

March 2019

Evans v. Michigan and the Abrogation of *State v. Korsen*: A Look at the Effect on Habeas Corpus Claims for Collateral Relief in Idaho

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EVANS V. MICHIGAN AND THE ABROGATION OF STATE V. KORSEN: A LOOK AT THE EFFECT ON HABEAS CORPUS CLAIMS FOR COLLATERAL RELIEF IN IDAHO

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I. INTRODUCTION

On February 20, 2013, The Supreme Court of the United States issued its holding in the case of *Evans v. Michigan*.¹ In an eight to one decision, the Supreme Court held that the Double Jeopardy Clause barred the retrial of a criminal defendant after a court-directed acquittal.² Retrial was barred even in the event that the acquittal rested on the trial court's erroneous understanding of the law.³ In holding that erroneous acquittals barred a retrial of criminal defendants, this Supreme Court decision overruled the Idaho Supreme Court's decision in *State v. Korsen*.⁴ In *Korsen*, the Idaho Supreme Court held an acquittal resting on an error of law did not bar a retrial.⁵ Both *Evans* and *Korsen* dealt with the issue of double jeopardy and the constitutional protections guaranteed to defendants in criminal trials, however, in each case, the court reached the opposite conclusion. This paper discusses the positions of each court, the reasoning expressed, and the issues that each court considered.

After fully discussing the positions found in each case, this paper moves on to the question of whether the decision in *Evans* has retroactive application. Specifi-

1. *Evans v. Michigan*, 133 S. Ct. 1069 (2013).

2. *Id.*; See also *Evans v. Michigan*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/evans-v-michigan/> (last visited May 17, 2015).

3. *Evans*, 133 S. Ct. at 1074; See also *Evans v. Michigan*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/evans-v-michigan/> (last visited May 17, 2015).

4. *State v. Korsen*, 69 P.3d 126, 138 Idaho 706, (2003), *abrogated by* *Evans v. Michigan*, 133 S. Ct. 1069 (2013).

5. *Id.* at 138.

cally, whether the decision in *Evans* provides Idaho prisoners, convicted under now overruled Idaho precedent, potential retroactive benefit. The retroactivity of Supreme Court decisions is an ever-evolving topic that traces back to a key Supreme Court case, *Teague v. Lane*.⁶ This paper discusses the various aspects of a retroactivity determination and the different questions that must be asked concerning the nature of the Supreme Court's ruling, the defendant's position in the review process, and the application of established exceptions to the retroactivity analysis found in *Teague*.

In so doing, this paper presents a discussion of the implications that *Evans* presents for the future of Double Jeopardy Clause defenses in Idaho that criminal defendants may raise in the wake of erroneous acquittals or acquittals based on misapprehensions of the law after the abrogation of *Korsen*. Part II of this paper discusses the background of the Double Jeopardy Clause. It focuses on the language of both the federal and state double jeopardy clauses, the historical purposes of the clauses, the specific protections enumerated by the courts and how those protections are interpreted by the courts, the specific protections granted to criminal defendants in the event of an acquittal, and when the Double Jeopardy Clause may be triggered.

Part III of this paper discusses the cases of *State v. Korsen*, and *Evans v. Michigan*. First, it discusses the Idaho Supreme Court's decision in the case of *State v. Korsen*,⁷ focusing on how the Idaho Supreme Court defined acquittal, and specifically what constituted an acquittal for the purposes of triggering the Double Jeopardy Clause. It further discusses the factual determination necessary for when an acquittal actually takes place, and the interplay between an acquittal based on a factual determination by the court in relation to the criminal charge, versus a misapprehension of the law.

Next, this paper discusses the United States Supreme Court case of *Evans v. Michigan*⁸ looking at the reasoning and policy rationales stated by the Supreme Court in reaching its holding, and how the factual determinations of the Court concerning the definition of acquittal differed in their application from *Korsen*. Finally, Part III contains a critique of the decision from *Evans*. It discusses the dissenting opinion found in *Evans*, and the policy rationales for allowing the Double Jeopardy Clause to trigger despite a clearly recognizable judicial error.

Part IV of this paper discusses the Supreme Court case of *Teague v. Lane* and the possible retroactivity of Supreme Court decisions. First, it provides a broad description of the decision in *Teague*, and how the analysis found therein provides the starting point for determining retroactivity. Next, it discusses the application of the three-part test developed in *Beard v. Banks*,⁹ looking at the finality of the conviction, the legal landscape at the time of finality and whether the constitution as then interpreted compels the new rule, and if the new rule falls within an established exception to the doctrine, for determining the retroactivity of Supreme Court decisions.¹⁰

6. *Teague v. Lane*, 489 U.S. 288 (1989).

7. *Korsen*, 138 Idaho at 717.

8. *Evans*, 133 S. Ct. at 1069.

9. *Beard v. Banks*, 542 U.S. 406 (2004).

10. *Id.* at 411.

Part V of this paper applies the established retroactivity analysis to the ruling in *Evans* to determine if the holding announces a new rule. And, whether the abrogation of *Korsen* has retroactive applicability in Idaho and what that may mean for criminal defendants, and Part VI of this paper discusses the conclusion drawn from the preceding parts.

II. THE DOUBLE JEOPARDY CLAUSE

One of the foundations of criminal jurisprudence is the concept of double jeopardy.¹¹ The United States Constitution states that no person shall be put in jeopardy of “life and limb” for the same offence twice.¹² The Idaho State Constitution mirrors the United States Constitution and provides that “[n]o person shall be twice put in jeopardy for the same offense.”¹³

Historically, like much of our modern jurisprudence, the Double Jeopardy Clause traces its roots back to English common law.¹⁴ While history shows a complicated development of the modern protection we now have, the first American colony to adopt protections against double jeopardy was Massachusetts in 1641.¹⁵ Titled the Body of Liberties, the Massachusetts charter stated that “[n]o man shall be twice [sic] sentenced by Civil Justice for one and the same Crime, offence, or Trespasse.”¹⁶ Departing from English common law, which had only given protection for capital offences, the Body of Liberties extended protection to all crimes.¹⁷ This Body of Liberties served as a model that other colonies used to develop their own protections against double jeopardy.¹⁸ It is also considered an important forerunner to the Bill of Rights.¹⁹ All thirteen states had established state constitutional protection against double jeopardy before the Bill of Rights was added to the federal constitution.²⁰

At its core, the constitutional protection provided by the Fifth Amendment is designed to protect individuals from the comparatively limitless resources of the State.²¹ Without such protection, individuals may live in a state of continuing anxiety for fear that they will be subjected to embarrassment, expense, and continuing ordeal due to repeated attempts by the State to obtain a conviction.²² Also, repeated attempts to obtain a conviction enhance the possibility that an innocent individual

11. See U.S. CONST. amend. V.

12. *Id.*

13. IDAHO CONST. art. I, § 13.

14. *Double Jeopardy Clause*, REVOLUTIONARY WAR AND BEYOND, <http://www.revolutionary-war-and-beyond.com/double-jeopardy-clause.html> (last visited May 24, 2015); See also David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 205 (2005), available at <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1209&context=wmborj> (“Scholars have advanced three different theories explaining the introduction of the double jeopardy principle into English common law.”).

15. Rudstein, *supra* note 14, at 221–22.

16. *Id.*

17. *Double Jeopardy Clause*, *supra* note 14; see also Rudstein, *supra* note 14, at 221–22.

18. *Double Jeopardy Clause*, *supra* note 14; see also Rudstein, *supra* note 14, at 222.

19. Rudstein, *supra* note 14, at 222.

20. *Double Jeopardy Clause*, *supra* note 14.

21. *Green v. United States*, 355 U.S. 184, 187–88 (1957).

22. *Id.*

may be found guilty.²³ Further, the prohibition against trying an individual twice for the same offence protects the courts interest in preserving the “finality of judgments.”²⁴ Courts argue that protecting the finality of criminal convictions benefits society.²⁵ It reduces the administrative costs of review and retrials.²⁶ And, it will lead to better representation of counsel.²⁷

Analysis under the Double Jeopardy Clause requires an understanding of when a person is considered “put in jeopardy.” Under case law, a person is put in jeopardy, and it is said that jeopardy attaches, only at a certain point after a criminal proceeding is under way.²⁸ In criminal cases brought before a jury, “jeopardy attaches when a jury is sworn.”²⁹ In bench trials, the Supreme Court has held that jeopardy attaches when the judge begins to hear evidence.³⁰ Once jeopardy attaches to a criminal defendant, the constitutional protections given by the Double Jeopardy Clause are triggered, preventing the person from being “put in jeopardy” by a later proceeding seeking to punish the same offense.³¹

Generally, courts have interpreted the Double Jeopardy Clause to provide three basic protections.³² First, defendants who have been acquitted of their crimes are protected against a second prosecution for the same offense.³³ Second, defendants who have been convicted of their crime are protected against a second prosecution for the same offense.³⁴ And third, defendants are protected from being punished a second time for an offense for which they have already been punished once.³⁵ The protections offered to defendants under the Idaho Constitution align with the policy reasons the Supreme Court states for the individual protections afforded by the United States constitution.³⁶

Case law has elaborated on when a second proceeding involves the same offense.³⁷ First, double jeopardy protects a defendant from subsequent prosecution for lesser-included offenses and from charges of crimes for which the original crime

23. *Id.*

24. *Yeager v. United States*, 557 U.S. 110, 118 (2009).

