NO. 17-682

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2018

LONNIE OLIVER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMBRIDGE SPRINGS, ET AL.,

Petitioners,

v.

AUDREY MCDANIELS,

Respondent.

Brief in Opposition
to a Petition for a Writ of Certiorari from the
United States Court of Appeals for the Third Circuit

SALVATORE C. ADAMO
Counsel for Respondent
1866 Leithsville Road, #306
Hellertown, PA 18055
Tel: 215-751-1735
Fax: 908-859-3182

QUESTIONS PRESENTED FOR REVIEW

A. Whether McDaniels' Double Jeopardy claim is procedurally barred.

B. Whether McDaniels' retrial constitutes Double Jeopardy.

C. Whether McDaniels' Double Jeopardy claims warrant habeas relief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE CASE

Although the jurors in Audrey McDaniels' case initially miscommunicated to the trial judge that they were unable to return a verdict on the charge of third degree murder, they subsequently confirmed in open court that in fact they had unanimously found McDaniels not guilty of that charge. The trial court then recorded a not guilty verdict. The Commonwealth of Pennsylvania successfully appealed the trial court's refusal to set aside the not guilty verdict. Thereafter, the Commonwealth tried McDaniels a second time. The second jury found McDaniels guilty of third degree murder and she received a sentence of 15 to 30 years of imprisonment. Eventually she filed a habeas petition pursuant to 28 U.S.C. § 2254. The District Court concluded that the retrial violated McDaniels' rights under the Double Jeopardy Clause of our Constitution and granted relief. The Commonwealth appealed.

Thereafter, the United States Court of Appeals for the Third Circuit affirmed the District Court order to grand relief.

SUMMARY OF ARGUMENT

Long-standing United States Supreme Court decisions have clearly set forth that McDaniels is a victim of Double Jeopardy and is entitled to habeas corpus relief. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), *Ball v. United States*, 163 U.S. 662 (1896), and *Fong Foo v. United States*, 369 U.S. 141, 142 (1962) all support the decision of the United States Court of Appeals for the Third Circuit decision. Consequently, the Petition for Writ of Certiorari has no merit and should be dismissed.

ARGUMENT

A. McDANIELS' DOUBLE JEOPARDY CLAIM IS NOT PROCEDURALLY BARRED.

"The most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (quoting *Ball v. United States*, 163 U.S. 662, 671 (1896)). "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . .." *Green v. United States*, 355 U.S. 184, 187 (1957). The Court in *Green* declared that it "is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous." *Id.* at 188 (citing *Ball*, 163 U.S. at 671). In *Benton v. Maryland*, the Supreme Court "f[ou]nd that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage," and it held that the prohibition applies "to the States through the Fourteenth Amendment." 395 U.S. 784, 794 (1969).

Whether McDaniels exhausted her double jeopardy claim requires consideration of whether Pennsylvania's state courts were given "an initial opportunity to pass upon and correct" the alleged violation of this fundamental right against double jeopardy. *Picard v. Connor*, 404 U.S. 270, 275 (1971). The doctrine of exhaustion "prevent[s] 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.'" *Picard*, 404 U.S. at 275 (quoting *Ex Parte Royall*, 117 U.S. 241, 251 (1886)). Thus, the habeas petitioner must "present the state courts with the same claim he urges upon the federal court." *Id.* at 276. While the claim must be "brought to the attention of the state courts," a state petitioner is not required to "cit[e] 'book and verse on the federal constitution'" to satisfy the exhaustion requirement. *Id.* at 278 (omitting citation). Rather, *Picard* "simply h[e]ld that the substance of the federal habeas corpus claim must first be presented" to the state courts. *Id.*, see also, *Baldwin v. Reese*, 541 U.S. 27, 32 (2004).

The record indicates that the issue of whether McDaniels could be retried in light of the not guilty verdict was entertained by the trial court when it considered the Commonwealth's motion. The trial court recognized the double jeopardy issue and denied the Commonwealth's motion to set aside the not guilty verdict on the basis that "once a person has been found not guilty by a jury, that person is not

entitled to be retried the second time." In its opinion denying the motion, the trial court explained that McDaniels could not be retired again or she would be "placed in double jeopardy, as prohibited by the federal constitution."

McDaniels' appellate brief, opposing the Commonwealth's appeal to Superior Court, asserted that the trial court's order should be affirmed because the "Commonwealth is seeking to overturn the verdict of not guilty on murder of the third degree and has asked this Honorable Court to review the same." As previously indicated, when an appellant alleges the State is seeking to overturn a not guilty verdict, an appellant has explicated the sine qua non of a double jeopardy claim. See, *Martin Linen Supply*, 430 U.S. at 571 ("Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" (quoting *Ball*, 163 U.S. at 671)); *see also*, *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (plurality opinion). Thus, even though McDaniels' brief failed to cite chapter and verse of the constitution or even to invoke the term "double jeopardy," her statement that the State sought to overturn her not guilty verdict "brought [her double jeopardy claim] to the attention" of the Superior Court. *Picard,* 404 U.S. at 277. In short, there was no need for the Superior Court to read beyond McDan-

iels' brief to glean her claim. Her brief, which also contained a detailed factual description, "alert[ed]" the Superior Court to her double jeopardy claim, which challenged the Commonwealth's attempt to overturn the not guilty verdict. *Baldwin*, 541 U.S. at 32.

