

EVANS V. MICHIGAN: THE IMPACT OF JUDICIAL ERROR ON DOUBLE JEOPARDY PROTECTION

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I. INTRODUCTION

The Fifth Amendment of the U.S. Constitution protects against double jeopardy, the retrying of a criminal defendant for the same offense after conviction or acquittal.¹ But does the Fifth Amendment protect a criminal defendant when a trial judge mistakenly requires the prosecution to prove an element that does not exist and, as a result, orders a directed verdict in favor of the defendant? The Michigan Supreme Court's answer was a definitive "no," interpreting the double jeopardy protection narrowly and holding that such a decision was not an "acquittal" barring retrial.² Because even erroneous acquittals cannot be retried, state courts—wanting to preserve the possibility of retrial for public policy reasons—readily avoid defining trial rulings as "acquittals." Strong public policy rationales support the Michigan Supreme Court's interpretation. The validity of these rationales, however, rests on the trial court making a legal, rather than a factual, error—a distinction not yet drawn by the U.S. Supreme Court. In *Evans v. Michigan*,³ the Court will decide whether to recognize such a distinction in judicial rulings for purposes of extending double jeopardy protection.

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1. U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .”).

2. *People v. Evans*, 810 N.W.2d 535, 536–37 (Mich. 2012), cert. granted sub nom. *Evans v. Michigan*, 132 S. Ct. 2753 (U.S. June 11, 2012) (No. 11-1327).

3. *Evans v. Michigan*, No. 11-1327 (U.S. argued Nov. 6, 2012).

II. FACTUAL BACKGROUND

In 2008, Lamar Evans was arrested in connection with a house fire.⁴ Evans was charged under the Michigan Penal Code with “willfully or maliciously” burning “any building or other real property.”⁵ The two arresting police officers testified at Evans’s trial that they had observed a house on fire and, upon investigating, saw Evans running away from the house with a gasoline can.⁶ They further testified that after apprehending Evans, he confessed to burning down the house.⁷ The fire department’s subsequent arson investigation concluded that the fire had been deliberately set.⁸ At the time of the fire, no one lived in the house, and the house lacked utility connections.⁹ However, the owner was in the process of purchasing the house and had begun moving in his belongings.¹⁰

The trial judge granted Evans’s motion for a directed verdict following the close of the prosecution’s case-in-chief.¹¹ Evans contended that the jury instructions showed that the charged offense required, as a necessary element, that the building in question not be a dwelling; however, the State’s evidence showed that the building was a dwelling.¹² The State argued that whether or not the building was a dwelling was not an element of the offense—the building just had to be a “structure”—and that the jury instructions were only a guide.¹³ The trial judge disagreed with the prosecution, referring to the jury instructions as “not a guide” but rather as “what is required by law.”¹⁴ The judge also read the statutory language to mean that because the State charged Evans under “burning other real property” and not “burning [a] dwelling house,”¹⁵ the State had to prove the building was not a dwelling.¹⁶

4. *Evans*, 810 N.W.2d at 537.

5. MICH. COMP. LAWS ANN. § 750.73 (West 2012).

6. *Evans*, 810 N.W.2d at 537.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 539.

12. *See id.* at 537 (describing Evans’s motion for a directed verdict following the close of the prosecution’s case-in-chief).

13. *Id.* at 537–38.

14. *Id.* at 538.

15. MICH. COMP. LAWS ANN. § 750.72 (West 2012).

16. *See Evans*, 810 N.W.2d at 538–39 (quoting the colloquy between the trial judge and counsel).