25. *See* Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the “Interests of Finality”*, 2013 UTAH L. REV. 561 (2013) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235812 (setting forth the currently stated goals underscoring courts attraction to finality in criminal cases and arguing for a reevaluation of the means used to achieve those goals in post-conviction criminal review cases).

26. *Id.*

27. *Id.*

28. *See* Julia Zebley, *Supreme Court Rules Double Jeopardy Does not Attach in Jury Deadlocks*, JURIST.ORG (May 25, 2012, 9:26 AM), <http://jurist.org/paperchase/2012/05/supreme-court-rules-double-jeopardy-does-not-attach-in-jury-deadlocks.php>.

29. *State v. Sharp*, 662 P.2d 1135, 1137,104 Idaho 691, 693 (1983).

30. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).

31. *See id.*

32. *State v. Corbus*, 256 P.3d 776, 778, 151 Idaho 368, 370 (Ct. App. 2011), *review denied* (Aug. 2, 2011).

33. *Id.*

34. *Id.*

35. *Id.*

36. *See* *State v. Avelar*, 979 P.2d 648, 651, 132 Idaho 775, 778 (1999) (“The multiple prosecution component of double jeopardy ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence.”) (internal quotations omitted).

37. *See* *State v. Petty*, 248 P.2d 218, 73 Idaho 136, (1952).

was a lesser-included offense.³⁸ For example, in *State v. Bryant*, the defendant was afforded constitutional double jeopardy protection for a conviction of aggravated assault by display and threat with a gun.³⁹ The defendant was originally convicted for kidnapping.⁴⁰ Because the kidnapping charge already included an enhancement count based on a display and threat with a gun, the lesser-included offense of aggravated assault by display and threat with a gun was barred on constitutional double jeopardy grounds.⁴¹ Key to the court's determination of double jeopardy protection was the question of whether the charges were sufficiently distinguishable from each other and whether each could have been prosecuted separately.⁴²

Similarly, in *State v. Pickens*, the defendant was convicted of both rape and assault with the intent to commit rape.⁴³ The court explained that assault with the intent to commit rape was a lesser-included offense of the defendant's rape conviction.⁴⁴ The court held that subsequent conviction of assault with the intent to commit rape, the lesser-included offense of rape, was barred on constitutional double jeopardy grounds.⁴⁵

Second, courts have drawn distinctions between prosecutions and punishment.⁴⁶ The constitutional protection against double jeopardy protects against both multiple prosecutions, and multiple punishments relating to the same offense.⁴⁷ Multiple trials dealing with punishment for both civil and criminal punishment corresponding to the same set of circumstances are dealt with in the order in which jeopardy is attached.⁴⁸ Further, civil forfeitures generally are not punishment for purposes of the protections afforded by double jeopardy.⁴⁹ In *State v. Ross*, the defendant raised a claim of double jeopardy to dispute his conviction and sentencing for delivery of a controlled substance and for money laundering.⁵⁰ The defendant argued that the prior civil forfeiture of property precluded additional criminal punishment.⁵¹ The court held that Supreme Court precedent dictated that civil forfeitures do not constitute punishment and do not raise the issue of double jeopardy under the Fifth Amendment.⁵²

38. *Id.*

39. *State v. Bryant*, 896 P.2d 350, 127 Idaho 24 (Ct. App. 1995).

40. *Id.* at 355, 127 Idaho at 29.

41. *Id.*

42. *Id.*

43. *State v. Pickens*, 224 P.3d 1143, 148 Idaho 554 (Ct. App. 2010).

44. *Id.* at 1144, 148 Idaho at 555.

45. *Id.* at 1147, 148 Idaho at 558.

46. *See State v. Avelar*, 979 P.2d 648, 651, 132 Idaho 775, 778 (1999).

47. *Id.*

48. *See id.* at 648–54, 132 Idaho at 775–81 (rejecting double jeopardy challenge to retrial of drug prosecution based on payment of civil drug stamp tax penalties prior to retrial, where no double jeopardy challenge was raised in tax proceedings).

49. *State v. Ross*, 924 P.2d 1224, 1225, 129 Idaho 380, 381 (1996).

50. *Id.* at 1224, 129 Idaho at 380.

51. *Id.*

52. *Id.* at 1225, 129 Idaho at 381 (“With regard to [the defendant’s] Fifth Amendment claim of double jeopardy, the United States Supreme Court recently determined that civil forfeitures in general, and specifically in cases involving money laundering and drug states, do not constitute ‘punishment’ for the purposes of the Double Jeopardy Clause.”); Joan Biskupic, *Supreme Court Rules That Civil Fines Don’t Bar Later Criminal Prosecution*, WASH. POST (Dec. 11, 1997), <http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/wp121197.htm>.

Additionally, the Double Jeopardy Clause sometimes protects criminal defendants after a mistrial.⁵³ Usually, a criminal defendant can be retried after a mistrial if, for example, the proceeding ends in a mistrial because of a hung jury, the defendant may then be retried.⁵⁴ The court must set forth a sufficiently compelling reason to declare a mistrial, such as procedural error that would cause some obstruction of the case.⁵⁵ The court must consider how to provide a “full and fair adjudication” of the case so as to provide finality to the action and the charges against the defendant.⁵⁶ Further, a defendant may not bring a defense of double jeopardy after a mistrial is declared on the defendant’s own motion.⁵⁷ Also, a “retrial following the reversal of a conviction on grounds other than the insufficiency of the evidence does not offend double jeopardy principles.”⁵⁸

However, acquittals are a different matter. There are many nuances to constitutional double jeopardy protection when it comes to acquittals.⁵⁹ After a jury conviction in a criminal action, if the verdict of guilty is set aside by a trial or appellate judge to enter a judgment of acquittal, the prosecution is not barred by constitutional double jeopardy protection from appealing for a reinstatement of the original jury conviction.⁶⁰ However, in cases where a judgment of acquittal is granted prior to a jury conviction, further action seeking that conviction may be barred.⁶¹ The prohibition of re-examination and re-prosecution following a court-decreed acquittal in non-jury cases is similarly barred by the Double Jeopardy Clause.⁶²

In a non-jury trial, a judge’s order of acquittal “represents a resolution, correct or not, of some or all of the factual elements of the offense charged.”⁶³ A trial judge may not control the classification of his action through creative characterization.⁶⁴ Pertinent to a double jeopardy analysis of a judgment of acquittal, is whether the basis for the determination of the judgment relied on the sufficiency of the evidence.⁶⁵ “When a trial court enters a judgment of acquittal based on a determination that the evidence is factually insufficient to support a charge, the prohibition against double jeopardy bars retrying that charge.”⁶⁶ The following cases explore

53. See *State v. Stevens*, 892 P.2d 889, 893, 126 Idaho 822, 826 (1995).

54. *Id.*

55. *Id.*

56. *Id.*; See also *Reprosecution Following Mistrial*, CORNELL UNIV. LAW SCH. LEGAL INFO. INST., http://www.law.cornell.edu/anncon/html/amdt5afrag3_user.html (last visited May 17, 2015) (“A mistrial may be the result of ‘manifest necessity,’ such as where, for example, the jury cannot reach a verdict or circumstances plainly prevent the continuation of the trial. Difficult has been the answer, however, when the doctrine of ‘manifest necessity’ has been called upon to justify a second trial following a mistrial granted by the trial judge because of some event within the prosecutor’s control or because of prosecutorial misconduct or because of error or abuse of discretion by the judge himself. There must ordinarily be a balancing of the defendant’s right in having the trial completed against the public interest in fair trials designed to end in just judgments.”).

57. John E. Theuman, *Former Jeopardy as bar to Retrial of Criminal Defendant after Original Court’s sua sponte Declaration of a Mistrial—State Cases*, 40 A.L.R.4th 741 (1985).

58. *State v. Avelar*, 979 P.2d 648, 651, 132 Idaho 775, 778 (1999).

