NO. 08-1103

IN THE SUPREME COURT OF THE UNITED STATES

MICHIGAN,

Petitioner,

v.

CHRISTOPHER JAMAL ANDERSON WILLIAMS,

Respondent.

On Petition for Writ of Certiorari to the
Michigan Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Jeanice Dagher-Margosian
Assistant Defender
Counsel of Record
Christopher M. Smith
State Appellate Defender Office
101 N. Washington Square 14th Fl.
Lansing, MI 48913
(517) 334-6069

Attorney for Respondent

COUNTER-STATEMENT OF QUESTION PRESENTED

Should this Court overturn long-standing precedent holding that the double jeopardy bar precludes appellate review of a directed verdict of acquittal predicated upon arguable legal error?

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COUNTER-STATEMENT OF THE CASE

This case involves a straight-forward application of this Court's double jeopardy jurisprudence. As recently as four years ago, this Court reaffirmed the long-standing principle that the double jeopardy bar "will attach to a preverdict acquittal that is patently wrong in law." *Smith v. Massachusetts*, 543 U.S. 462, 473; 125 S.Ct. 1129; 160 L.Ed.2d 914 (2005). Applying this rule, the Michigan Court of Appeals refused to analyze the legal correctness of the directed verdict entered below. Petitioner now seeks certiorari.

A. Trial and Acquittal

Respondent Christopher Williams stood trial in Detroit on a single count of criminal sexual conduct in the third degree. MICH. COMP. LAWS § 750.520d(1)(a). At the close of the prosecution's case-in-chief, the defense moved for a directed verdict of acquittal. *See* MICH. CT. R. 6.419(A). The trial court granted this motion, holding that "[v]iewing the evidence in the light most favorable to the People I don't know that I could send it back for them to make a decision." (R-III, 170).

This acquittal was premised upon a fatal variance between the charging instrument and the complainant's testimony as to the date of the offense. The trial court acknowledged that, under ordinary circumstances, time is not an essential element of the charged offense. (R-III, 147, 154). The court reasoned, however, that time had become essential to the instant case because Respondent had demanded a specific allegation of time and relied upon that specificity in constructing his defense. (R-III, 168). Accordingly, the trial court refused to allow the prosecution to amend the charge and directed a verdict of acquittal for Respondent. (R-III, 168).

B. Appellate Proceedings

Petitioner sought to appeal this judgment to the Michigan Court of Appeals, arguing that the trial court had misconstrued the elements of the charged offense. Respondent defended the trial court's ruling on two grounds. First, Respondent noted that no appeal could be taken because double jeopardy barred retrial. Alternatively, Respondent argued that his acquittal was not predicated upon legal error.

The Michigan Court of Appeals dismissed the appeal. (Pet. App. 1a). Without analyzing Respondent's alternative argument, the appellate court assumed for the sake of analysis that the trial court erred in requiring proof of the date specified in the charging instrument. (Pet. App. 3a-4a). It determined that "the trial court's finding that the prosecution had presented insufficient evidence to sustain a conviction—even if technically incorrect—constituted an acquittal on the merits for double jeopardy purposes." (Pet. App. 3a-4a).

The Michigan Supreme Court denied discretionary review. (Pet. App. 5a). Petitioner now asks this Court to review the appellate court's ruling.

REASONS FOR DENYING THE PETITION

The opinion of the Michigan Court of Appeals rests on what this Court has deemed "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence...." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) (citing *United States v. Ball*, 163 U.S. 662, 671, 16 S.Ct. 1192, 1195, 41 L.Ed. 300 (1896)). Simply put, the Government may not appeal from an acquittal, no matter how erroneous it may seem. *Id.* Contrary to what Petitioner contends, this rule requires neither clarification nor

modification. Indeed, this Court and the lower courts have consistently applied it for decades. Accordingly, this Court should deny certiorari.

A. This Court Has Consistently Applied the Double Jeopardy Bar to Directed Verdicts of Acquittal, Even Those Arguably Predicated Upon Legal Error.

The Fifth Amendment to the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." If the 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 a retrial on that charge. *Smalis v. Pennsylvania*, 476 U.S. 140, 144-46, 106 S.Ct. 1745, 1748-49, 90 L.Ed.2d 116, 121-22 (1986); *United States v. Scott*, 437 U.S. 82, 97, 98 S.Ct. 2187, 2197, 57 L.Ed.2d 65, 78 (1978). This is so "even if the legal rulings underlying the acquittal were erroneous." *Sanabria v. United States*, 437 U.S. 54, 64; 98 S.Ct. 2170; 57 L.Ed.2d 43 (1978); *Fong Foo v. United States*, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962).