The State appealed, seeking to retry Evans.¹⁷ The Michigan Court of Appeals reversed the trial court's ruling.¹⁸ The appellate court found it "undisputed"¹⁹ that the trial judge had erroneously required the State to prove the building was not a dwelling. Furthermore, the appellate court concluded that the legal error meant the trial court's ruling was not an acquittal barring retrial under the Double Jeopardy Clause.²⁰ The Michigan Supreme Court affirmed.²¹

III. LEGAL BACKGROUND

A. *Double Jeopardy Clause Protection Against Retrial Following Acquittal*

The Fifth Amendment provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."²² The U.S. Supreme Court has construed this clause, known as the Double Jeopardy Clause, to provide three categorical protections for criminal defendants: (1) protection against multiple prosecutions for the same offense; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against a second prosecution for the same offense after acquittal.²³ *Evans* will require the Supreme Court to consider the scope of this last protection.

The Court has long held that an acquittal is final and cannot be reviewed without violating a defendant's constitutional right to be protected against double jeopardy.²⁴ According to the Court, "[a]t the heart of this policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm

17. *Id.* at 539.

18. *People v. Evans*, 794 N.W.2d 848, 850 (Mich. Ct. App. 2010), *aff'd*, 810 N.W.2d 535 (Mich. 2012), *cert. granted sub nom. Evans v. Michigan*, 132 S. Ct. 2753 (U.S. June 11, 2012) (No. 11-1327).

19. *Id.* at 852.

20. *See Evans*, 810 N.W.2d at 539 ("[T]he panel concluded that double-jeopardy principles did not bar retrial because the trial court had not resolved a factual element necessary to establish a conviction.").

21. *Id.* at 549.

22. U.S. CONST. amend. V.

23. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *see* Notes and Comments, *Twice in Jeopardy*, 75 YALE L.J. 262, 265-66 (1965) (outlining the three central double jeopardy prohibitions).

24. *See Ball v. United States*, 163 U.S. 662, 671 (1896) ("The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the [C]onstitution.").

Government with a potent instrument of oppression.”²⁵ This double jeopardy protection also serves important interests of finality in judicial proceedings and the preservation of the integrity of verdicts.²⁶

In recent decades, the Supreme Court has also treated judicial acquittals the same as jury acquittals for purposes of double jeopardy protection.²⁷ In the central case *United States v. Martin Linen Supply Co.*,²⁸ the Court held that a trial court ruling is an “acquittal” meriting double jeopardy protection if it “represents a resolution, correct or not, of some or all of the factual elements of the offense charged.”²⁹ In that case, the trial court had entered a judgment of acquittal under Federal Rule of Criminal Procedure 29(c) after discharging the deadlocked jury and determining that the state’s evidence was legally insufficient to sustain a conviction.³⁰ The state appealed the judgment, but the Fifth Circuit held that the Double Jeopardy Clause barred appeal because it would allow the defendants to be tried a second time.³¹ The Supreme Court affirmed, holding that the trial court’s ruling constituted an “acquittal” for double jeopardy purposes.³² The Court emphasized that it was the trial judge’s substantive resolution of the charged offense’s factual elements that deemed it an acquittal, rather than the label of the ruling.³³

The Court’s emphasis that even erroneous acquittals preclude retrial under the Double Jeopardy Clause was important to *Martin*

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

26. *See, e.g.*, *Green v. United States*, 355 U.S. 184, 187 (1957) (“[T]he State . . . should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby . . . 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.”).

27. *See Smith v. Massachusetts*, 543 U.S. 462, 467 (2005) (“[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.”). However, as the United States notes, as *amicus curiae*, this aspect of the Court’s Double Jeopardy Clause jurisprudence is somewhat controversial. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 29, *Evans v. Michigan*, No. 11-1327 (U.S. June 11, 2012) (describing commentators’ observations that “when the Court summarily equated a judge’s insufficiency ruling with a jury’s verdict of acquittal, it gave . . . virtually no reason at all for that treatment”).

28. 430 U.S. 564 (1977).

29. *Id.* at 571.

30. *Id.* at 565–66 & nn.2–3.

31. *Id.* at 567.

32. *Id.*

33. *See id.* at 571 (“[W]hat constitutes an ‘acquittal’ is not to be controlled by the form of the judge’s action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.”).