59. See *Smith v. Massachusetts*, 543 U.S. 462, 467 (2005).

60. See *id.*

61. See *id.*

62. *State v. Howard*, 238 P.3d 722, 728, 150 Idaho 471, 478 (2011).

63. *Id.* at 728–29, 150 Idaho at 478–79.

64. *United States v. Scott*, 437 U.S. 82, 96 (1978); *Howard*, 238 P.3d at 728, 150 Idaho at 478.

65. *Howard*, 238 P.3d at 728, 150 Idaho at 478.

66. *Id.*

the relationship between acquittals and the Double Jeopardy Clause as interpreted by the Idaho Supreme Court and then the United States Supreme Court.

III. KORSEN AND EVANS

The thrust of the two court decisions and their relationship to the protections granted by the Double Jeopardy Clause is the legal concept of acquittal. Both Court decisions deal with trial court judgments granting defendants an acquittal. The disparity between the two decisions deals with the definition of the term acquittal. In the case of *State v. Korsen*, the Idaho Supreme Court defined acquittal as a judgment regarding the determination that the evidence was insufficient to prove an essential element of the crime charged.⁶⁷ That definition focused on the elements of the criminal charge and whether the decision for judgment and the acquittal were linked with the particular elements of the charge.⁶⁸ If the judgment for acquittal was based on the sufficiency of the evidence related to an element that was erroneously connected with the criminal charge, then the acquittal would not trigger double jeopardy protection.

However, in *Evans v. Michigan*, the United States Supreme Court defined acquittal in terms relating to the idea of substantive versus procedural rulings.⁶⁹ The Court related judgments of acquittal, not on the particular elements of the criminal charge, but rather made the distinction between whether the ruling was related to the sufficiency of the evidence going toward the substantive nature of the case, or whether the judgment related to any particular procedural mistakes the trial court may have made.⁷⁰

A. *State v. Korsen*

In 2003, in *State v. Korsen*, the Idaho Supreme Court held that retrial of a criminal charge of trespass was not barred because it was a misapprehension of the law that led to the magistrate's ruling to grant the defendant an acquittal and dismiss the case.⁷¹ The defendant, David Korsen, had entered the Idaho Department of Health and Welfare in Boise.⁷² Mr. Korsen was there because of his child support obligations.⁷³ He told the office personnel that he wanted to talk with someone about his obligations, and he indicated that he was not going to leave the office until he was granted some relief from the current requirements he was subject to.⁷⁴ He informed the office workers that he might get loud.⁷⁵ The office workers told Mr. Korsen that they could not help him.⁷⁶ Rather, only the court could do what he was asking.⁷⁷

67. *State v. Korsen*, 69 P.3d 126, 138 Idaho 706, (2003).

68. *Id.*

69. *Evans v. Michigan*, 133 S. Ct. 1069 (2013).

70. *Id.*

71. *Korsen*, 69 P.3d at 138, 138 Idaho at 718.

72. *Id.* at 130, 138 Idaho at 710.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Korsen*, 69 P.3d at 130, 138 Idaho at 710.

Mr. Korsen was told that if he wanted his required child support payments changed, he would need to speak with the court.⁷⁸ During that discussion, Mr. Korsen began to raise his voice.⁷⁹ While Mr. Korsen did not make any threats, nor did he swear at the office works, Mr. Korsen would not leave the offices.⁸⁰ The office workers called the police.⁸¹ When the police arrived, Mr. Korsen “was arrested at the scene on a charge of trespass under I.C. § 18–7008(8), because he refused to leave after being asked by the regional director of the department, who was in charge of the offices, to vacate the premises.”⁸²

The case went to trial in magistrate court.⁸³ The magistrate judge dismissed the trespass charge for two reasons.⁸⁴ First, on Constitutional grounds, the magistrate held that the statute was void for vagueness “as applied to public property and because the statute failed to properly inform a person on public property about the specific conduct prohibited by the statute.”⁸⁵ Second, the magistrate granted Mr. Korsen an acquittal “under Idaho Criminal Rule 29.”⁸⁶ The magistrate concluded that “insufficient evidence had been presented to support a verdict of guilty on the trespass charge.”⁸⁷ The magistrate held that “the state failed to prove that Korsen did or said anything to justify the director's request that Korsen leave the premises.”⁸⁸ The State appealed the magistrate's decision to the district court.⁸⁹

On appeal, Mr. Korsen argued that even if the magistrate had erred when the case was dismissed, Mr. Korsen was protected from retrial by the protections given under the Double Jeopardy Clause.⁹⁰ The district court upheld the magistrate's determination that the statute was void for vagueness; however, it also ruled that “double jeopardy did not apply because the acquittal by the magistrate was based on an erroneous legal ruling.”⁹¹ On the State's appeal to the Idaho Supreme Court, Mr. Korsen argued that “even if the Rule 29 dismissal was made in error, double jeopardy had attached, barring a retrial on the trespass charge in the event of a remand.”⁹² After the district court affirmed the magistrate's void for vagueness determination, at issue before the Idaho Supreme Court was whether the magistrate erred “by granting Korsen's Rule 29 motion for acquittal based upon the State's

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Korsen*, 69 P.3d at 130, 138 Idaho at 710.

84. *Id.*

85. *Id.*

86. *Id.*; see also I.C.R. 29(a) (“The court on motion of the defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the state is not granted, the defendant may offer evidence. In the event the court dismisses the charged offense, the court must consider whether the evidence would be sufficient to sustain a conviction on a lesser included offense.”).

87. *Korsen*, 69 P.3d at 130, 138 Idaho at 710.

88. *Id.*

89. *Id.*

90. *Id.* at 136, 138 Idaho at 716.

91. *Id.*

92. *Id.*

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?”⁹³

In reviewing the case, the Idaho Supreme Court started with the established principle that double jeopardy will bar the retrial of a criminal defendant if the court grants an acquittal to the defendant based on an evidentiary determination that the evidence submitted was insufficient to support the charge.⁹⁴ The mere characterization of the action as an acquittal is not sufficient to determine that double jeopardy protection was triggered.⁹⁵ What that meant, was that for Mr. Korsen to be protected by the Double Jeopardy Clause, the Court would have to determine that the magistrate’s judgment of acquittal was based on a ruling that the State failed to provide factual evidence sufficient to support that charge.⁹⁶ The trial court must have “actually resolved in favor of the defendant a factual element necessary for a criminal conviction” for the acquittal to be deemed appropriate.⁹⁷ The factual element in question must have been an essential element of the offense charged.⁹⁸

The Idaho Supreme Court reasoned that it was not the resolution of a factual dispute in favor of the defendant that led to the dismissal; therefore, the dismissal did not constitute an acquittal necessary to trigger the double jeopardy prohibition.⁹⁹ The problem was that the trespass statute in question did not require any “adequate reason” as required by the magistrate.¹⁰⁰ In reviewing the magistrate’s reasoning for requiring this “adequate reason,” the Idaho Supreme Court determined that the lower court had made a legal conclusion.¹⁰¹

The Idaho Supreme Court noted that “[t]he determination that the trespass statute requires this ‘adequate reason’ element was a legal one.”¹⁰² But, “[t]he determination that the reason in this case was not adequate was, at least arguably, factual.”¹⁰³ Where the magistrate went wrong, was that the factual findings and the legal conclusion did not actually determine any essential element of the crime of trespass.¹⁰⁴ And again, the determination of whether double jeopardy bars a retrial hinges upon the determination of an essential element of the crime charged.¹⁰⁵

The Idaho Supreme Court explained that “by requiring proof of an adequate reason for asking someone to leave public property, the magistrate effectively created an additional statutory element to I.C. § 18–7008(8) that the law does not require.”¹⁰⁶ The Court held that because “the magistrate’s determination that there was inadequate reason for asking Korsen to leave the Health and Welfare offices

93. Korsen, 69 P.3d at 131, 138 Idaho at 711.

94. *Id.* at 136–37, 138 Idaho at 716–17.

95. *Id.* at 137, 138 Idaho at 717.

96. *Id.*

97. *Id.*

98. *Id.*

99. Korsen, 69 P.3d at 138, 138 Idaho at 718.

100. See IDAHO CODE ANN. § 18-7008(8) (West 2013) (“Every person, except under landlord-tenant relationship, who, being first notified in writing, or verbally by the owner or authorized agent of the owner of real property, to immediately depart from the same and who refuses to so depart, or who, without permission or invitation, returns and enters said property within a year, after being so notified.”).

