No. _____

In the
Supreme Court of the United States

RUSSELL A. SUZUKI; KEITH M. KANESHIRO; NOLAN P. ESPINDA, WARDEN; AND STATE OF HAWAII,
Petitioners,

v.

CHRISTOPHER DEEDY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents two straightforward questions: 1) the limits the Constitution and Congress impose on the jurisdiction of lower federal courts; and 2) the state of Hawai'i's sovereign right to enforce its criminal laws.

[1] 28 U.S.C. § 1257, "as long interpreted", by the Court, "vests authority to review a state court's judgment solely in this Court". *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292, 125 S.Ct. 1517, 1526 (2005). The "paradigm situation" in which a federal district court lacks jurisdiction to proceed are "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284, 293, 125 S.Ct. at 1521–22, 1527.

The first question presented: Did the Ninth Circuit err in affirming the district court's exercise of appellate jurisdiction to adjudicate a case brought by a state-court loser complaining of injuries caused by the judgment rendered by the state's highest court before the district court proceedings commenced and inviting the court to review and reject that judgment?

[2] A long line of decisions of the Court leaves no doubt that "an acquittal . . . encompass[es] any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans v. Michigan*, 568 U.S. 313, 318, 133 S.Ct. 1069, 1074–75 (2013) (external citations omitted).

The second question presented: Did the Ninth Circuit err in concluding that the state trial court's

decision not to charge the jury on reckless manslaughter–a lesser-included offense of murder for which the defendant stood trial–constituted an acquittal of that offense?

RELATED CASES

a. The Circuit Court of the First Circuit of the State of Hawai‘i docketed the proceedings in the state trial court as *State v. Deedy,* Crim. No. 11-1-1647. The state trial court denied Respondent, Christopher Deedy's (hereinafter "Deedy") motions in which he argued that double jeopardy barred his retrial for the offenses of reckless manslaughter and assault–all of which were lesser-included offenses of murder in the second-degree. *See generally*, RUSSELL A. SUZUKI et al., Petitioners' (hereinafter "Hawai‘i Petitioners") Appendix (hereinafter "App.") at 14 and 18.

b. *Hawaii v. Deedy*, No. MC 12-00205 LEK-BMK, 2012 WL 13047589, (D. Haw. Aug. 21, 2012), *aff'd,* 532 Fed.Appx. 751 (9th Cir. 2013)

c. *State v. Deedy*, 141 Hawai‘i 208, 407 P.3d 164 (2017). Opinion entered December 14th, 2017.

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The amended memorandum of the Ninth Circuit (App. at 3-7) is reported at *Deedy v. Suzuki*, 788 Fed.Appx. 549 (9th Cir. 2019). The order of the district court (App. at 8-52) is reported at *Deedy v. Suzuki*, 326 F.Supp.3d 1022 (D. Haw. 2018), *aff'd in part, rev'd in part and remanded,* 783 Fed.Appx. 780 (9th Cir. 2019), *opinion amended and superseded on denial of reh'g,* 788 Fed.Appx. 549 (9th Cir. 2019), and *aff'd in part, rev'd in part and remanded,* 788 Fed.Appx. 549 (9th Cir. 2019). The Court of Appeals' denial of Hawai'i Petitioners' petition for rehearing *en banc* (App. at 1-2) is reported at *Deedy v. Suzuki*, 788 Fed.Appx. 549 (9th Cir. 2019).

JURISDICTION

The Court of Appeals entered the amended memorandum on December 20th, 2019 and denied rehearing *en banc* on December 20th, 2019. App. 1-2 and 3-7. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257(a)[1], provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a

[1] Unless otherwise indicated, federal statutes are all within Title 28 of the United States Code.

> treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 2241, provides:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States;

HAWAIʻI STATUTORY PROVISIONS INVOLVED

Hawai'i Revised Statutes (hereinafter "*HRS*") § 701-114, "Proof beyond a reasonable doubt" provides, in relevant part:

> (1) . . . no person may be convicted of an offense unless the following are proved beyond a reasonable doubt:
>
> (a) Each element of the offense;

> (b) The state of mind required to establish each element of the offense; . . .

HRS § 702-204, "State of mind required" provides, in relevant part: ". . . a person is not guilty of an offense unless the person acted intentionally, knowingly, [or] recklessly . . . with respect to each element of the offense".