Linen's holding and particularly relevant to *Evans*. Though this position has been heavily criticized,³⁴ the Court has continued to recognize that the *Martin Linen* standard applies to a multitude of erroneous rulings. In *Arizona v. Rumsey*,³⁵ the Court held that the trial court effectively "acquitted" the defendant of the death penalty by misinterpreting the sentencing statute and finding a lack of aggravating circumstances; the trial court was thus barred on remand from sentencing the defendant to death.³⁶ In *Smalis v. Pennsylvania*,³⁷ the Court held that a trial court's grant of defendants' demurrer constituted an acquittal barring retrial.³⁸ Further, the trial court's potentially erroneous requirement that the prosecution show a higher degree of recklessness than was statutorily necessary to prove third-degree murder did not affect the ruling's status as an acquittal.³⁹ The ruling was an acquittal because "[w]hat the demurring defendant seeks is a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt."⁴⁰

More recently, in *Smith v. Massachusetts*,⁴¹ the Court held that a trial judge acquitted a defendant of an unlawful firearms possession charge when she ruled that the state had not proven a gun barrel was less than sixteen inches long, as required by statute, even though the judge later orally "reversed" her ruling upon reconsideration of the trial testimony.⁴² According to the Court, the trial judge's initial ruling was final and constituted an acquittal, because it was entered under a criminal procedure rule "direct[ing] the trial judge to enter a finding of not guilty 'if the evidence is insufficient as a matter of law to sustain a conviction.'"⁴³ Whether it was correct or not, the ruling

34. *E.g.*, *Kepner v. United States*, 195 U.S. 100, 135 (1904) (Holmes, J., dissenting) ("[The defendant] no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm.").

35. 467 U.S. 203 (1984).

36. *Id.* at 211.

37. 476 U.S. 140 (1986).

38. *See id.* at 144 ("The Pennsylvania Supreme Court erred in holding that, for purposes of considering a plea of double jeopardy, a defendant who demurs at the close of the prosecution's case in chief elects to seek dismissal on grounds unrelated to his factual guilt or innocence." (internal quotation marks omitted)).

39. *Id.* at 144 n.7.

40. *Id.* at 144.

41. 543 U.S. 462 (2005).

42. *See id.* at 465-67 (holding that the trial judge's initial ruling, based on her finding that the prosecution had not presented any evidence showing the defendant possessed a weapon with a barrel less than sixteen inches long, constituted an acquittal).

43. *Id.* at 467 (quoting MASS. R. CRIM. P. 25(a)).

resolved the defendant's guilt or innocence on the charge and was thus an acquittal.⁴⁴

Conversely, the Court's precedent does provide some guidance on when the Double Jeopardy Clause does not bar retrial following trial court orders that terminate proceedings before a jury verdict is rendered. In *United States v. Scott*,⁴⁵ the trial court granted the defendant's mid-trial motion to dismiss drug charges based on prejudice due to pre-indictment delay.⁴⁶ The state sought to appeal the dismissal, but the Sixth Circuit held that the Double Jeopardy Clause barred any further prosecution.⁴⁷ The Supreme Court reversed, distinguishing the case on the basis that there had been no findings as to the defendant's guilt or innocence.⁴⁸ The Court held that the underlying principles and purposes of the Double Jeopardy Clause are not implicated where the trial court ruling is unrelated to issues of the defendant's culpability.⁴⁹

In the Supreme Court's last term, it considered the scope of double jeopardy protection in the context of a jury trial in *Blueford v. Arkansas*.⁵⁰ During deliberations in that case, the foreperson reported to the trial judge that the jury "was unanimous against guilt on capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide."⁵¹ The jury continued to deliberate but was unable to reach a verdict, and a mistrial was declared.⁵² The Court held that the Double Jeopardy Clause did not bar retrial of the defendant on the murder charges.⁵³ In the majority's

44. *See id.* at 468–69 (applying the *Martin Linen* standard and holding that "what matters is that, as the Massachusetts Rules authorize, the judge evaluated the [Commonwealth's] evidence and determined that it was legally insufficient to sustain a conviction" (alteration in original) (internal quotation marks omitted)).