The Superior Court understood the basis of McDaniels' opposition to the Commonwealth's appeal. Indeed, as noted above, the court began its analysis by stating: "At first glance, it appears that the Commonwealth is appealing a verdict of acquittal, which is clearly impermissible." *Commonwealth v. McDaniels*, 886 A.2d 688 (Pa. Super. 2005). That, quite simply, is the stuff of which double jeopardy is made.

Therefore, McDaniels' argument in her brief opposing the Commonwealth's motion presented the Superior Court with the "substance of [her] federal habeas corpus claim." *Picard*, 404 U.S. at 278. Additionally, as inarticulately as it may have been framed, the claim McDaniels advanced was a claim of double jeopardy, and it has been exhausted.

B. MCDANIELS' RETRIAL CONSTITUTES DOUBLE JEOPARDY.

In *United States v. Jorn*, the Supreme Court declared that "a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge." 400 U.S. at 479 (citing *Green*, 355 U.S. at 188). "Acquittals, unlike convictions, terminate the initial jeopardy." *Justices of Bos. Mun. Ct. v. Lydon*, 466 U.S. 294, 308 (1984). In determining what constitutes an acquittal, the Court in *Martin Linen* instructed that the focus of the inquiry is whether there has been a "resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 571. That is, did the government prove its case beyond a reasonable doubt? *See, id.* at 572. Was there a determination that the evidence was "legally insufficient to sustain a conviction"? *Id.* It is a question of whether, once jeopardy has attached, there has been a determination regarding the defendant's guilt or innocence. *United States v. Scott*, 437 U.S. 82, 98 & n.11, 99-100 (1978).

Here, there can be no dispute. Jeopardy attached once the jury was empaneled. Because the jury confirmed in court that it unanimously had determined McDaniels was not guilty of third degree murder, there was a substantive determination that the Commonwealth failed to prove its case.

The unconstitutionality of reviewing a verdict of acquittal had its genesis in *Ball v. United States*, 163 U.S. 662 (1896). There, three defendants were tried for murder. 163 U.S. at 663. Millard Ball was acquitted by a jury. *Id.* at 664. Millard Ball's brother, John Ball, and Robert Boutwell were found guilty. John Ball and Boutwell successfully appealed, obtaining a reversal of their convictions on the basis that the indictment was fatally defective. A new indictment was returned against all three defendants and they objected to their retrial on double jeopardy grounds. Despite their objections, the second trial was held and the three men were convicted of murder. They appealed.

Addressing Millard Ball's appeal, the Supreme Court pointed out that he had been acquitted by the jury and that the insufficiency of the indictment did not factor into his freedom. *Id.* at 670. The Court declared that Millard Ball's "acquittal by verdict of the jury could not be deprived of its legitimate effect." *Id.* It then articulated the bedrock principle of double jeopardy jurisprudence, stating:

> As to the defendant who had been acquitted by the verdict duly rendered and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, *on error or otherwise*, without putting him twice in jeopardy, and thereby violating the constitution.

Id. at 671 (emphasis added).

The Supreme Court has steadfastly applied this rule from *Ball*, even where the acquittal was clearly erroneous. For example, in *Fong Foo v. United States*, during the testimony of the government's fourth witness, the trial court directed the jury to return verdicts of acquittal as to all defendants. 369 U.S. 141, 142 (1962) (per curiam). The United States filed a petition for a writ of mandamus seeking vacatur of the judgments of acquittal, which the First Circuit granted. The Supreme Court granted certiorari. Although Justice Clark dissented on the basis that the trial court lacked the "power" to direct the verdicts of acquittal in the midst of the government's case in chief and that the judgment were a nullity," *id*. at 144 (Clark, J., dissenting), the majority was not persuaded. It followed *Ball* and determined that, even though the acquittals by the jury were based on an "egregiously erroneous foundation," retrial was barred under the Double Jeopardy Clause. *Id.* at 143.

In *McDaniels*, the Superior Court declared that Pennsylvania law does not allow a trial court to re-empanel a criminal jury that has been discharged. 886 A.2d 682, 688 (Pa.Super. 2005). Nevertheless, they conclude that the trial court's erroneous re-empanelment and the subsequent entry on the record of the not guilty verdict on the third degree murder charge constituted an acquittal that should have barred retrial. *Ball*, 163 U.S. at 671; *Fong Foo*, 369 U.S. at 143. Thus, the

Superior Court's decision, which allowed McDaniels to be tried a second time on the third degree murder charge, resulted in a violation of McDaniels' rights under the Double Jeopardy Clause.

C. McDANIELS' DOUBLE JEOPARDY CLAIM WARRANTS HABEAS RELIEF.

When the Pennsylvania Superior Court rendered its decision in 2005, it was well settled that even an erroneous acquittal will bar the government from retrying a defendant. *Ball*, 163 U.S. at 671; *Martin Linen*, 430 U.S. at 571, and *Fong Foo*, 369 U.S. at 143. The Superior Court of Pennsylvania focused solely on the procedural impropriety of re-empaneling the jury and failed to apply *Ball's* "most fundamental rule" regarding the acquittal by the re-empaneled jury. Given the nature of the Double Jeopardy Clause and this court's adherence to the principle enunciated in *Ball*, the Pennsylvania Superior Court's analysis was an unreasonable application of clearly established federal law as determined by this Court in *Ball*, *Fong Foo*, *Martin Linen* and their progeny.

CONCLUSION

For these reasons set forth, respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

SALVATORE C. ADAMO
Counsel for Respondent
1866 Leithsville Road, #306
Hellertown, PA 18055
215-751-1735

Dated: January 21, 2018