HRS § 702-205, "Elements of an offense" provides, in relevant part, "[t]he elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct, as . . . [a]re specified by the definition of the offense".

HRS § 702-206(3), "Definitions of states of mind" "Recklessly[ ]" provides, in relevant part:

> (a) A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.
>
> (b) A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.
>
> (c) A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.

HRS § 702-208, "Substitutes for . . . recklessness" provides, in relevant part, "[w]hen the law provides that recklessness is sufficient to establish an element

of an offense, that element also is established if, with respect thereto, a person acts intentionally or knowingly".

HRS § 707-701.5(1), "Murder in the second degree" provides, in relevant part, "a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person".

HRS § 707-702(1) (a), "Manslaughter" provides, in relevant part, "a person commits the offense of manslaughter if . . . [t]he person recklessly causes the death of another person".

INTRODUCTION

Justice Ginsburg's unanimous opinion in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, made clear that the "paradigm situation" in which a federal district court lacks jurisdiction to proceed arises in "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.*, 544 U.S. 280, 284, 293, 125 S.Ct. 1517, 1521–22, 1527 (2005). The conclusion follows ineluctably from Congress's enactment of § 1257 that generally empowers only the Court to review judgments rendered by a state's highest court.

The Ninth Circuit, however, affirmed the district court's exercise of appellate jurisdiction to reverse the judgment rendered by the Hawai'i Supreme Court that allowed the State to retry Respondent Christopher Deedy (hereinafter "Deedy") for the included offense of

reckless manslaughter as a result of the jury's inability to reach a verdict on that offense in his retrial for murder. Deedy's § 2241 habeas petition possessed all the characteristics of the paradigm situation identified in *Exxon* that should have compelled the court to reverse the district court's unconstitutional exercise of appellate jurisdiction. This Court should not allow the court to evade the jurisdictional limitations the Constitution authorizes Congress to impose on lower federal courts and warrants the summary reversal of its decision.

On the merits, the Ninth Circuit clearly erred in affirming the district court's ruling that pursuant to the holding in *Evans v. Michigan*, 568 U.S. 313, 133 S.Ct. 1069 (2013), the state trial court's decision not to charge the jury with the lesser-included offense of reckless manslaughter acquitted Deedy of that offense. The court's decision cannot be reconciled with the definition of rulings that constitute acquittals as discussed in *Evans*. The Court should grant certiorari and summarily reverse the decision.

STATEMENT OF THE CASE

On November 5th, 2011, after "a night of socializing" and "drinking alcoholic beverages at multiple bars" in Waikīkī with friends, Deedy, "a State Department" federal agent, fatally shot Kollin Elderts during an altercation with him at a fast food restaurant. App. at 10; *State v. Deedy*, 141 Hawai'i 208, 233, 407 P.3d 164, 189 (2017). Notably, Deedy did "not explain how a night of socializing and drinking alcoholic beverages in Waikīkī with friends was part of his 'official duties' as a State Department agent". *Ibid*. (punctuation altered).

Furthermore, "Deedy's expert witness . . . testified that federal agents 'should not instigate confrontation' and that they should not 'use deadly force in a situation in which [they] ha[ve] created the need for such force.'" *Ibid.* (punctuation altered).

The Oahu Grand Jury indicted Deedy for second-degree murder in Count 1 and using a firearm to commit the murder in Count 2. App. at 10. In Deedy's first trial, "[t]he parties did not propose lesser included offense instructions" and "specifically objected to instructing the jury on reckless manslaughter" (App. at 12)–an included offense of second-degree murder. *Id*. at 10 n.1. During the discussion regarding the verdict forms (App. at 43), the state trial court uttered the following unsolicited remark: "Both of you [*i.e.*, the government and Deedy] asked that a manslaughter instruction not be given. And from what I can recall of the evidence as to that final shot, I don't think there's any evidence to support manslaughter, anyway". App. at 12. Thereafter the following exchange occurred:

> [DEPUTY PROSECUTING ATTORNEY FUDO]: Support reckless manslaughter.
>
> THE COURT: Yeah.
>
> [DEPUTY PROSECUTING ATTORNEY FUDO]: Okay.
>
> THE COURT: I don't think so, not as to that final shot.
>
> [DEPUTY PROSECUTING ATTORNEY FUDO]: Not as to the lethal shot, right?

> THE COURT: I'm sorry. The lethal shot. Exactly.