45. 437 U.S. 82 (1978).

46. *Id.* at 84.

47. *Id.*

48. *See id.* at 100–01 (allowing the prosecution to appeal the trial court's ruling because no Double Jeopardy Clause-protected interest has been invaded when "the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence").

49. *See id.* at 95–96 (deciding that "the underlying purposes of the Double Jeopardy Clause" are not pertinent to a defendant who seeks termination "not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt").

50. 132 S. Ct. 2044 (2012).

51. *Id.* at 2048.

52. *Id.*

53. *Id.* at 2053.

view, “the foreperson’s report was not a final resolution of anything”⁵⁴—the defendant was neither convicted nor acquitted of the murder charges—and therefore the Double Jeopardy Clause did not preclude retrial.⁵⁵

B. Michigan Supreme Court Holding

Considering U.S. Supreme Court precedent on the Double Jeopardy Clause as well as the public policy interests involved, the Michigan Supreme Court in *Evans* held that the State was not barred from retrying Evans following the trial judge’s misconstruction of the criminal statute under which Evans was charged.⁵⁶

At the core of the holding was the Michigan Supreme Court’s conclusion that the trial judge’s ruling did not constitute an acquittal warranting protection under the Double Jeopardy Clause. The court looked to *Martin Linen* as the foundation for determining whether a ruling is an acquittal for double jeopardy purposes.⁵⁷ In particular, the court found that *Martin Linen* set forth the definition of an acquittal as “a ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the *factual elements* of the offense charged.”⁵⁸ Because the trial court erroneously required that the prosecution establish an element of the charged offense that did not actually exist, the Michigan Supreme Court found that the trial court never ruled on any of the factual elements required by statute.⁵⁹ Moreover, since the trial court’s ruling was based on this “extraneous element,” the Michigan Supreme Court found that the trial court never reached the question of the defendant’s guilt or innocence.⁶⁰

The Michigan Supreme Court distinguished the legal error committed in this case from the factual errors in cases that extended

54. *Id.* at 2050.

55. *Id.* at 2053. Justice Sotomayor, joined by Justices Ginsburg and Kagan, asserted that the majority opinion effectively gave “the State what the Constitution withholds: the proverbial second bite at the apple.” *Id.* (Sotomayor, J., dissenting) (internal quotation marks omitted).

56. *People v. Evans*, 810 N.W.2d 535, 548–49 (Mich. 2012), *cert. granted sub nom. Evans v. Michigan*, 132 S. Ct. 2753 (U.S. June 11, 2012) (No. 11-1327).

57. *Id.* at 540–41.

58. *Id.* at 546 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)).

59. *See id.* (agreeing with the court of appeals that because the trial court incorrectly added an extra element to the charged offense, it “did not resolve or even address any factual element necessary to establish a conviction for burning other real property”).

60. *Id.*

double jeopardy protection.⁶¹ According to the court, in *Rumsey*, *Smalis*, and *Smith*, the trial courts had made evidentiary errors relating to the proof required to establish factual elements of the charged offenses.⁶² Though the court noted that the rulings in those cases “were based on the prosecution’s failure to prove something that the law did not actually require it to prove,” the “key distinction” was that the trial courts in those cases resolved at least one of the factual elements of the charged offense.⁶³ In contrast, the trial judge’s ruling in Evans’s case was “entirely focused on the extraneous element” that the trial judge grafted onto the statutory offense.⁶⁴ Thus, in the court’s view, there was a “constitutionally meaningful difference”⁶⁵ between the post-*Martin Linen* cases and the current case before the court. Here, the trial court’s error effectively dismissed the case without resolving any factual elements.⁶⁶

