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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

BRIEF *AMICUS CURIAE* FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit organization with a direct national membership of approximately 10,000 attorneys, in addition to almost 40,000 affiliate members from all 50 states.[*] Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files briefs *amicus curiae* in criminal cases in this Court and other courts.

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*. Pursuant to Rule 37.6, counsel for *amicus* curiae state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. After receiving timely notice from *amicus curiae*, the parties consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

This Court has, for over a century, insisted that an acquittal is always a bar to further proceedings for the same offense. This iron-clad rule applies even if the acquittal resulted "from erroneous evidentiary rulings or erroneous interpretations of governing legal principles." *United States v. Scott*, 437 U.S. 82, 98 (1978). An error of law leading to an acquittal "affects the accuracy of that determination, but it does not alter its essential character." *Id.* In 2005, the Court explained that "any contention that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a preverdict acquittal that is patently wrong in law." *Smith v. Massachusetts*, 543 U.S. 462, 473 (2005). The Court takes this principle so seriously that in 1896 it departed from centuries of English law and the prevailing view in the United States to hold that an acquittal to an indictment so defective that it would not support a conviction was a jeopardy bar to a properly drawn indictment. *United States v. Ball*, 163 U.S. 662 (1896).

The Court has applied the teaching in *Ball* to bar retrials following acquittals even when a legal error led to the acquittal. The only question presented by the instant case is whether there should be an exception to the venerable acquittal principle when the legal error is to require proof of a fact that was not necessary to prove guilt. The State argues that the effect of the trial judge's erroneous construction of the arson statute was to require proof of an element—that the structure be something other than a dwelling house—that the statute did not require. Thus, the

argument goes, this kind of legal error is different from the other kinds of legal errors that have been held not to undermine the finality of an acquittal. The State's argument is clever but ultimately flawed for three reasons.

First, the state offers no plausible reason to treat a legal error that results in requiring an additional fact any differently from any other legal error—for example the *Ball* legal error in drafting the indictment. Just because a distinction is possible does not mean it is a good idea. To be sure, this Court has never explicitly said that an error in construing an offense to require an additional fact has the same former acquittal implications as all other legal errors, but this is not, in itself, a reason to treat it differently.

Second, the distinction is indeterminate and cannot serve as a principle by which to decide cases. Imagine an offense that requires proof that the defendant was armed. The trial judge decides that a defendant who is carrying a box cutter is not armed and, based on this finding, acquits. The court of appeals reverses the trial court's interpretation of the statute, holding that a defendant is armed if carrying a box cutter. Has the trial judge misconstrued the legal reach of the statute, in which case *Ball* forbids a retrial? Or has the trial judge required a fact that the statute does not require—the fact that a defendant be carrying a weapon other than a box cutter—in which case double jeopardy would not prevent a mistrial? A distinction this malleable should not be engrafted onto fundamental basic principles of double jeopardy.

Third, the Court has already settled the "distinct-element" question against the State in at

least three cases. Of particular relevance is *Sanabria v. United States*, 437 U.S. 54 (1978), where the trial judge held that the federal gambling offense required proof of a particular element that was missing from the Government's case. This led the judge to enter an acquittal. The Court of Appeals held that the trial judge was wrong, that the gambling offense could be established by proof of the very element that the Government had alleged and proved. This Court assumed that the Court of Appeals was correct that the trial judge had erroneously required proof of an element that was not necessary but nonetheless held that the acquittal resulting from this legal error was final for purposes of the Double Jeopardy Clause. The only way for the State to win the instant case is for the Court to overrule *Sanabria*. The State has failed to make a case for overruling *Sanabria*.

ARGUMENT

The year 1896 saw a watershed development in the American principle of former acquittal under the Fifth Amendment Double Jeopardy Clause, applicable to the states through the Fourteenth Amendment. In *United States v. Ball*, 163 U.S. 662 (1896), this Court was faced with centuries of English and American precedent holding that an acquittal on a voidable indictment was no bar to another trial for the same offense. The principle was established in *Vaux's Case*, 76 Eng. Rep. 992, decided by the King's Bench in 1591, and embraced by Lord Coke in The Third Part of the Institutes of the Laws of England, 214 (1644). *Ball* cited, 163 U.S. at 666, an impressive list of English authorities supporting this view of former acquittal: John Frederick Archbold, Pleading, Evidence, and Practice in Criminal Cases; Joseph Chitty, A Practical

Treatise on the Criminal Law; Matthew Hale, A History of the Pleas of the Crown; William Hawkins, A Treatise of the Pleas of the Crown; William Russell, A Treatise on Crimes and Misdemeanors; Thomas Starkie, A Treatise on Criminal Pleading. As for American authorities, the Court cited Simon Greenleaf, A Treatise on the Law of Evidence; Joel Prentiss Bishop, Commentaries on the Criminal Law.