101. Korsen, 69 P.2d at 137, 138 Idaho at 717.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Korsen, 69 P.2d at 137, 138 Idaho at 717.

did not resolve an essential element of trespassing, the dismissal of the case on that ground does not constitute an ‘acquittal’ implicating double jeopardy concerns. Retrial is therefore not barred.¹⁰⁷

The Court found that the policy rationales that underlie the principles of the Double Jeopardy Clause permitted retrial in this case because the prosecution was not being given an opportunity to bring in new evidence that it failed to supply during the first trial, rather, the retrial was the result of a legal error in which the prosecution was required to prove an element that was not necessary for a conviction.¹⁰⁸

Seven years later, in *State v. Howard*, the Idaho Supreme Court once again explained the significance of judicial determination based on evidence that is factually sufficient to support the charge of the crime.¹⁰⁹ Citing *Korsen* as precedent, the Idaho Supreme Court in *Howard* explained that double jeopardy is generally triggered upon acquittal in criminal actions.¹¹⁰ That is true even if the acquittal was based on erroneous legal rulings.¹¹¹ However, in certain cases, such as *Korsen*, the erroneous legal rulings create a situation in which the defendant cannot be considered to have been “acquitted” so as to trigger double jeopardy.¹¹² The ultimate determination is whether or not the acquittal was based on the sufficiency of the evidence relating to the elements of the crime charged.¹¹³

B. *Evans v. Michigan*

In an eight to one decision, the United States Supreme Court held, in *Evans v. Michigan*, that when the trial court rules that a state has failed to produce sufficient evidence of guilt and renders an acquittal, the Double Jeopardy Clause bars retrial for the offense.¹¹⁴ This holds true even if the trial court misunderstands the elements of the charged offense. In *Evans*, the defendant, Lamar Evans, was charged with burning other real property, a violation of Michigan statutory law.¹¹⁵ Mr. Evans was arrested after police heard an explosion and they saw Mr. Evans moving away from a burning building carrying a gasoline can.¹¹⁶ Mr. Evans admitted that

107. *Korsen*, 69 P.2d at 137, 138 Idaho at 717; *see also Howard*, 248 P.3d at 730, 150 Idaho at 479 (“In *Korsen*, the magistrate erroneously required the State to prove an additional element for trespass, and the magistrate dismissed the case upon concluding that the State failed to prove this additional, unnecessary, factual element. Due to this misapprehension of the law, the magistrate dismissed the case without resolving any factual element in the defendant's favor. Thus, on appeal, we held that the magistrate's dismissal did not constitute an “acquittal” that triggers double jeopardy.”) (internal citations omitted).

108. *Korsen*, 69 P.2d at 138, 138 Idaho at 717.

109. *Howard*, 248 P.3d at 729, 150 Idaho at 478 (“When a trial court enters a judgment of acquittal based on a determination that the evidence is factually insufficient to support a charge, the prohibition against double jeopardy bars retrying that charge.”).

110. *Id.* at 730, 150 Idaho at 479.

111. *Id.*

112. *Id.*

113. *See id.*

114. *Evans v. Michigan*, 133 S. Ct. 1069, 1081 (2013).

115. *Id.* at 1073.

116. *Id.* at 1082 (Alito, J., dissenting).

he was the one who had set the house of fire.¹¹⁷ The house was unoccupied at the time.¹¹⁸

If the building had been a “dwelling house,” Mr. Evans might have been charged with burning a dwelling, a crime under a statute punishable by up to twenty years in prison.¹¹⁹ However, because the building was not occupied at the time, Mr. Evans was only charged with burning other real property, a crime under a statute only punishable by up to ten years in prison.¹²⁰ The crime of burning other real property was a lesser-included offence of the crime of burning a dwelling house.¹²¹

After the prosecution had presented their evidence, Mr. Evans moved for a directed verdict.¹²² Mr. Evans argued that the prosecution had failed to prove all of the elements of the charged offense.¹²³ Specifically, Mr. Evans argued that the prosecution was required to prove that the building in question was not a dwelling, and failing to so prove, Mr. Evans was entitled to a directed verdict.¹²⁴ Despite the prosecution’s denial that the charged offense required any such element to be proven, the trial judge concluded that the prosecution was, in fact, required to establish that the building was not a dwelling.¹²⁵ After the trial judge determined that the State had failed to prove that the building was not a dwelling, the judge granted Mr. Evans’ petition for a directed verdict.¹²⁶ The order entered into the record was labeled an acquittal.¹²⁷

The State appealed to the Michigan Court of Appeals, and Mr. Evans conceded that his original position concerning the elements of the charged offense was wrong.¹²⁸ The judge had erred by adding an element to the offense that was not required by statute.¹²⁹ The Michigan Court of Appeals reversed the trial court’s ruling and remanded for a retrial.¹³⁰ The court held that trial court’s order did not constitute an acquittal and did not trigger double jeopardy protection because there was no resolution of a factual element of the criminal offense.¹³¹ The Michigan Supreme Court affirmed the court of appeals. The Court held that when an acquittal is based on the erroneous addition of an essential element to a charged offense, then the decision does not constitute a resolution of the defendant’s guilt or innocence of the charged offense so as to trigger double jeopardy protection.¹³² The United States Supreme Court granted review.¹³³

117. *Id.*

118. *Id.*

119. *Id.*

120. *Evans*, 133 S. Ct. at 1082.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Evans*, 133 S. Ct. at 1082.

127. *Id.*

128. *Id.* at 1082–83.

129. *Id.* at 1083.

130. *Id.* at 1073.

131. *Id.* at 1073–74.

132. *Evans*, 133 S. Ct. at 1074.

133. *Id.* at 1073.

In its decision, the Supreme Court started its reasoning and analysis looking at precedent.¹³⁴ The Court proclaimed, “It has been half a century since we first recognized that the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is ‘based upon an egregiously erroneous foundation.’”¹³⁵ The Court was referring to the case of *Fong Foo v. United States*.¹³⁶ In *Fong Foo*, the defendants were charged with conspiracy and concealing material facts “in a matter within the jurisdiction of an agency of the United States.”¹³⁷ During the trial, the district judge “directed the jury to return verdicts of acquittal as to all the defendants.”¹³⁸ However, the trial court did not have the power to issue such a direction.¹³⁹

The Supreme Court held that a verdict of acquittal, even acquittals based on “egregiously erroneous” foundations, were final.¹⁴⁰ Therefore, verdicts of acquittal could not be reviewed.¹⁴¹ The Court found that “[t]he 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 judgment” but rather “[i]t terminated with the entry of a final judgment of acquittal as to each petitioner.”¹⁴² The Court held that while “[t]he Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation. Nevertheless, the verdict of acquittal was final, and could not be reviewed without putting the petitioners twice in jeopardy, and thereby violating the constitution.”¹⁴³

The Court further noted that in *Smith v. Massachusetts*, the Supreme Court held that a mistake in the understanding of what evidence would be sufficient for a conviction to be sustained, barred retrial after a court-decreed acquittal.¹⁴⁴ The Court stated, “[W]e have long held 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.”¹⁴⁵ Going further, the Court stated that “any contention that the Double Jeopardy Clause must itself (even absent provision by the State) leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a pre-verdict acquittal that is patently wrong in law.”¹⁴⁶

Similarly, the Court explained that in *Sanabria v. United States*, the Court held that verdicts of acquittal are final,¹⁴⁷ even if based on erroneous decisions that

134. *Id.*

135. *Id.* at 1074 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)).

136. *Id.*

137. *Fong Foo v. United States*, 369 U.S. 141, 141 (1962).

138. *Id.* at 142.

139. *Id.*

140. *Id.* at 143.

141. *Id.*

142. *Id.*

143. *Fong Foo*, 369 U.S. at 143.

144. *Smith*, 543 U.S. at 473.

145. *Id.* at 467.

146. *Id.* at 473.

147. *Sanabria v. United States*, 437 U.S. 54, 64 (1978) (internal quotation marks omitted) (“That a verdict of acquittal may not be reviewed without putting the defendant twice in jeopardy, and thereby violating the Constitution, has recently been described as the most fundamental rule in the history of double jeopardy jurisprudence.”).

exclude pertinent evidence.¹⁴⁸ However, if after the court renders a guilty verdict the indictment was dismissed, then constitutional double jeopardy protection would not stop the verdict from being reinstated.¹⁴⁹ And, in *Arizona v. Rumsey*, the Court held that an acquittal based on a “misconstruction of the statute” barred a retrial.¹⁵⁰ The Court reasoned that “an acquittal on the merits by the sole decision maker in the proceeding is final and bars retrial on the same charge.”¹⁵¹ The Court held that application of double jeopardy principals barred the imposition of the death penalty after a sentencing of life imprisonment.¹⁵²

In *Evans*, The Supreme Court recognized that the Double Jeopardy Clause bars a retrial of any acquittal decreed by the court.¹⁵³ It makes no difference if the acquittal is based upon a legal error.¹⁵⁴ An acquittal cannot be reviewed without triggering double jeopardy in violation of the Constitution.¹⁵⁵ Supreme Court cases have “defined an acquittal to encompass any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense.”¹⁵⁶ Acquittal would, therefore, include rulings by the courts on the insufficiency of evidence to convict.¹⁵⁷ Also, factual findings that necessarily establish a criminal defendant’s lack of culpability, and “any other ruling which relates to the ultimate question of guilt or innocence” would fall under the category of acquittal.¹⁵⁸

The Supreme Court differentiated between two types of rulings.¹⁵⁹ The Court explained that there are both substantive and procedural rulings.¹⁶⁰ Both substantive and procedural rulings may end a trial early.¹⁶¹ However, the consequences of each type of ruling are different.¹⁶² Substantive rulings are different from procedural rulings because if a retrial is allowed due to a substantive ruling, the superior resources of the Government may wear down the defendant to a point where the innocent may be found guilty.¹⁶³

Procedural dismissals relate to questions of factual guilt that are not related but serve other purposes such as a judgment that a defendant may not be punished due to an error with the indictment.¹⁶⁴ The courts generally refer to procedural ter-

148. *Id.* at 78.