App. at 12-13. After five days of deliberations, the jury was unable to reach a verdict on either count and the state trial court declared a mistrial. App. at 13.

Prior to the commencement of his retrial, Deedy filed a "'Motion to Exclude Reckless Manslaughter Jury Instruction'" (hereinafter "Motion to Exclude Manslaughter Instruction"). App. at 14 (punctuation altered). Deedy argued, *inter alia*, "by declining to instruct the jury on reckless manslaughter during the first trial due to the absence of evidence, the circuit court had acquitted [him] of that offense for double jeopardy purposes". *Ibid.* The state trial court and the parties addressed Deedy's Motion to Exclude Manslaughter Instruction during the settling of the jury instructions. App. at 15. The state trial court denied Deedy's motion explaining that the instructional ruling at the first trial "was not tantamount to an acquittal because the court did not determine his "guilt or innocence"' of reckless manslaughter. App. at 17 (punctuation altered). Over the parties' objections, the trial court provided the jury with "instructions on reckless manslaughter and the assault offenses". App. at 18 (external citation omitted). Ultimately, the jury acquitted Deedy of murder, but "deadlocked on all of the lesser included offenses" and using a firearm to commit the offenses (Count 2 of the indictment). App. at 18. Months after his retrial ended, Deedy filed, and the state trial court denied, his "motions to dismiss" in which he renewed his claim with respect to the

instructional ruling in the first trial regarding reckless manslaughter. App. at 18.

Deedy appealed the denial of his motions to the Hawai‘i Supreme Court raising, *inter alia*, "federal double jeopardy claims". App. at 19-20. In a published decision, the Hawai‘i Supreme Court rejected Deedy's double jeopardy claim holding that "the State was not barred from further retrial on reckless manslaughter and the included assault offenses". *State v. Deedy*, 141 Hawai'i 208, 407 P.3d 164 (Dec. 14, 2017)." App. at 19 (citation in original). Citing state law, the court explained, in relevant part, that "'a trial court's ruling on whether to issue jury instructions on lesser included offenses does not constitute an acquittal for double jeopardy purposes[ ]'" the "'decision resolving the issue of whether to give or withhold certain jury instructions is not a 'resolution . . . of some or all of the factual elements of the offense charged' and, thus, does not constitute an acquittal'". App. at 19 (citations in original omitted, punctuation altered).

Deedy did not seek a writ of certiorari from this Court, and instead filed a federal petition for habeas corpus pursuant to § 2241 (hereinafter "§ 2241 habeas petition") inviting the district court to reverse the Hawai‘i Supreme Court's decision. App. at 21. As relevant to the instant petition, Deedy asserted, "the circuit court's ruling at the first trial that there was no evidence of recklessness as to the fatal shot was an acquittal that bars further prosecution . . . for reckless manslaughter or any included offense". App. at 21.

The district court rejected Hawai'i Petitioners' contention that it lacked appellate jurisdiction to review the decision ruling, *inter alia,* "Deedy [was] not limited to taking a direct appeal of the Hawaii Supreme Court's decision, by writ of certiorari, to the United States Supreme Court under Section 1257" (App. at 31), and according to Ninth Circuit precedent "habeas jurisdiction is a 'statutory exception'" to § 2241 pursuant to which the district court had jurisdiction to review the decision. App. at 31. On the merits, the district court reversed the Hawai'i Supreme Court's decision ruling,

> . . . Deedy may not be retried for reckless manslaughter because the circuit court's ruling at the first trial–that there was no rational basis in the evidence to support a reckless manslaughter jury instruction–constituted an acquittal for purposes of double jeopardy. . . . as was the case in *Evans*, 'it is plain that the [circuit court] . . . evaluated the [State's] evidence and determined that it was legally insufficient to sustain a conviction.' *Evans* [*v. Michigan*], 568 U.S. [313,] . . . 320[, 133 S.Ct. 1069 (2013)] . . .

App. at 40 (citations in original and punctuation altered).