Hawkins has the clearest exposition of the voidable indictment principle. In his first edition, published in 1721, Hawkins said that it was "settled at this Day" that when the indictment was so flawed that no good judgment "could have been given upon it," the acquittal could be no bar to a later prosecution because "the Defendant was never in Danger of his Life from the first." 2 Hawkins, ch. 5, § 8. The logic of the common law position was impeccable. If the defendant was never in jeopardy from the first indictment, because it was voidable, how could he be placed twice in jeopardy by a subsequent indictment? But logic does not always prevail.

To prevail, the defendant in *Ball* had to do more than repudiate the logic of the common law. Even as late as 1896, the Court often deferred to English legal principles, particularly ones that had been settled since 1591. To go against that historical tide required a strong belief that the common law view was fundamentally wrong. The Court made clear that this was its view:

> 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; and the question being now for the first time presented to this court, we are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing.

Id. at 669.

Rejecting the premise of the common law view, the Court concluded that a trial upon a "fatally defective" indictment put the defendant in jeopardy as much as a trial on a valid indictment. The voidable indictment could, of course, be avoided by the defendant. But if it was not avoided, the jeopardy was final. As the Court put it, when an acquittal results from a voidable indictment, "the defendant, indeed, will not seek to have it reversed; and the government cannot."

The principle was established: If a defendant submitted the issue of guilt or innocence to a fact-finder, an acquittal by that fact-finder was final. The rule was iron-clad. Over the next hundred years, the Court admitted of no exceptions and, indeed, strengthened the acquittal rule. In *Fong Foo v. United States*, 369 U.S. 141 (1962), the prosecution was in the midst of presenting its case in chief when the trial judge abruptly ordered the jury to return a verdict of acquittal. The Court of Appeals vacated the judgment of acquittal on the ground that the trial court lacked

the power to direct an acquittal before the Government had completed its case. Without questioning the view that the directed verdict was outside the power of the trial judge, the Court nonetheless reversed the lower court and held that the judgment of acquittal was final for double jeopardy purposes. The petitioners "were tried under a valid indictment in a federal court which had jurisdiction over them and over the subject matter. The trial did not terminate prior to the entry of a judgment . . . . [but] terminated with the entry of a final judgment of acquittal as to each petitioner." *Id.* at 143. End of story. No second trial was possible. *See also Smalis v. Pennsylvania*, 476 U.S. 140 (1986) (defendant who demurs at close of prosecution's case in chief seeks determination of guilt or innocence).

In *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the trial judge granted a Rule 29(c) acquittal after the jury was hopelessly deadlocked. The Court held that no appeal from that judgment was possible because a second trial would put the defendant twice in jeopardy. Quoting from earlier cases, the Court held that the trial judge's acquittal was "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case." *Id.* at 575.

The next year, the Court clarified the scope and meaning of *Martin Linen*. In *United States v. Scott*, 437 U.S. 82 (1978), the Court held that a dismissal on the ground of pre-indictment delay did not bar another trial. The key distinction was that Scott involved a dismissal "without any finding by judge or jury as to his guilt or innocence." *Id.* at 100. The dismissal in *Martin Linen*, on the other hand, was a "factual finding [that] *does* 'necessarily establish the criminal

defendant's lack of culpability' under existing law; the fact that 'the acquittal may result from erroneous evident rulings or erroneous interpretations of governing legal principles,' affects the accuracy of that determination, but it does not alter its essential character." *Id.* at 98, quoting *id.* at 106, Brennan, J., dissenting (citation omitted; emphasis in original).

These principles cover the instant case. As the rest of the brief will detail, Evans was tried under a valid indictment in a court with jurisdiction over him and over the subject matter; his trial terminated with the entry of a final judgment of acquittal on the basis of facts adduced at the trial relating to the general issue of the case. Moreover, *Ball* makes plain that the acquittal rule holds even when the first jeopardy is infected with legal error.