149. *Id.* at 63.

150. *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984).

151. *Id.*

152. *Id.* at 205.

153. *Evans*, 133 S. Ct. at 1073.

154. *Id.*

155. *See id.*

156. *Id.* at 1074–75.

157. *Id.* at 1075.

158. *Id.*

159. *Evans*, 133 S. Ct. at 1075.

160. *Id.*

161. *Id.*

162. *Id.* (“And retrial following an acquittal would upset a defendant’s expectation of repose, for it would subject him to additional embarrassment, expense and ordeal while compelling him to live in a continuing state of anxiety and insecurity. In contrast, a termination of the proceedings against a defendant on a basis unrelated to factual guilt or innocence of the offense of which he is accused, some procedural ground, does not pose the same concerns, because no expectation of finality attaches to a properly granted mistrial.”) (internal quotations and citations omitted).

163. *Id.*

164. *Id.* at 1073–76.

minations as dismissal or mistrial.¹⁶⁵ Procedural rulings may also cause a case to be terminated midtrial.¹⁶⁶ However, procedural rulings do not pose the same concerns as substantive rulings because they do not produce the same expectation of finality in a defendant that substantive rulings do.¹⁶⁷

The Court admitted that “[t]here [was] no question the trial court’s ruling was wrong; it was predicated upon a clear misunderstanding of what facts the State needed to prove under State law.”¹⁶⁸ However, the Court explained that all precedent cases instruct that any acquittal based on the insufficiency of evidence precludes a retrial regardless of whether the trial court’s evaluation of the evidence was based on a correct ruling of the law.¹⁶⁹ The Court drew a distinction between the accuracy of the trial court’s judgment to acquit, and the essential character of an acquittal itself.¹⁷⁰

The Supreme Court explained that the trial court had granted the defendant’s motion in the context of a finding that the evidence was insufficient to support the conviction.¹⁷¹ Further evidence showed that the trial court had made its determination of the testimony presented by the State.¹⁷² And as such, “the trial court’s judgment of acquittal resolved the question of Evans’ guilt or innocence as a matter of the sufficiency of the evidence, not on unrelated procedural grounds. That judgment, ‘however erroneous’ it was, precludes reprosecution on this charge, and so should have barred the State’s appeal as well.”¹⁷³

The Court went on to state that “for cases such as this, in which a trial court’s interpretation of the relevant criminal statute is likely to prove dispositive, we see no reason why jurisdictions could not provide for mandatory continuances or expedited interlocutory appeals if they wished to prevent misguided acquittals from being entered.”¹⁷⁴ The Court explained that “having chosen to vest its courts with the power to grant midtrial acquittals, the State must bear the corresponding risk that some acquittals will be granted in error.”¹⁷⁵

Therefore, the trial court’s ruling was not a procedural dismissal that was unrelated to the factual guilt or innocent of the defendant, but rather “a determination that the State had failed to prove its case.”¹⁷⁶ Therefore, under Supreme Court precedent, such a ruling constituted an acquittal for purposes of double jeopardy and triggered the defendant’s constitutional protection.¹⁷⁷

C. The Evans Dissent

A strong critique of the *Evans* decision is found in Justice Alito’s dissenting opin-

165. *Evans*, 133 S. Ct. at 1073–76.

166. *Id.* at 1074–75.

167. *Id.* at 1073–76.

168. *Id.* at 1075.

169. *Id.*

170. *Id.* at 1076.

171. *Evans*, 133 S. Ct. at 1073–76.

172. *Id.*

173. *Id.* at 1078.

174. *Id.* at 1081.

175. *Id.*

176. *Id.* at 1075.

177. *Evans*, 133 S. Ct. at 1073–76.

ion. Justice Alito provides strong opposition to the majority's decision, finding fault with its reasoning and its interpretation of Court precedent. First, the Court's decision "is not consistent with the original meaning of the Double Jeopardy Clause."¹⁷⁸ The Fifth Amendment states that no "person be subject for the same offence to be twice put in jeopardy of life or limb."¹⁷⁹ As such, the protections afforded by the Double Jeopardy Clause focus on the offense that an individual is subject to.¹⁸⁰ The offense, or criminal charge, is defined by the specific elements of the charge.¹⁸¹ For that reason, the Court has consistently held that an acquittal must represent a resolution of "some or all of the factual elements of the offense charged."¹⁸²

However, the Court's decision, in *Evans*, rejects the entire notion that the elements of an offense play a part in the definition of an acquittal, rather, the Court reached the conclusion that acquittal was defined by a determination of the substantive or procedural nature of the judgment.¹⁸³ This rejection of an element based definition of acquittal for a substantive or procedural based determination of the judgment is not in line with the Court's precedent.¹⁸⁴

Further, the Court's decision opens up the legal system to exploitation from any silver-tongued litigator who is able to convince a trial judge of a misapplication of the law. As Justice Alito notes in his dissent, the Supreme Court ordered the application of double jeopardy protection because an "attorney managed to convince a judge to terminate petitioner's first trial prior to verdict on the specious ground that the offense with which he was charged contains an imaginary 'element' that the prosecution could not prove."¹⁸⁵ If all acquittals trigger application of double jeopardy protection, regardless of any factual or legal errors, so long as the acquittal is based on the substantive aspect of the criminal charge, then defendants may start invoking outlandish defenses based on quasi-legal analysis in the hopes of enticing an acquittal because once that acquittal is granted, the defendants are home free.

Finally, the Court's decision in *Evans* is inconsistent with the purposes of the Double Jeopardy Clause. The Fifth Amendment is designed to protect individuals from the comparatively limitless resources of the State.¹⁸⁶ Without such protection, individuals may live in a state of continuing anxiety for fear that they will be subjected to embarrassment, expense, and continuing ordeal due to repeated attempts by the State to obtain a conviction.¹⁸⁷ Also, repeated attempts to obtain a conviction enhance the possibility that an innocent individual may be found guilty.¹⁸⁸

However, the Court's decision here does not follow from those designed protections, and "[a]llowing retrial in the circumstances of the present case would not

178. *Id.* at 1082 (J. Alito dissenting).

179. U.S. CONST. amend. V.

180. *Evans*, 133 S. Ct. at 1081–82 (J. Alito dissenting).

181. *Id.*

182. *Id.*

183. *Id.* at 1085 (quoting *Smith v. Massachusetts*, 543 U.S. 462, 468 (2005)).

184. *Id.*

185. *Id.* at 1081–82.

186. *Green v. United States*, 355 U.S. 184, 187–88 (1957).

187. *Id.*

188. *Id.*

result in any such abuse.”¹⁸⁹ Allowing a retrial would simply give the prosecution an opportunity to persuade the trial judge based on the actual elements of the offense.¹⁹⁰ This is not a case where the prosecution is attempting to convict the defendant multiple times in an exercise of limitless resources being used to gain a guilty verdict.¹⁹¹ It was, in fact, the defendant who “fooled the judge into committing an error.”¹⁹²

The Supreme Court has repeatedly emphasized that States have a recognizable interest in receiving a chance to convict individuals who violate State laws.¹⁹³ However, the Court’s decision in this case takes that chance away from Michigan, and sets a precedent for taking that chance away from many States in the future.

IV. TEAGUE V. LANE: THE RETROACTIVITY OF SUPREME COURT DECISIONS

A fundamental component necessary for answering the question of what effect *Evans* has on habeas corpus claims in Idaho, is an understanding of when a Supreme Court decision may be applied retroactively on collateral appeals. This part first presents the Supreme Court case of *Teague v. Lane* that sets forth a three-step analysis for determining when Supreme Court decisions are given retroactive effect, then takes a closer look at when a Supreme Court decision is determined to have announced a new rule.

