation in *Smalis*, and the Court firmly and unanimously declined it: "Our past decisions, which we are not inclined to reconsider at this time, hold that [a midtrial ruling that the evidence is insufficient to convict] is an acquittal under the Double Jeopardy Clause." *Smalis*, 476 U.S. at 144 (citing *Martin Linen* and *Sanabria v. United States*, 437 U.S. 54 (1978)).

The Court should decline the invitation again.[4] Principles of *stare decisis*, of course, weigh heavily

[4] This Court could, in its discretion, simply decline to entertain the invitation to radically rewrite its Double Jeopardy Clause jurisprudence because that invitation was not fairly presented in the Brief in Opposition to the Petition. Respondent devoted one paragraph of its Brief in Opposition to the proposition that "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 either by the text or history of the jeopardy clause." Brief in Opposition 15. In that paragraph, Respondent never explicitly urged this Court to overrule *Martin Linen*, much less adopt the dissent from *Kepner*. *See, e.g., Granite Rock Co. v. Int'l Broth. of Teamsters*, ___ U.S. ___, 130 S. Ct. 2847, 2861 (2010) ("Local did not raise this

(Continued on following page)

against a reconsideration of such well-established precedent. This is especially true given the failure of Respondent and the United States to demonstrate that the challenged precedents have created any systemic problems justifying the extraordinary step of revisiting so many cases that have stood so long. But beyond that, the entire argument is based on a demonstrably false premise.

That premise is that the Double Jeopardy Clause of the Fifth Amendment is nothing more than a codification of English common law principles. Thus, Respondent devotes considerable space to establishing that: (1) directed verdicts as we know them today were unknown at the time of the Framing; and (2) the common law sometimes permitted second prosecutions following acquittals infected by legal error.

As for the first proposition, it is true that the modern directed verdict developed well after the Fifth Amendment was ratified. But that tells us nothing about how the courts of the time would have treated a midtrial directed verdict by a judge if a particular jurisdiction had authorized it. As discussed above, this Court has concluded that if a State chooses to extend the acquittal power to a judge, it must accept

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argument in the Court of Appeals. Nor, more importantly, did Local's brief in opposition to Granite Rock's petition for certiorari raise the argument as an alternative ground on which this Court could or should affirm the Court of Appeal's judgment. . . . Accordingly, the argument is properly 'deemed waived.' ") (citation omitted).

the constitutional consequences of that decision, that is, if juries can acquit for erroneous reasons without appellate review, so can judges. *See Smith*, 543 U.S. at 474 (describing steps prosecutors and states may take to protect themselves against "ill-considered acquittal rulings").

The Court made this point clear more than a century ago in *Kepner*:

> Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against a second trial for the same offense, *it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit*.

195 U.S. at 128 (emphasis added). This conclusion is entirely faithful to the text of the Double Jeopardy Clause, which protects against post-acquittal proceedings without regard to the identity of the actor who rendered the acquittal.

As for the second point and the broader premise underlying it, more than a century ago the Court recognized that the Double Jeopardy Clause is not a mere codification of the common law and that, therefore, the English authorities permitting retrials

following some acquittals are not binding here. In *Ball v. United States*, 163 U.S. 662 (1896), the Court repeatedly made it clear that it was not bound by the common law in interpreting the Double Jeopardy Clause. The Court observed that, "In England an acquittal upon an indictment so defective that if it had been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported any conviction or sentence, has generally been considered as insufficient to support a plea of former acquittal." *Id.* at 666 (citations omitted). But the Court then squarely rejected that common law precedent:

> After the full consideration which the importance of the question demands, that doctrine appears to us to be unsatisfactory in the grounds on which it proceeds, as well as unjust in its operation upon those accused of crime[.] . . . The constitution of the United States, in the fifth amendment, declares, "nor shall any person be subject to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.

Id. at 669. After next observing that the verdict acquitting Ball was received on a Sunday and citing English cases for the significance of this fact, the Court concluded:

> The 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. *However it may be in England*, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense.

Id. at 671 (emphasis added; citing *Sanges v. United States*, 144 U.S. 310 (1892)).

Respondent's historical discussion is thus beside the point. This Court has long recognized that the Double Jeopardy Clause, while informed by English common law, is not bound by it.

Neither Respondent nor the United States has given any persuasive reason why this Court should revisit and overrule so many of its venerable precedents. Those precedents have not produced confusion, instability, or systemic problems.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted,

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