Evans was charged with the Michigan offense of burning "other real property." At the close of the prosecution's proofs, Evans moved for a directed verdict of acquittal on the ground that the State had failed to prove that the structure he had allegedly burned fit the definition of "other real property." Because the structure was a dwelling house, Evans argued, it did not fit the statutory definition.

The trial court agreed with Evans that the crime with which he was charged required that the building be other than a dwelling house. Accordingly, the court entered a written order granting "the Motion for Directed Verdict of Acquittal." App. 72. But the Michigan appellate courts held that the trial judge was wrong in her reading of the arson statute, holding that "other structures" included dwelling houses. *See People v. Evans*, 810 N.W.2d 535 (Mich. 2012); *People*

v. Evans, 794 N.W.2d 848 (Mich. Ct. App. 2010). Because the acquittal was based on a single legal error that resulted in requiring an element that the statute did not require, the Michigan appellate courts also held that the acquittal in the Evans case did not fit the *Ball* rule that acquittals are final despite resulting from a legal error.

What the state courts missed, however, is that the Supreme Court has already faced the "distinct element" situation and held that the erroneous acquittal was final. In *Sanabria v. United States*, 437 U.S. 54 (1978), the indictment alleged illegal numbers betting, based on violation of Mass. Gen. Laws Ann., ch. 271, § 17 (West 1970). At the close of the Government's case, *Sanabria* moved for a judgment of acquittal on the ground that § 17 did not prohibit numbers betting. The district court agreed that § 17 did not prohibit numbers betting. Instead, the judge ruled, the Government should have charged Mass. Gen. Laws Ann., ch. 271, § 7 (West 1970). Because the Government had charged a state law that did not prohibit numbers betting, the district judge excluded all evidence of numbers betting and granted a judgment of acquittal.

The next day, the Government asked the trial court to restore the evidence of numbers betting and to reconsider its acquittal. The judge refused but said that if he had granted the motion to restore, he would have vacated the judgment of acquittal. The Government appealed, and the First Circuit held that the trial judge had erred when it dismissed the numbers "theory" because § 17 *did* prohibit numbers betting. The judge thus erred in excluding evidence of numbers betting and in granting the acquittal.

Accordingly, the First Circuit vacated the acquittal.

The Supreme Court reversed. The Government argued that the trial judge had, in effect, dismissed the numbers part of the indictment and that this dismissal could be appealed. The Supreme Court disagreed:

> We must assume that the trial court's interpretation of the indictment was erroneous. But not every erroneous interpretation of an indictment for purposes of deciding what evidence is admissible can be regarded as a "dismissal." Here the District Court did not find that the count failed to charge a necessary element of the offense; rather, it found the indictment's description of the offense too narrow to warrant the admission of certain evidence. To this extent, we believe the ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence. That judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error.

Id. at 68-69 (footnote and citations omitted).

To put *Sanabria* in the "distinct element" terms used by the State in the instant case, the district judge required the Government to prove an element, § 7, that it did not have to prove. The Court nonetheless held that the resulting acquittal could not be appealed. Though the State's "distinct element" argument was

apparently not presented to the *Sanabria* Court, the Court's holding and analysis excludes the argument. *Sanabria* said that when "an erroneous evidentiary ruling" leads "to an acquittal for insufficient evidence," the Double Jeopardy Clause forbids a second trial. That is precisely what happened in Evans's case.

To be sure, on at least some understandings of stare decisis, the Court's failure expressly to address the "distinct-element" argument in *Sanabria* leaves an opening to create an exception to its holding. But creating an exception to an acquittal rule that has been ironclad since 1896 requires a strong justification. The State has failed to offer even a plausible justification, let along one strong enough to modify a rule that has been settled for over a century.

Consider the equities. Evans faced conviction in his first trial. He did not seek to avoid the trial through a motion for mistrial or dismissal on grounds unrelated to guilt or innocence. The *jury* did not reach the merits of the charge against him but only because *the judge made a legal error in construing the charge*. If one knew nothing about double jeopardy but decided the case on basic fairness, Evans should not have to face another determination of guilt or innocence since he did not avoid the first determination. The error was not his; he merely asked the judge to declare his lack of guilt, which the judge did. As the Court put the equities in 1957:

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

Green v. United States, 355 U.S. 184, 187-88 (1957).