Pursuant to §§ 1291, 1294(1), and 2253(a), Hawai'i Petitioners appealed to the Ninth Circuit arguing, *inter alia*, that the district court lacked appellate jurisdiction to review the decision of the Hawai'i Supreme Court that Deedy collaterally attacked in his § 2241 habeas petition. App. at 4. The court rejected the

"jurisdictional argument" citing its ruling in "Gouveia v. Espinda, 926 F.3d 1102, 1107–10 (9th Cir. 2019)." App. at 4. On the merits, Hawai'i Petitioners contended that the Hawai'i Supreme Court correctly ruled that the Double Jeopardy Clause did not bar retrial on reckless manslaughter and the assaults–all of which are lesser-included offenses of murder. The court disagreed with Hawai'i Petitioners' contention ruling, in relevant part, "by explicitly stating that there was no evidence to support a manslaughter instruction, and by refusing to instruct the jury on manslaughter, the trial court determined that the State's proof was insufficient to establish Petitioner's criminal liability for that offense".[2] App. at 5. Accordingly, the court affirmed in part, reversed in part, and remanded. App. at 6. The court denied Hawai'i Petitioners' timely petition for rehearing *en banc*. App. at 1-2.

REASONS FOR GRANTING THE PETITION

In this case, the Ninth Circuit decided important questions of federal law in a manner that critically undermines Hawai'i's sovereign right to enforce its criminal laws to protect all people within its borders. First, the court's affirmance of the district court's exercise of appellate jurisdiction is irreconcilable with *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S.Ct. 1517 (2005). In the unanimous

[2] Over the dissent of one panel member, the majority ruled that with respect "to the two assault charges, the Double Jeopardy Clause [did] not forbid the State from retrying [Deedy]", but remanded the matter to the district court to consider Deedy's argument that "the State abandoned its opportunity to retry the assaults or is estopped from doing so". App. at 5-7.

opinion, Justice Ginsburg noted that the Court has not retreated from its well-established precedent that holds that absent express statutory authorization from Congress, lower federal courts are not empowered with appellate jurisdiction to review and undo judgments rendered by a state's highest court. Because this case presents the paradigm situation identified in *Exxon* that barred the district court from proceeding, the court's refusal to reverse the district court's decision for lack of appellate jurisdiction justifies the summary reversal of the Ninth Circuit's decision.

Second, the Ninth Circuit's affirmance of the district court's reversal of the judgment rendered by Hawai'i Supreme Court barring the State from retrying Deedy for the lesser-included offense of reckless manslaughter conflicts directly with the Court's settled precedent that teaches that with respect to "a judicial acquittal" "[c]ulpability (i.e., the 'ultimate question of guilt or innocence') is the touchstone". *Evans*, 568 U.S. at 324, 133 S.Ct. at 1077–78 (external citation omitted). In contravention of *Evans*, the court expanded the definition of a judicial acquittal to encompass the state trial court's decision not to instruct the jury on the lesser-included offense of reckless manslaughter. The court's decision is wrong and merits summary reversal.

I. The Court Should Intervene And Halt The Ninth Circuit's Unconstitutional Expansion Of The Jurisdiction Of District Courts.

A. Pursuant to the power vested in it by the Constitution, only Congress may confer appellate jurisdiction to lower federal courts.

Article III of the United States Constitution "vests the judicial power 'in one supreme Court, and in such inferior Courts as . . . Congress may . . . establish,' § 1." *Patchak v. Zinke*, ___U.S. ___, 138 S.Ct. 897, 906 (2018) (punctuation altered).

§ 1257(a) provides, in relevant part,

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any . . . right, privilege, or immunity is specially set up or claimed under the Constitution or . . . statutes of . . . the United States.

"§ 1257, as long interpreted, [by the Court] vests authority to review a state court's judgment solely in th[e] Court". *Exxon*, 544 U.S. at 292, 125 S.Ct. at 1526; *see also*, *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 416, 44 S.Ct. 149, 150 (1923) ("Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors . . . To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original." (internal citation omitted)) and *D.C. Court of Appeals*

v. Feldman, 460 U.S. 462, 482, 103 S.Ct. 1303, 1315 (1983) ("a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this Court."). Relatedly, as *Exxon* made clear, "Congress, if so minded, may explicitly empower district courts to oversee certain state-court judgments and has done so, most notably, in authorizing federal habeas review of state prisoners' petitions. 28 U.S.C. § 2254(a)." *Id.* at 292 n.8, 125 S.Ct. at 1526 n.8 (external citation in original).