Petitioner now challenges this rule, advancing the same argument rejected by this Court nearly a half-century ago in *Fong Foo*. In that case, the trial court entered a direct verdict of acquittal after only a few of the prosecution's witnesses had testified. *Fong Foo*, 369 U.S. at 141-142. The trial court cited the witnesses' lack of credibility and the prosecutor's improper conduct as grounds for acquittal. *Id.* at 142.

On appeal, the Government maintained that the trial court was without authority to enter a directed verdict on those grounds. *Id.* Like Petitioner, it sought to distinguish the trial court's legally erroneous ruling from an acquittal based upon insufficient evidence. *Id.* at 144 (Clark, J., dissenting). But the *Fong Foo* Court rejected this argument and invoked the bar on double jeopardy. *Id.* at 143. This Court held that although "the acquittal was based upon an egregiously

erroneous foundation . . . '[it] could not be reviewed . . . without putting (the petitioners) twice in jeopardy, and thereby violating the constitution.'" *Fong Foo*, 369 U.S. at 143 (quoting *United States v. Ball*, 163 U.S. 662, 671, 16 S.Ct. 1192, 1195, 41 L.Ed. 300 (1896)).

This Court reaffirmed this rule in *Martin Linen*. In that case, the Government argued that the trial court's midtrial acquittal of the defendant did not implicate the Double Jeopardy Clause because the judge's determination was legal rather than factual. *Martin Linen*, 430 U.S. at 572. This Court disagreed, finding that jeopardy terminates whenever a trial court "evaluate[s] the Government's evidence and determine[s] that it was legally insufficient to sustain a conviction." *Id.* No appeal may be taken by the Government from such a ruling "no matter how erroneous the legal theory underlying the decision." *Id.* at 577 (Stevens, J., concurring) (quoting *United States v. Sisson*, 399 U.S. 267, 307, 90 S.Ct. 2117, 2139, 26 L.Ed.2d 608 (1970)).

Following *Fong Foo* and *Martin Linen*, several of this Court's opinions have reiterated this rule. In *Sanabria*, this Court held that "when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous." *Sanabria*, 437 U.S. at 64. In *Scott* and again in *Smalis*, this Court noted that "the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . affects the accuracy of that determination, but it does not alter its essential character." *Scott*, 437 U.S. at 98 (internal citations and quotations omitted). *See also Smalis*, 476 U.S. at 144 n.7. And as recently as four years ago, this Court repeated that "any contention that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a preverdict acquittal

that is patently wrong in law." *Smith v. Massachusetts*, 543 U.S. 462, 473; 125 S.Ct. 1129; 160 L.Ed.2d 914 (2005).

The Michigan Court of Appeals did not, as Petitioner contends, misapply this rule. (Pet. 12). The appellate court correctly held that "the trial court's finding that the prosecution had presented insufficient evidence to sustain a conviction—even if technically incorrect—constituted an acquittal on the merits for double jeopardy purposes." (Pet. App. 3a-4a). This holding represents a straight-forward application of the unambiguous rule of *Fong Foo*, *Martin Linen*, and their progeny.

B. State Courts and Federal Courts of Appeals Have Consistently Applied This Court's Double Jeopardy Jurisprudence to Bar Appeals from Directed Verdicts of Acquittal.

State courts have had no difficulty applying the rule that prosecutors may not challenge the legal correctness of an acquittal. Nearly every jurisdiction has case-law similar to that cited by the Michigan Court of Appeals. And the lone holdout, Idaho, reached a contrary conclusion only after misconstruing a Third Circuit opinion that dealt with a somewhat different question.

Some state appellate courts, when faced with legally erroneous acquittals, use advisory opinions as way to strike a balance between the prosecution's desire to prevent future error and an individual defendant's constitutional rights. The Arkansas Supreme Court, for example, agrees that, "We can do no more than declare the error of the trial court . . . We cannot reverse the judgment because appellee's acquittal prevents the state from retrying him on the same charge." *State v. Jones*, 903 S.W.2d 170, 173-174 (Ark. 1995). *See also Moore v. State*, 882 N.E.2d 788 (Ind. App. 2008) (finding legal error underlying the trial court's judgment of

acquittal, but holding that the state is barred, on double-jeopardy grounds, from trying the defendant again).