The Michigan Supreme Court also discussed the policy concerns underlying its holding. Interpreting the outer bounds of “acquittal” requires the balancing of two competing interests. The first is the State’s “interest in having one full and fair opportunity to prosecute a criminal case.”⁶⁷ This interest weighs in favor of a narrow interpretation of “acquittal.” The second is the “interest in protecting a criminal defendant from being subjected ‘to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity’” about his adjudication.⁶⁸ This interest weighs in favor of a broader interpretation of “acquittal.” In balancing the interests in this case, the Michigan Supreme Court found that the public policy interest in allowing the State to present its case weighed heavily, while retrying Evans did not invoke the kinds of hazards warranting double jeopardy protection.⁶⁹ As a result, the Michigan Supreme Court affirmed the appellate court’s reversal of the trial court ruling, holding that the Double Jeopardy Clause did not bar

61. *Id.* at 543.

62. *Id.*

63. *Id.* at 543 n.39.

64. *Id.* at 546.

65. *Id.* at 543.

66. *Id.*

67. *Id.* at 548.

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

69. *See id.* (“[T]he people have not been afforded the opportunity to have their case reviewed for the sufficiency of the evidence on the factual elements even once. Permitting retrial to allow such an opportunity hardly depicts an all-powerful state relentlessly pursuing a defendant . . .”).

Evans's retrial.⁷⁰

IV. ARGUMENTS

A. *Evans's Argument*

Evans contends that the Double Jeopardy Clause bars the State from retrying him because the trial court's judgment of directed verdict was an acquittal, despite the legal error involved. First, Evans argues that the trial court's ruling implicates Double Jeopardy Clause protection because the court essentially rendered a finding that he was not culpable for the charged offense.⁷¹ Asserting that *Martin Linen* and *Scott* "established a bright line between acquittals and other judicial decisions terminating a criminal proceeding,"⁷² Evans argues that the ruling clearly resolved the question of his guilt or innocence and was thus an acquittal.⁷³ Evans notes that the trial judge evaluated the criminal statute, jury instructions and its commentary, and the State's evidence before issuing her ruling.⁷⁴ Because the trial judge found the evidence "legally insufficient to sustain a conviction,"⁷⁵ Evans asserts that "the ruling, correct or not, was entirely about [his] innocence of the charged offense."⁷⁶ Thus, Evans concludes that permitting a retrial would be unconstitutional and inconsistent with the Court's prior holdings in analogous cases.

Second, Evans argues that the Michigan Supreme Court's decision is an "attempt to carve out an 'extra element' exception to the definition of 'acquittal,'" and as such is an unworkable precedent.⁷⁷ In Evans's view, requiring the State to prove facts to support a misconstruction of the law—held sufficient to bar retrial in *Rumsey*, *Smalis*, and *Smith*—is functionally equivalent to requiring the State to prove an element the trial court added to the statutory requirements.⁷⁸ Both errors "increase[] the prosecution's burden"⁷⁹ and when either such error results in the court terminating trial proceedings, the ruling

70. *Id.* at 548–49.

71. Brief for Petitioner at 9, *Evans v. Michigan*, No. 11-1327 (U.S. Aug. 15, 2012).

72. *Id.* at 11.

73. *See id.* at 14 ("The trial judge's ruling in Petitioner's case was manifestly on the 'guilt or innocence' side of the line drawn in *Scott* and *Martin Linen*.").

74. *Id.* at 14–15.

75. *Id.* at 15 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977)).

76. *Id.*

77. *Id.* at 20.

78. *Id.* at 27.