A. *Teague v. Lane*

In *Teague v. Lane*, the United States Supreme Court analyzed and established the current rule concerning the retroactivity of Supreme Court decisions in matters of new rules concerning constitutional criminal procedure.¹⁹⁴ The retroactivity analysis prior to the *Teague* ruling was constantly in flux,¹⁹⁵ and the Court had been looking for a way to simplify the analysis.¹⁹⁶ Further, prior to the *Teague* ruling, the Court often set forth a new constitutional rule of criminal procedure and applied it then and there to the current defendant.¹⁹⁷ In some instances the Court addressed the question of retroactivity in the same case.¹⁹⁸ However, in most cases the Court would take up any retroactivity discussion concerning that new rule at a later time when brought by a new petitioner.¹⁹⁹

However, in *Teague*, the Court changed its position.²⁰⁰ The Court stated that “the question whether a decision announcing a new rule should be given prospec-

189. *Evans*, 133 S. Ct. at 1084 (J. Alito dissenting).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Teague v. Lane*, 489 U.S. 288, 315–16 (1989).

195. John Blume & William Pratt, *Understanding Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 325, 325 (1991).

196. *Id.*

197. *Teague*, 489 U.S. at 299.

198. *Id.*

199. *Id.*

200. *Id.* at 300.

tive or retroactive effect should be faced at the time of that decision.”²⁰¹ As such, the Court noted that “[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.”²⁰² The Court became fully committed to the idea that questions concerning the retroactivity of new rules dealing with constitutional criminal procedure needed to be answered first.²⁰³ The Court stated that “we should ask whether such a rule would be applied retroactively to the case at issue.”²⁰⁴

The general rule established in *Teague* is that “new rules of criminal procedure do not apply retroactively to cases which had become final on direct review at the time the new rule was decided.”²⁰⁵ The Court stated that “it has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule.”²⁰⁶ The Court was trying to protect the finality of criminal convictions.²⁰⁷ The Court understood that States had a vested interest in that finality.²⁰⁸ The Court stated that “[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.”²⁰⁹ The deterrent effect of the criminal justice system is lost if finality is taken away.²¹⁰

The Court adopted a retroactivity approach based on the “principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure,” except under limited circumstances.²¹¹ Convictions may become final in a number of different ways. For purposes of determining the finality of convictions, “[s]tate convictions are final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted.”²¹² Further, for conviction to be final, “the time for filing a petition for a writ of certiorari” must have elapsed.²¹³ Additionally, a conviction is final if a filed petition for a writ of certiorari has been denied.²¹⁴

In *Teague*, the Supreme Court drew the distinction between cases that were still on direct appeal when a new rule was established, and those cases that were on collateral review at the time of the new rule.²¹⁵ In criminal jurisprudence, there are two different types of appeals. There is direct appeal, and there is a collateral appeal. A direct appeal is an appeal of a criminal verdict made directly to the state or federal court of appeals or from the court of appeals to a higher court from the trial

201. *Id.*
202. *Id.*
203. *See Teague*, 489 U.S. at 299.
204. *Id.* at 301.
205. Blume & Pratt, *supra* note 195, at 325.
206. *Teague*, 489 U.S. at 308.
207. Blume & Pratt, *supra* note 195, at 326.
208. *Id.*
209. *Teague*, 489 U.S. at 309.
210. *See id.*
211. *Id.* at 316.
212. *Beard*, 542 U.S. at 411 (internal quotation marks omitted).
213. *Id.*
214. *Id.*
215. *Teague*, 489 U.S. at 301.

court. Collateral appeal starts when a defendant files a habeas corpus petition. Because habeas corpus petitions are civil law cases, they use the rules of civil procedure and appellate procedure.

While the Supreme Court established that new rules of criminal procedure will not be generally applied retroactively to collateral review cases,²¹⁶ the Court stated that there was the possibility of retroactivity if “those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated.”²¹⁷

First, retroactivity should apply if the new rule changes the fundamental nature of what kinds of conduct may or may not be proscribed by the criminal system.²¹⁸ In other words, this exception is understood to apply to new rules dealing grounds relating to substantive due process.²¹⁹ Substantive rules, are rules that “alter[] the range of conduct or the class of persons that the law punishes.”²²⁰ For example, in *Street v. New York*, the conduct in question was the act of saying words and was up as a matter of constitutional interpretation that put individuals constitutionally protected conduct in question.²²¹

Second, retroactivity should apply if the new rule of constitutional criminal procedure implicates the fundamental fairness of a trial.²²² In other words, “watershed rules of criminal procedure.”²²³ A rule falling under the second exception would need to be of a type that without it, the “likelihood of an accurate conviction is seriously diminished.”²²⁴ While not completely out of the realm of possibility, the Court stated, “Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.”²²⁵ The Court indicated that such an exception would rarely be met.²²⁶

The analysis coming out of *Teague*, when determining whether to retroactively apply a new rule of constitutional criminal procedure, is a three-step test.²²⁷ First, the court must consider nature of the defendant’s conviction.²²⁸ That is, whether the conviction is final or not.²²⁹ Second, the court must consider the legal landscape at the time of the conviction.²³⁰ The court must consider the new rule, and whether the constitution and existing precedent would have compelled the new rule at the time of the conviction.²³¹ In essence, the second question asks the court to determine if

216. *Id.* at 316.

217. *Id.*

218. *See id.* at 307.

219. Ellen E. Boshkoff, *Resolving Retroactivity After Teague v. Lane*, 65 IND. L.J. 651, 656 (1990).

220. *Schiro v. Summerlin*, 542 U.S. 348, 353 (2004).

221. *Street v. New York*, 394 U.S. 576.

222. *Teague*, 489 U.S. at 307; *see also* Boshkoff, *supra* note 219, at 656.

223. *Teague*, 489 U.S. at 311, 312.

224. Boshkoff, *supra* note 219, at 656 (quoting *Teague*, 489 U.S. at 313).

225. *Teague*, 489 U.S. at 313.

226. *Id.*

227. *Beard*, 542 U.S. at 411.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

the rule is actually new, or just a different interpretation of already existing law.²³² If the court determines that the new law is, in fact, new, then the final step asks the court to determine whether the new law fits under either of the two exceptions that would allow the rule to have retroactive effect.²³³

B. What Constitutes a New Rule?

One of the primary components, if not the primary component, of a retroactivity analysis, is the determination that a Court decision announces a new rule.²³⁴ Looking back at the difference between direct review and collateral review, court decisions that do not announce a new rule are generally applicable in all cases on direct review because, in those cases, judicial finality is not threatened; however, for cases on collateral review, absent the announcement of a new rule, falling into the accompanying exceptions, the general rule coming out of *Teague* establishes that judicial decisions are not available as a basis for collateral relief. Thus for petitioners on collateral review, it is vital to establish what constitutes a new rule, and when the Court announces a new rule.

In *Teague*, the Court explained that there are two circumstances in which the Court will have announced a new rule.²³⁵ First, a Court holding that breaks new legal ground will constitute the announcement of a new rule.²³⁶ Second, a Court holding that “imposes a new obligation on the States or the Federal Government” will constitute the announcement of a new rule.²³⁷ Or rather, “a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”²³⁸ But again, the Court went on to state that “[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”²³⁹

In *Graham v. Collins*, the Court explained that if the new rule of constitutional criminal procedure expressly overrules a prior decision, the Court may easily hold that it constitutes a new rule.²⁴⁰ However, determining whether an extension of the reasoning found in precedent cases constitutes a new rule is more difficult.²⁴¹ The purpose of federal habeas review is to ensure that criminal proceedings are conducted in accordance with timely interpretation of the constitution.²⁴² As such, a good faith interpretation of existing precedent at the time of the conviction will not be held as contrary to later decisions sufficient to announce a new rule.²⁴³ In so reasoning, the Court drew distinctions on the time frame for when the Court should apply a constitutional analysis for determining if a new rule was announced. The

232. *Id.*

233. *Beard*, 542 U.S. at 411.

234. *Teague*, 489 U.S. at 301.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 310.

240. *Graham v. Collins*, 506 U.S. 461, 467 (1993).

241. *Id.*

242. *Id.*

243. *Id.*

timely interpretation of the constitution was not meant as a present interpretation, but rather an interpretation at the time of the precedent's decision.

The Court in *Graham* provided that it was the precedent Court that was given a good faith interpretation on the constitution and that the present Court should place the focus, not on a constitutional interpretation of the rule under circumstances present at the time of the current conviction, but rather how the constitution was interpreted at the time of the precedent Court's decision. Thus, announcing a new rule based simply on the overruling of a precedent decision was no longer a straightforward affair but consisted of looking at the precedent Court's decision and applying a good faith standard to its constitutional interpretation at the time of the original decision.