The overwhelming majority of state appellate courts, however, refuse to hear appeals from acquittals. Relying on the principles espoused in *Fong Foo*, *Martin Linen*, and their progeny, these courts hold that double jeopardy bars further prosecution even when the directed verdict was predicated upon a legal error. *See, e.g., State v. Kramer*, 760 N.W.2d 190, 197 (Iowa 2009) (holding that a final "judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error"); *State v. Large*, 607 N.W.2d 774 (Minn. 2000) (holding that a verdict of acquittal deprives the state of an opportunity to appeal and deprives the appellate court of jurisdiction to review the lower court's ruling, even if the acquittal on the merits results from a trial court's reliance on an error of law); *State v. Shields*, 49 Md. 301, 303 (1878) ("the verdict of acquittal can never afterward . . . in any form of proceeding, be set aside and a new trial granted, and it matters not whether such verdict be the result of a misdirection of the judge on a question of law, or of a misconception of fact on the part of the jury").[1]

Alabama, despite what Petitioner suggests, also applies the rule of *Fong Foo* and *Martin Linen*. (Pet. 14). Indeed, the Petitioner misplaces its reliance upon *State v. Saxton*, 724 So.2d 77 (Ala. Cr. App. 1998). In that case, the trial court granted a directed verdict of acquittal based

[1] *See also State v. Kott*, 636 P.2d 622, 623 (Alaska App.1981), *overruled on other grounds by Kott v. State*, 678 P.2d 386 (Alaska 1984); *State v. Rumsey*, 665 P.2d 48 (Ariz. 1983); *State v. Ledbetter*, 240 Conn. 317 (1997); *Towles v. U.S.*, 521 A.2d 651, 654 (D.C. Ct. App. 1987); *State v. Swint*, 643 S.E.2d 840 (Ga. App. 2007); *State v. Lynch*, 399 A.2d 629 (N.J. 1979); *City of Dickinson v. Kraft*, 472 N.W.2d 441 (N.D. 1991); *State v. Arnett*, 489 N.E.2d 284 (Ohio 1986); *State v. Harrington*, 296 P.2d 200 (Okla. Crim. App. 1956); *Com. v. Tillman*, 461 A.2d 795 (Pa. 1983); *Horry County v. Parbel*, 662 S.E.2d 466 (S.C. App. 2008); *Towery v. State*, 262 S.W.3d 586 (Tex. Crim. App. 2008); *State v. Bundy*, 587 P.2d 562 (Wash. App. 1978); *State v. Detco. Inc.*, 223 N.W.2d 859, 864 (Wis. 1974).

upon a fatal variance between the offense charged in the indictment and the offense discussed at trial. *Id.* at 79. The Alabama Court of Criminal Appeals noted that the trial court should not have acquitted the defendant on this ground. *Id.* It held that while defendant could be charged with a different offense than that in the original indictment, the Double Jeopardy Clause "bar[red] a second prosecution for the same offense after an acquittal." *Id.*

Petitioner is also incorrect in identifying Idaho as a holdout jurisdiction. (Pet. 15). In *State v. Bennion*, 765 P.2d 692 (Idaho 1988), the Supreme Court of Idaho observed, "It is well settled that even when the trial court errs in directing an acquittal at the end of the state's case, the double jeopardy clause of the United States Constitution precludes retrial of the defendant again for the same offense." *Id.* at 695. The *Bennion* case was not overruled by the case cited by Petitioner, *State v. Korsen*, 69 P.3d 126 (Idaho 2003). (Pet. 15). Rather, *Korsen* involved a state procedural mechanism that "does not constitute an 'acquittal' implicating double jeopardy concerns." *Id.* at 137.

The Massachusetts case cited by Petition is distinct for the same reason. (Pet. 13) (citing *Commonwealth v. Hosmer*, 727 N.E.2d 537 (Mass. App. 2000)). *Hosmer* involved a dismissal that could not be characterized as an acquittal. *Id.* at 539. Indeed, the trial judge did not regard his ruling as an acquittal, and he informed the prosecution that "You have the right to appeal my decision." *Id.* For that reason, the court applied a different double jeopardy analysis. But the *Hosmer* court made clear that, under *Martin Linen*, "[i]f there was a finding of not guilty, principles of double jeopardy prevent a retrial of the defendant on the same charge." *Id.* at 538.