79. *Id.*

constitutes an acquittal barring retrial under the Double Jeopardy Clause.⁸⁰ Evans further contends that upholding the Michigan Supreme Court’s “extra element” exception would “seriously undermine the core Double Jeopardy Clause protection against post-acquittal proceedings,”⁸¹ opening the door to prosecutorial appeals every time a trial judge orders a mid-trial directed verdict based on legal interpretations with which the prosecution disagrees.⁸² The prosecution could characterize the judge’s interpretation as the addition of an extra, non-existent element, thereby forcing appellate courts to review the decision, and thus undermining the finality of proceedings for already-tried defendants.⁸³

B. State’s Argument

The State argues that the trial judge’s legal error at Evans’s trial was not an acquittal barring retrial. According to the State, this case is fundamentally distinguishable from *Martin Linen* and successive case law, because the errors in those cases affected the factual resolution of the charged offense.⁸⁴ The error here, by contrast, precluded the judge or jury from resolving any of the factual elements required by statute.⁸⁵ In the State’s view, requiring that the structure burned be a dwelling is “no more related to ‘factual guilt or innocence’ of the offense charged than a requirement that the structure burned be blue.”⁸⁶ Because the trial judge required the prosecution to prove something that was indisputably *not* an element⁸⁷ and because this error provided the basis for the judge’s ruling, the State argues that the ruling cannot be characterized as an acquittal.⁸⁸

80. See *id.* at 27–28 (“[T]he fundamental Double Jeopardy Clause bar on further proceedings cannot turn on such a distinction.”).

81. *Id.* at 28.

82. *Id.*

83. See *id.* (“Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him.” (quoting *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986))).

84. See Brief for the Respondent at 13–14, *Evans v. Michigan*, No. 11-1327 (U.S. Oct. 5, 2012) (arguing that under the *Martin Linen* test, a judicial resolution based on “something *other* than one or more of the constituent parts of the crime charged . . . is not an acquittal, and jeopardy does not bar appeal and retrial”).

85. *Id.* at 24.

86. *Id.* at 16–17.

87. See *id.* at 6 (“The trial court wrongly added an extraneous element to the statute under which the Petitioner was charged, and terminated the trial . . . by finding an absence of proof on this extraneous or faux element . . .” (internal quotation marks omitted)).

88. *Id.* at 9.

The State's brief also appeals to the policy justifications for the Double Jeopardy Clause and contends that they are not present in this case. At the outset, the State notes that the ruling resulted from Evans's motion seeking termination of the trial proceedings and argues that as a result "[t]he case involves no attempt to harass the defendant through repeated prosecutions, as all the State seeks is one full and fair opportunity to have the case decided by a jury."⁸⁹ According to the State, the double jeopardy hazards of a powerful state oppressing an individual are simply not present in Evans's case.⁹⁰ In the State's view, adopting Evans's position effectively "turns the storied protections of the Jeopardy Clause into a parlor trick."⁹¹

V. ANALYSIS

In order for Evans to prevail, he needs to convince the Court that the trial court's legal error in his case is no different from the factual errors in other decisions that were held to be unreviewable acquittals warranting double jeopardy protection. In addition to examining the contours of *Martin Linen* and its successive cases, the Court is likely to consider the competing public policy issues involved. On one side is the fundamental protection the Constitution provides to defendants whose guilt the state fails to prove from being tried twice for the same offense⁹² and the public interest in finality in judicial proceedings. On the other side is the need for proper adjudication in criminal trials and the arguable lack of double jeopardy dangers. In light of the Court's long-standing precedent recognizing Double Jeopardy Clause protection even in incorrect judicial resolutions, the State faces an uphill battle.

However, even if the Court finds for Evans, it most likely did not grant certiorari simply to reverse the Michigan Supreme Court and

89. *Id.* at 5–6.

90. *See id.* at 55 (“[W]here the government appeals in this situation ‘the state is not attempting to wear the accused out by a multitude of cases with accumulated trials . . . This is not cruelty at all, nor even vexation in any immoderate degree.’” (quoting *Palko v. Connecticut*, 302 U.S. 319, 328 (1937))). More broadly, the State urges the Supreme Court to reconsider its treatment of judicial acquittals as functionally equivalent to jury acquittals for double jeopardy purposes. *See id.* at 35 (arguing that “reconsideration of the foundations of *Martin Linen* is appropriate” in light of the historical common law origins of the Double Jeopardy Clause).

91. *Id.* at 33.