With such a standard that allows the Court to give precedent Courts the benefit of a good faith constitutional interpretation, new rules are almost never announced.²⁴⁴ The language used in *Teague* is mirrored in *Chaidez v. United States*, where the Supreme Court explained *Teague*'s application of the new rule analysis stating that the Court announces a new rule "when it breaks new ground or imposes a new obligation on the government."²⁴⁵ Or, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."²⁴⁶

However, the *Chaidez* Court went further and explained that there is a flipside to the *Teague* holding.²⁴⁷ The Court noted that "*Teague* also made clear that a case does *not* announce a new rule, when it is merely an application of the principle that governed a prior decision to a different set of facts."²⁴⁸ The Court was referring to situations where an established legal standard was being applied to a different set of facts. Specifically, the *Chaidez* Court noted the cases of *Strickland v. Washington*²⁴⁹ and *Padilla v. Kentucky*.²⁵⁰ The legal standard at issue in *Strickland* was whether the assistance of counsel fell below an objective standard of reasonableness.²⁵¹ While application of that standard to different factual circumstances may yield different or even contradictory outcomes, it does not rise to the level of establishing a new rule.²⁵² The *Chaidez* Court noted that "we have granted relief under *Strickland* in diverse contexts without ever suggesting that doing so required a new rule."²⁵³

Comparing *Strickland* to *Padilla*, the Court explained that "*Padilla* would not have created a new rule had it only applied *Strickland*'s general standard to yet another factual situation"²⁵⁴ However, the Court went on to explain that *Padilla* added a question prior to the application of the standard found in *Strickland*.²⁵⁵ The *Padilla* Court asked the question whether the *Strickland* standard should even

244. See *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Strickland v. Washington*, 466 U.S. 668 (1984).

250. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

251. *Chaidez*, 133 S. Ct. at 1107–08.

252. *Id.*

253. *Id.* at 1108.

254. *Id.*

255. *Id.*

be applied under the circumstances.²⁵⁶ While the simple application of the standard from *Strickland* did not rise to the level of a new rule, the *Chaidez* Court held that adding that prior question was sufficient to hold that *Padilla* did announce a new rule.²⁵⁷

Distinguishing between the two cases, the Court went on to explain that “the beginning point of [the Court’s] analysis is a rule of general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts.”²⁵⁸ Additionally, the Court noted that “it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.”²⁵⁹ In other words, “when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes.”²⁶⁰

V. APPLICATION OF *TEAGUE*’S RETROACTIVITY ANALYSIS TO *EVANS*

Teague’s three-step retroactivity analysis provides the framework for deciding if a Supreme Court decision has retroactive application. This part first considers whether the Court in *Evans* announced a new rule and, if so, whether either of the two exceptions to the general rule against the retroactive application of new rules to petitioners on collateral review would apply, then considers what effect, in any, the *Evans* ruling has for habeas corpus claims in Idaho.

A. Does *Evans* Announce a New Rule?

The question then, is did *Evans* announce a new rule that would have retroactive applicability to criminal defendant petitioners in Idaho who wish to bring a habeas corpus action due to the abrogation of *Korsen*? Remember, the Court in *Teague* explained that there are two circumstances in which the Supreme Court will have announced a new rule.²⁶¹ First, a Court holding that breaks new legal ground will constitute the announcement of a new rule.²⁶² Second, a Court holding that “imposes a new obligation on the States or the Federal Government” will constitute the announcement of a new rule.²⁶³ Or rather, “a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.”²⁶⁴

The Court in *Evans* was quick to find existing precedent more than sufficient to show the application of a general standard.²⁶⁵ The Court explained the application of precedent within its holding.²⁶⁶ And, speaking to the matter of precedent, the Court stated that “we do not write on a clean slate. Quite the opposite. It has been half a century since we first recognized that the Double Jeopardy Clause bars retrial

256. *Id.*

257. *Chaidez*, 133 S. Ct. at 1107–08.

258. *Id.* at 1107 (internal quotation marks omitted).

259. *Id.*

260. *Id.*

261. *Teague v. Lane*, 489 U.S. 288, 301 (1989).

262. *Id.*

263. *Id.*

264. *Id.*

265. *See Evans v. Michigan*, 133 S. Ct. 1069, 1074 (2013).

266. *Id.*

following a court-decreed acquittal, even if the acquittal is based upon an egregiously erroneous foundation.²⁶⁷ The Court explained that “mistaken acquittal is an acquittal nonetheless.”²⁶⁸ The Court based its legal conclusion on the difference between two types of rulings.²⁶⁹ The general standard the Court applied hinged on whether the lower court’s acquittal was based on substantive or procedural rulings.²⁷⁰ The Court reasoned that even though erroneous procedural rulings may terminate a trial, the risks associated with procedural rulings are not as severe as the risks associated with substantive rulings.²⁷¹ The Court considers the judicial interest in finality to be much stronger in cases of court determinations based on substantive rulings because it more adequately protects the defendant.²⁷²

However, erroneous procedural rulings do not trigger the same judicial protection for defendants because they are not sufficiently based on the factual determination of guilt or innocence.²⁷³ The Court’s main focus in defining this differentiation was to maintain the defendant’s expectation of finality.²⁷⁴ As such, the Court held that substantive judicial rulings, but not procedural rulings, that end in a court-decreed acquittal, trigger double jeopardy protection for criminal defendants regardless of any erroneous foundation.²⁷⁵ Based on the majority’s reasoning for its decision in *Evans*, and *Teague*’s holding that “a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final,”²⁷⁶ *Evans* did not announce a new rule.

However, while the majority opinion in *Evans* held that an acquittal based on a substantive ruling cannot be reviewed, “on error or otherwise, without putting a defendant twice in jeopardy, and thereby violating the Constitution,”²⁷⁷ the dissenting opinion raised some concerns.²⁷⁸ The primary objection to the majority’s position is that it breaks from the original meaning of the Double Jeopardy Clause by switching the focus from the elements of the offense, to a categorical determination of substantive verses procedural rulings.²⁷⁹ As the dissent notes, the text of the Fifth Amendment reads that no “person shall be subject for the same offence to be twice put in jeopardy of life or limb.”²⁸⁰ A plain reading of the text shows that the “offence” is the pivotal part of the amendment.²⁸¹ A criminal charge is defined by that elements that comprise the charge.²⁸²

The dissent noted that by moving away from the specific elements of the charge, the majority held contrary to established precedent that had consistently

267. *Id.* (internal quotation marks omitted).

268. *Id.*

269. *Id.* at 1074–75.

270. *Evans*, 133 S. Ct. at 1074–75.

271. *Id.* at 1073–76.

272. *Id.*

273. *Id.*

274. *See id.*

275. *Evans*, 133 S. Ct. at 1074.

276. *Teague v. Lane*, 489 U.S. 288, 301 (1989).

277. *Evans*, 133 S. Ct. at 1074.

278. *See id.* at 1085 (Alito, J., dissenting).

279. *Id.* at 1081–82.

280. U.S. CONST. amend. V.

281. *See Evans*, 133 S. Ct. at 1081–82 (Alito, J., dissenting).

282. *Id.*

held that an acquittal must represent a resolution of “some or all of the factual elements of the offense charged.”²⁸³ Holding that an acquittal was valid based on a determination that a substantive, rather than procedural, ruling was issued, regardless of any connection to the actual elements of the offense charged, changed the nature of the Court’s view on the protections granted by the Double Jeopardy Clause.²⁸⁴

Under the dissent’s characterization of what the majority held, *Evans* looks like a fundamental change in the nature of how the Double Jeopardy Clause is interpreted by the Supreme Court, and a decision that was “not dictated by precedent existing at the time the defendant’s conviction became final.”²⁸⁵ As such, the dissent’s understanding of what the majority held may be interpreted to characterize the decision in *Evans* as announcing a new rule that may provide relief to criminal defendants on collateral appeal if the new rule were to fall into one of the two exceptions.

B. The Effect of *Evans* on Habeas Corpus Claims in Idaho

With the Court in *Evans* holding for double jeopardy protection in cases dealing with erroneous judicial determinations, and with the abrogation of the Idaho Supreme Court case of *Korsen*, the question arises of what, if any, effect the Court’s holding in *Evans* will have on habeas corpus claims for collateral relief in Idaho. That question is answered through an application of the three-step test for retroactivity discussed in *Teague*.