If the State can somehow persuade this Court that the equities favor giving the State another chance to prove guilt in Evans's case, it faces a second hurdle. Before creating an exception to the venerable acquittal rule, this Court must be persuaded that the rule the State urges is a sound one that will in practice easily separate cases into categories. Here, too, the State fails, as three examples will demonstrate.

In *Arizona v. Rumsey*, 467 U.S. 203 (1984), the trial judge construed the relevant aggravating circumstance in a death sentencing phase as applying only to "a contract-type killing situation and not to a robbery, burglary, etc." Based on this interpretation, the trial judge "acquitted" Rumsey of the death penalty. After the state courts held that the judge's interpretation of the death penalty statute was erroneous, the State sought to re-litigate the sentence. This Court ruled that the Double Jeopardy Clause prohibited a second sentencing hearing.

How *Rumsey* would be decided under the State's "distinct-element" test is impossible to predict. If the trial judge's interpretation is a general legal error in construing the death penalty statute, then *Rumsey* is covered by *Ball*, and the sentence could not be re-litigated. It seems more likely, however, that the judge's error amounted to adding an element to the

sentencing scheme—that the killing be a contract killing. On this interpretation, the State should have won *Rumsey*.

The second example is *Smith v. Massachusetts*, 543 U.S. 462 (2005), where the trial judge granted a directed verdict of acquittal because of a lack of evidence that the weapon the defendant possessed had a barrel length of less than 16 inches. After the defense had completed its case, the prosecution presented a state law precedent that persuaded the trial judge that the victim's testimony about the kind of gun indirectly demonstrated that the barrel length was less than 16 inches. The trial judge sought to overrule her directed verdict of acquittal based on this development. The Court held that the trial judge's ruling was an acquittal precluding further proceedings on that count even if it was based on an error about the law. *Id.* at 473. Did the trial judge simply misconstrue the 16-inch element of the offense or did she in effect add a requirement that the length must be proved only by direct testimony? Under the State's proposed "distinct-element" test, the double jeopardy result depends on which characterization a court chooses.

The third example is Evans's case itself. The statute required proof of burning "other buildings." The trial court's error in agreeing that this excluded dwelling houses can be understood, as the Michigan appellate courts did, as adding an element that the statute did not require—that the building not be a dwelling house. But why is it not just as plausible to say that the trial court simply got the meaning of "other buildings" wrong, that she just made a general legal error in her interpretation of "other buildings"?

Indeed, describing the error in this case as one of misinterpretation is less strained than imaging that the judge was adding a new element to the offense.

A standard that can be this easily manipulated is not a sound idea, as a policy matter, if the Court were writing on a blank slate when considering the State's proposed "distinct element" test. But this Court is not writing on a blank slate. In *Ball*, the Court rejected centuries of English precedent in 1896 to create a robust protection of acquittals. It has steadfastly maintained that robust protection, and for good reason: "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, 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 . . . ." *Green*, 355 U.S. at 187. Lamar Evans submitted his guilt or innocence once in 2009. The State should abide by the result of that trial.

CONCLUSION

"It is a short point," Justice Holmes said for the Court in rejecting the Government's attempt to multiply penalties for the same false entry in bank records. *United States v. Adams*, 281 U.S. 202, 203 (1930). The argument presented here is also a "short point." Acquittals rendered after a defendant has submitted his guilt or innocence to the fact-finder are final, and this principle holds even if the fact-finder is the judge and even if the judge has made a legal error that leads to the acquittal. The State seeks to avoid this categorical bar by invoking a "distinct-element" exception—if the error was to add a new element to the offense, the acquittal is no longer final. *Sanabria* implicitly rejected the State's "distinct-element" exception when it held that the judge's mistake in requiring proof of one state law violation rather than another did not undermine the resulting acquittal. The State in the instant case fails to show the kind of strong justification it would need to re-open the "distinct element" issue seemingly settled in *Sanabria*. Indeed, the State fails to show that the "distinct-element" exception is a sound idea in policy or practice even if the Court were deciding the issue as a matter of first impression.

Lamar Evans submitted the question of his guilt or innocence to a judge and jury in Michigan in 2009. The judge decided that the offense required a fact that the State had failed to prove and, accordingly, entered an acquittal based on insufficient evidence. Whether

the judge was right or wrong about what the State had to prove, the acquittal should be final.

Respectfully submitted,

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