B. The Court should correct the Ninth Circuit's constitutionally flawed jurisdictional inspection.

"Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 1331 (1986) (external citation omitted). "For that reason, every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review'". *Ibid.* (external citation omitted, punctuation altered). In this case, Deedy repaired to the district court and filed a § 2241 habeas petition inviting the court to review and invalidate the decision rendered by the Hawai'i Supreme Court–the '"paradigm situation"' identified in *Exxon* that precludes a '"federal district court from proceeding"'. *Id.* at 293, 125 S.Ct. at 1527 (2005) (punctuation altered). The Ninth Circuit affirmed the district court's

improvident acceptance of the invitation without identifying any text in § 2241 that expressly conferred the required appellate jurisdiction to the district court to review the judgment. Nor did the court identify any decision of the Court that authorized it to modify the holding in *Exxon* and render it inapplicable to bar the district court from proceeding in the paradigm situation. The court simply stated, "The Rooker-Feldman doctrine did not bar the district court from exercising jurisdiction over the § 2241 petition. We rejected this jurisdictional argument in Gouveia v. Espinda, 926 F.3d 1102, 1107–10 (9th Cir. 2019)." App. at 4 (citation in original). As discussed below, the decision betrays a number of critical flaws in the court's truncated jurisdictional analysis.

"It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute." *Carroll v. United States*, 354 U.S. 394, 399 (1957). Clearly, "Gouveia v. Espinda"–the jurisdictional authority on which the Ninth Circuit relied–is not a statute, and as such, the court fundamentally erred in relying on its own precedent to validate the district court's exercise of appellate jurisdiction. Moreover, the *Gouveia* court erroneously conflated appellate jurisdiction and habeas jurisdiction holding, in relevant part,

> Section 2241 provides that '[w]rits of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions' for prisoners 'in custody in violation of the

> Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(a), (c) (3). Relying on this grant of jurisdiction, this court has consistently held that § 2241 confers jurisdiction for 'habeas petition[s] raising a double jeopardy challenge to a petitioner's pending retrial in state court.'

Gouveia v. Espinda, 926 F.3d 1102, 1108 (9th Cir. 2019), *cert. denied,* No. 19-6528, 2020 WL 129791 (U.S. Jan. 13, 2020), and *cert. denied,* No. 19-516, 2020 WL 129964 (U.S. Jan. 13, 2020).

The Ninth Circuit's extension of the statutorily prescribed jurisdiction of the district court to include the appellate jurisdiction Congress generally reserved to the Court in § 1257 runs afoul of the admonition in *Justices of Boston Mun. Court v. Lydon*,–"We do not carve out a special-purpose jurisdictional exception for double jeopardy allegations with respect to custody. Nothing in our discussion of [the] custody [requirement of § 2241] is dependent upon the nature of the claim that is raised." 466 U.S. 294, 302 n.2, 104 S.Ct. 1805, 1810 n.2 (1984). The court's decision also ignores the Court's admonition that the limited jurisdiction of federal courts "is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 1675 (1994) (external citation in original omitted).

Rather than asking, as *Exxon* commands, whether Deedy's claim required the district court to review a state-court judgment rendered prior to the commencement of proceedings in the court–the Ninth Circuit simply asked whether the claim involved a

double jeopardy challenge. *Gouveia*, 926 F.3d at 1108. Because Deedy's claim raised a double jeopardy challenge, the court did not pause, as *Exxon* commands, and consider whether Congress in § 2241 "explicitly empower[ed]" the district court with appellate jurisdiction to review the judgment rendered by the Hawai'i Supreme Court. *Exxon*, 544 U.S. at 292 n.8, 125 S.Ct. at 1526 n.8. Significantly, the analysis casts the court as the outlier among federal courts that have applied the straightforward holding in *Exxon* to dismiss for lack of appellate jurisdiction "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced". *Id*. at 284, 125 S.Ct. at 1521–22.

For example, in *Neal v. Johnson*, a decision from the Fourth Circuit, the court held,

> Federal courts lack jurisdiction under § 2241 to review state criminal judgments. . . . Neither § 2254 nor any other statute provide for allowing federal habeas review of state criminal judgments under § 2241, *Woodfin v. Angelone*, 213 F. Supp.2d 593, 595 (E.D. Va. 2002) (rejecting similar argument).

Id., No. 1:09CV458 (LMB/TCB), 2009 WL 10702285, at *1 (E.D. Va. July 27, 2009) (internal citations omitted, external citation in original).