92. *See* Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner at 11, *Evans v. Michigan*, No. 11-1327 (U.S. Aug. 22, 2012) (“The error was not [Evans’s]; he merely asked the judge to declare his lack of guilt, which the judge did.”).

correct a perceived error.⁹³ Rather, the Court may clarify the scope of *Martin Linen*'s standard, especially since the Michigan Supreme Court's decision was the latest in a number of lower court opinions concluding that *Martin Linen* does not apply to particular legal errors committed by trial courts.⁹⁴

The Court will likely hold the trial judge's ruling to be an acquittal. Procedurally, there is very little difference between the specific legal error committed in Evans's trial and the errors at issue in the *Martin Linen* line of cases. In Evans's trial, the judge issued her ruling under Michigan Court Rule 6.419(A), enabling the court to "direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction" after the close of the prosecution's case-in-chief.⁹⁵ In *Smith*, the Supreme Court looked to similar procedural language to support its conclusion that the trial judge's ruling was indeed an acquittal.⁹⁶ The trial court in that case had ruled under Massachusetts Rule of Criminal Procedure 25(a), directing a finding of not guilty following the close of the prosecution's case "if the evidence is insufficient as a matter of law to sustain a conviction."⁹⁷ The Court held that the trial court's order met the *Martin Linen* definition of an acquittal "consistently used in our double-jeopardy cases."⁹⁸

Additionally, the Court faces the potential of setting uncertain precedent if it were to recognize an exception in its double jeopardy jurisprudence for the erroneous ruling in Evans's case. If the Court agrees with the Michigan Supreme Court that the trial judge's ruling

93. See, e.g., Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 272 (2006) (discussing "the Court's long struggle to control its caseload to avoid being (or being viewed as) a court whose primary role is to correct errors made by lower courts").

94. The Third Circuit, citing other circuits, asserted that the *Martin Linen* test "require[s] an acquittal only when, in terminating the proceeding, the trial court actually resolves in favor of the defendant a factual element necessary for a criminal conviction." *United States v. Maker*, 751 F.2d 614, 622 (3d Cir. 1984). Under this interpretation, the court concluded that a trial court's dismissal of an indictment did not constitute an acquittal because it was based on the court's legally erroneous determination that the indictment's allegations were insufficient. *Id.* at 623–24. More recently, the Idaho Supreme Court held that the state was not barred from retrying a defendant following a directed verdict of acquittal, because the ruling was legally, not factually, erroneous: the magistrate judge had required the state to prove a legitimate reason for asking the defendant to leave public property, when the statute did not contain such an element. *See State v. Korsen*, 69 P.3d 126, 136–37 (Idaho 2003).

95. MICH. CT. R. 6.419(A).

96. *Smith v. Massachusetts*, 543 U.S. 462, 467–68 (2005).

97. MASS. R. CRIM. P. 25(a).

98. *Smith*, 543 U.S. at 467–68.

was not an acquittal, it would essentially create an exception not just for a misinterpretation of law, but a particular *kind* of misinterpretation. After all, the Court has declined to recognize exceptions for trial court errors such as misinterpretations of statutory definitions,⁹⁹ capital sentencing law,¹⁰⁰ and witness testimony.¹⁰¹ The Court has not demonstrated a willingness to carve out such a fact-intensive exception as it would need to in *Evans*. Instead, the wide range of erroneous rulings foreclosing retrial reflects the Court's hesitation to withhold double jeopardy protection from defendants whom courts have found innocent.