Nor do any of the federal courts of appeals apply a rule different from that stated in *Fong Foo* and *Martin Linen*. Petitioner misplaces its reliance upon *United States v. Maker*, 751 F.2d

614, 622 (3d Cir.1984). *Maker*, like *Korsen* and *Hosmer*, involved a dismissal of charges that, in contrast to the instant case, could not be characterized as an acquittal. Indeed, the district court explicitly denied the defendants' motion for judgment of acquittal. *Id.* at 620.

A more analogous Third Circuit case is that of *United States v Giampa,* 758 F.2d 928 (3d Cir. 1985). There, the district court directed a verdict of acquittal after misapplying the legal standards governing such a disposition. *Id.* at 934. Specifically, the district court acquitted the defendant only after weighing the evidence and assessing credibility—tasks reserved for the jury. *Id.* at 934-935. The Third Circuit disagreed with this judgment, but held that the double jeopardy bar precluded appellate review of the issue. *Id.* at 934.

Other federal courts of appeals have reached a similar conclusion. *See, e.g., Stow v. Murashige*, 389 F.3d 880 (9th Cir. 2004) (finding that even an erroneous judgment of acquittal bars further prosecution on any aspect of the offense charged and precludes a review of the trial court's error); *U.S. v. Hunt*, 212 F.3d 539 (10th Cir. 2000) (holding that the grant of an acquittal "prevents independent appellate review of the legal error"); *U.S. v. Jenkins*, 490 F.2d 868 (2d Cir. 1973). In short, there appears to be no evidence that *Fong Foo* and *Martin Linen* require clarification. Accordingly, this Court should deny *certiorari.*

C. The Principle of *Stare Decisis* Precludes this Court from Accepting Petitioner's Invitation to Overrule the Longstanding Bar on Appeals from Directed Verdicts of Acquittal.

Given the clarity of *Fong Foo* and *Martin Linen*, and given the uniformity of application in the lower courts, the principle of *stare decisis* precludes this Court from re-interpreting the Double Jeopardy Clause in Petitioner's favor. As this Court recently held, the relevant factors in deciding whether to adhere to previously decided cases include: (1) whether the decision has

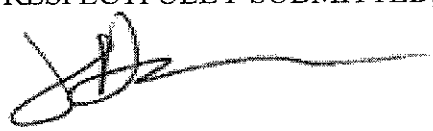
proved "unworkable," (2) the precedent's antiquity, (3) the reliance interests at stake, and (4) whether the decision was well-reasoned. *Montejo v Louisiana,* __ U.S. __, __ S.Ct. __, __ L.Ed.2d (2009). None of these factors compel the overruling of *Fong Foo* and *Martin Linen.*

Here, the uniform application of this Court's double jeopardy jurisprudence belies any claim that the rule challenged by Petitioner has proven to be unworkable. Further, virtually every jurisdiction has followed and relied upon *Fong Foo* since it was announced nearly a half-century ago. None of those jurisdictions have deemed *Fong Foo* or *Martin Linen* to be poorly reasoned. Rather, those opinions were compelled by the Fifth Amendment itself. Petitioner, therefore, has not provided a sufficient reason for overruling *Fong Foo* and *Martin Linen.* This Court should therefore deny Petitioner's request for a writ of *certiorari.*

CONCLUSION

Wherefore, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,



Jeanice Dagher-Margosian
Counsel of Record
Christopher M. Smith
State Appellate Defender Office
101 N. Washington Square 14th Fl.
Lansing, MI 48913
(517) 334-6069

Date: June 5, 2009

Attorney for Petitioner

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PROOF OF SERVICE

Christopher M. Smith, Counsel for Respondent, states that on June 5, 2009, he sent one copy of the following: Motion for Leave to Proceed In Forma Pauperis; Affidavit in Support of Motion; Brief in Opposition to Petition for Writ of Certiorari; and Proof of Service, to:

Timothy A. Baughman
Chief of Research, Training, and Appeals
Wayne County Prosecutor's Office
1441 St. Antoine 11th Fl.
Detroit, MI 48226

by placing these documents in a properly addressed envelope with fully prepaid first-class postage affixed thereon, and placing the envelope in a United States Postal Service Box located in Lansing, Michigan.

Christopher M. Smith
Counsel for Respondent

Subscribed and sworn to before me
June 5, 2009.

Jean M. Downey
Notary Public, Ingham County, Michigan
My commission expires: 11/1/2014
IDEN No. 22990