Based on the Supreme Court’s holding in *Evans*, the abrogation of *Korsen* will not have any effect on habeas corpus claims for collateral relief in Idaho. Starting with the three-step analysis established by the Court in *Teague*, first, the court must consider the nature of the defendant’s conviction.²⁸⁶ That is, whether the conviction is final or not.²⁸⁷ This is a case specific question that the Court will consider at the time. This first inquiry is almost a threshold question based on the holding in *Teague* that “new rules of criminal procedure do not apply retroactively to cases which had become final on direct review at the time the new rule was decided.”²⁸⁸ If the petitioner’s conviction is not yet final, then if a new rule of constitutional criminal procedure was announced, it would be applied to any petitioner currently on direct review.²⁸⁹

Second, the Court must consider the legal landscape at the time of the conviction and whether the constitution and existing precedent would have compelled the new rule at the time of the conviction.²⁹⁰ In *Evans*, the Court clearly expressed that its decision was based on established precedent that sufficiently showed the general standard for analysis of a claim under double jeopardy protection.²⁹¹ The Court

283. *Id.* at 1082.

284. *See id.*

285. *Teague*, 489 U.S. at 301.

286. *Beard*, 542 U.S. at 411.

287. *Id.*

288. Blume & Pratt, *supra* note 195, at 325.

289. *See Teague*, 489 U.S. at 301.

290. *Beard*, 542 U.S. at 411.

291. *See Evans*, 133 S. Ct. at 1074.

expressed that its decision was based on the presence of a long standing recognition that the Double Jeopardy Clause protects criminal defendants from a retrial after a court-decreed acquittal even if that acquittal was based on an erroneous legal foundation.²⁹²

While a defendant may argue that the abrogation of the ruling in *Korsen* was a rule of constitutional criminal procedure that expressly overruled a prior decision and, therefore, the Court should hold that it constitutes a new rule,²⁹³ as previously noted, determining whether an extension of the reasoning found in precedent cases constitutes a new rule is not an easy task.²⁹⁴ In any future claim for collateral relief based on the decision in *Evans*, the Court would apply the good faith interpretation of existing precedent found in *Graham*.²⁹⁵ Based on the clear statements of the majority opinion in *Evans*, the Court might easily hold that at the time of the *Evans* decision, the Court's ruling was based on an adequate interpretation of the constitutional landscape at the time.²⁹⁶ Therefore, *Evans* did not announce a new rule, and the three-step *Teague* analysis would end there.

However, some weight may be given to the arguments given in the *Evans* dissent. The precedent cases and the analysis of the Court's decision to base its ruling of the condition of substantive rulings versus procedural rulings rather than an analysis of the elements of the criminal charged, as found through the use of the word offence in the Fifth Amendment, is strong support for the argument that the Court in *Evans* did, in fact, announce a new rule. A rule that changed how the Double Jeopardy Clause would be analyzed for triggering constitutional protections for criminal defendants in situations where a court-decreed acquittal was based on an erroneous determination of one of the essential elements of the charged offense. As such, an analysis of the third *Teague* step is informative. If the Court determined that the holding in *Evans* did announce a new rule, then the Court would continue on to the final step in the *Teague* analysis.²⁹⁷

Finally, the Court will determine if either of the exceptions to the general rule against the retroactivity of new rules announced by the Supreme Court are applicable. First, a new rule of constitutional criminal procedure will be given retroactive effect if it changes the fundamental nature of what kinds of conduct may or may not be proscribed by the criminal system.²⁹⁸ What that means, is that if a new rule relates to substantive due process,²⁹⁹ or rather, alters "the range of conduct or the class of persons that the law punishes," then it will be given retroactive effect.³⁰⁰

It would strain any possible interpretation of the ruling in *Evans* to find satisfaction of this first exception to the rule against retroactivity. The circumstances dealing with the protections granted by the Double Jeopardy Clause fall outside the range of substantive due process and bear no relation on prohibited or proscribed conduct of the defendants, and further, bears no relationship to any specific class of

292. *Id.*

293. *See Graham*, 506 U.S. at 467.

294. *Id.*

295. *See id.*

296. *See id.*

297. *Beard*, 542 U.S. at 411.

298. *Teague*, 489 U.S. at 307.

299. Boshkoff, *supra* note 219, at 655.

300. *Schiro*, 542 U.S. at 353.

defendant. Even if the Court found that *Evans* announced a new rule, that new rule would not fall within the first exception.

Second, retroactivity should apply if the new rule of constitutional criminal procedure implicates the fundamental fairness of a trial.³⁰¹ The Court has categorized this exception to mean “watershed rules of criminal procedure.”³⁰² Or rather, this second exception deals with rules so fundamental to the judicial process that without them, the “likelihood of an accurate conviction is seriously diminished.”³⁰³ The Court has stated that it considers such basic rules, that are fundamental to the judicial process, to be “so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.”³⁰⁴ It is only in the rarest circumstances that such an exception would be met.³⁰⁵ While the decision in *Evans* may influence the accuracy of convictions dealing with erroneous substantive rulings, it would again strain a reasonable interpretation to find that it impact the basic, fundamental, likelihood for an accurate determination of innocence or guilt that is required under the second exception.

And so, while an alternate interpretation of the ruling in *Evans* would suggest that it did, in fact, announce a new rule, under an application of the *Teague* analysis for retroactivity—even if the Court found that *Evans* announced a new rule—such a judicial determination would fall outside of the two exceptions to the general rule against the retroactivity of Supreme Court decisions. Thus, *Evans*, despite its abrogation of *Korsen*, would have no effect on habeas corpus claims for collateral relief in Idaho.

VI. CONCLUSION

In the Supreme Court case of *Evans v. Michigan*, the Court held that the Double Jeopardy Clause barred the retrial of a criminal defendant after a court-directed acquittal. Retrial was barred even in the event that the acquittal rested on the trial court’s erroneous understanding of the law. Based on the Supreme Court’s holding in *Evans*, it is safe to say that the abrogation of *Korsen* will not have any effect on habeas corpus claims for collateral relief in Idaho. The likely interpretation of the ruling in *Evans* was that the Court did not announce a new rule, and even if it did, that new rule announced does not fall within the two exceptions that would allow retroactive application to petitioners in habeas corpus claims for collateral relief.

The Supreme Court in *Evans* did not announce a new rule. The two established circumstances that the Supreme Court has stated announce a new rule are not applicable to *Evans*. The Court discussed a number of established precedent cases dealing with acquittals and the majority opinion clearly sets forth the precedent from which it drew its decision and the general standard from which its ruling stems; that being the distinction between an erroneous court-decreed acquittal based on a substantive ruling versus one based on a procedural ruling. The Su-

301. Boshkoff, *supra* note 219, at 656.

302. *Teague*, 489 U.S. at 311.

303. Boshkoff, *supra* note 219, at 656.

304. *Teague*, 489 U.S. at 313.

305. *Id.*

preme Court explained that it was not the application of a new rule but rather a clarification of existing precedent to a new set of circumstances. As such, the holding in *Evans* did not break new legal ground.

Further, even an interpretation of *Evans* that establishes a new rule of constitutional criminal procedure would offer no benefit to petitioners on collateral appeal. While the shift from a focus on the essential elements of a criminal offense to a categorical determination of the ruling based on its substantive or procedural nature might constitute a new rule and trigger a *Teague* retroactivity analysis, such a new rule still fails to satisfy either of the two exceptions to the general rule against the retroactive application of new rules for petitioners on collateral appeal.

Such a new rule does not change the fundamental nature of what kinds of conduct may or may not be proscribed by the criminal system or alter the class of person that the law encompasses. The Double Jeopardy Clause and its protections are awarded to all classes of persons, and the protection against the retrial of criminal defendants is, at its core, procedural. Additionally, such a new rule does not seriously increase the likelihood of an accurate conviction. Only new rules that the Court considers fundamental to the judicial process on a level that is central in determining the innocence or guilt of a criminal defendant will be given retroactive application. A presumed new rule coming out of *Evans* fails to meet such a definition.

Looking at the entirety of the *Teague* analysis, the Court's decision in *Evans* fails to meet the established conditions for announcing a new rule. An interpretation of the *Evans* holding, as set forth by Justice Alito in the dissent, does cast the majority's decision in a light favoring establishment of a new rule. However, even if that were true, the new rule established in *Evans* fails to fall within the two exceptions to the general rule against retroactive application of new rules of criminal procedure that was established in *Teague*.

Based on the holding that the Double Jeopardy Clause offers protection to criminal defendants from retrials after a court-directed acquittal, and a determination that retrial is barred even when the acquittal is founded on the trial court's erroneous understanding of the law, the Supreme Court case of *Evans v. Michigan* will not act as a source for a claim by criminal defendant petitioners upon which they may seek collateral relief. Therefore, the Supreme Court case of *Evans v. Michigan*, and its abrogation of *State v. Korsen*, will have no effect on the state of habeas corpus claims for collateral relief in Idaho.

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