Moreover, as a policy matter, if the Court were to uphold the Michigan Supreme Court's ruling, the decision may open the door to all manner of unpredictable double jeopardy exceptions. Perhaps the standard would be fairly easy to apply in circumstances such as this, where the trial judge announces (incorrectly) the precise element she has read into the criminal statute and believes the prosecution has failed to prove. However, in less clear-cut cases, affirming the Michigan Supreme Court could create more confusion in the Court's already fraught double jeopardy jurisprudence.¹⁰² The Court would need to proceed carefully, identifying the specific requirements that distinguish a judicial decision from one that substantively "represents a resolution, correct or not, of some or all of the factual elements of the offense charged."¹⁰³ For example, would a new rule only apply when, as in this case, neither party disputes that a factual element the prosecution was required to prove was actually not part of the statutory offense? While attaching such limitations may lend clarity, it would likely raise the question of how useful such a cabined rule would be. Lower courts would also likely find an "extra element" legal error exemption to double jeopardy protection difficult to apply,

99. See *Smalis v. Pennsylvania*, 476 U.S. 140, 141, 144 n.7 (1986) (extending double jeopardy protection even though the trial court may have required the incorrect level of recklessness); see also *supra* notes 37–40 and accompanying text.

100. See *Arizona v. Rumsey*, 467 U.S. 203, 205 (1984) (extending double jeopardy protection even though the trial court misinterpreted the requirements for an aggravating circumstance for capital sentencing); see also *supra* notes 35–36 and accompanying text.

101. See *Smith*, 543 U.S. at 465 (extending double jeopardy protection even though the trial court misjudged the adequacy of the witness's testimony in proving one of the elements); see also *supra* notes 41–44 and accompanying text.

102. See, e.g., William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 465–66 (1993) (discussing the complicated case law behind the Double Jeopardy Clause's protection against multiple prosecutions for the same offense).

103. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

especially in cases involving erroneous rulings that fall somewhere in the spectrum between *Evans* and the *Martin Linen* line of cases. Ultimately, following the *Martin Linen* standard, the distinction that should matter to the Court is whether the trial judge decided on the defendant's culpability (either legal or factual).¹⁰⁴

Granted, there is an uneasy quality to the factual circumstances of this case, as one may sense that *Evans* is not the kind of defendant the Double Jeopardy Clause aims to protect. The undercurrent of the Michigan Supreme Court's holding is that prohibiting the State from retrying *Evans* serves no strong public policy interest, but rather, harms the public interest.¹⁰⁵ This discomfort with extending Double Jeopardy Clause protection in the wake of the particular legal error committed reflects the criticism of one constitutional scholar: "We do not demand that the defendant go free because the initial jurors catch fever and a new trial is ordered; why should things be any different if a fevered judge makes egregiously wrong legal rulings at trial?"¹⁰⁶ While the Court will be concerned about eroding the Double Jeopardy Clause's fundamental protections, not allowing retrial in this case could arguably present just such an erosion.

VI. CONCLUSION

Though compelling public policy justifications support the Michigan Supreme Court's decision in this case, the State faces an uphill battle in the appeal before the U.S. Supreme Court. Many Supreme Court decisions have extended double jeopardy protection in cases of erroneous acquittals, and the State will need to persuade the Court that the erroneous path taken to end *Evans*'s trial is definitively distinguishable from those cases. The State's task may prove to be insurmountable. Though the circumstances of this case do not provide a particularly strong illustration of the Double Jeopardy Clause's necessity and justifications, the Court is nonetheless likely to

104. See *United States v. Scott*, 437 U.S. 82, 101 (1978) (holding that the Double Jeopardy Clause does not protect a defendant who seeks to terminate trial proceedings "without any submission to either judge or jury as to his guilt or innocence").

105. See *People v. Evans*, 810 N.W.2d 535, 548 (Mich. 2012) *cert. granted sub nom. Evans v. Michigan*, 132 S. Ct. 2753 (U.S. June 11, 2012) (No. 11-1327) ("[A] court's adding an extraneous element and resolving the case solely on the basis of that added element prevents any evaluation of the charged crime on the merits and thus completely thwarts society's interest in allowing the prosecution one full and fair opportunity to present its case.").

106. Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1845 (1997).

find that Evans's culpability has been decided. Upholding the decision would require the Court to articulate a substantive difference between legally and factually erroneous trial court rulings, a distinction with scant foundation in the Court's double jeopardy jurisprudence thus far.