In *Niles v. Wilshire Inv. Group, LLC*, a decision from the Second Circuit, the court acknowledged that § 1257 empowers only the Court with jurisdiction to review state-court judgments. *Id.*, 859 F.Supp.2d 308,

334 (E.D.N.Y. 2012) (footnote and external citation omitted, punctuation altered). With respect to Congress's constitutional and plenary authority to determine the appellate jurisdiction of lower federal courts, the court cited *Exxon* and recognized that in "28 U.S.C. § 2254(a)" Congress enacted a "notable exception" to the jurisdictional rule of § 1257. *Id*. at 334 n. 23 (citation in original, punctuation altered).

In *Campbell v. City of Spencer*, 682 F.3d 1278, 1280 (10th Cir. 2012), the Tenth Circuit Court of Appeals applied the teachings of *Exxon* to dismiss for lack of jurisdiction a challenge to the County Sheriff's seizure of mistreated horses that were the subject of the municipalities' petition for forfeiture. Following a hearing on the petition, the court "ordered immediate forfeiture", after which Doctor Campell–the owner of the horses–appealed to the Oklahoma Court of Civil Appeals. *Ibid.* "The court affirmed and the Oklahoma Supreme Court denied certiorari." *Ibid.* Doctor Campbell filed a "§ 1983 action" in federal district court alleging that the municipalities violated her rights under the Fourth, Fifth and Eighth Amendments. *Ibid.* The municipalities "filed motions to dismiss on a number of grounds" that the district court granted (*see Campbell v. City of Spencer*, No. CIV-09-0821-HE, 2010 WL 1780304, at *3 (W.D. Okla. May 4, 2010), *aff'd in part, rev'd in part,* 682 F.3d 1278 (10th Cir. 2012)) and dismissed the doctor's claims for lack of subject-matter jurisdiction. *Id.* at 1280–81.

On appeal to the Tenth Circuit, the court limited its review "to the merits of the district court's dismissal for lack of subject-matter jurisdiction". *Campbell*, 682 F.3d

at 1281. The court "agree[d] with the district court that it lacked jurisdiction over Dr. Campbell's due-process and excessive-fine claims"; *i.e.*, the alleged violations of the Fifth and Eight Amendments, respectively. *Ibid.* The court "follow[ed] the Supreme Court's lead, using the *Exxon Mobil* formulation" stating, "The essential point is that barred claims are those 'complaining of injuries caused by state-court judgments.' . . . In other words, an element of the claim must be that the state court wrongfully entered its judgment." *Id.* at 1283 (internal citation omitted, punctuation altered). The court explained,

> . . . Properly understood, Dr. Campbell's claim under the Fifth Amendment is a direct attack on the state court's judgment because an element of the claim is that the judgment was wrongful. . . . In the words of *Exxon Mobil,* the claim is one 'brought by [a] state-court loser[ ] complaining of [an] injur[y] caused by [a] state-court judgment[ ].' 544 U.S. at 284, 125 S.Ct. 1517. . . .
>
> Similarly, the Eighth Amendment claim is that 'Defendants sought *and obtained* an excessive fine by using the seizure statutes to forfeit [her] horses to Defendants,' and 'sought an excessive fine *through the imposition of an unreasonable bond.*' . . . Once again, the merits of this claim cannot be stated except in terms of the state-court judgment. Neither the City nor the Town independently imposed an excessive fine. The alleged constitutional wrong was the content of the judgment.

Id. at 1284–85 (emphasis in original, internal citation omitted, punctuation altered).

The Ninth Circuit's misinterpretation and misapplication of the Court's holding in *Exxon* undermines the comprehensive system of federal collateral review of state-court criminal judgments that Congress created to establish nationwide standards for the writ of habeas corpus. The court's decision poses a real and present threat to "the constitutional balance between the state and federal judiciaries" reflected in the structure of federal habeas corpus. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, ___U.S. ___, 136 S.Ct. 1562, 1573 (2016). The jurisdictional issue is straightforward and fully developed. Accordingly, the case is an excellent and appropriate vehicle warranting the Court's exercise of its supervisory authority over the Ninth Circuit to correct its refusal to adhere to the Constitution and the Court's straightforward holding in *Exxon*.

II. The Ninth Circuit Erroneously Expanded The Court's Definition Of A Judicial Acquittal To Include The State Trial Court's Decision Not To Instruct The Jury On The Lesser-included Offense Of Reckless Manslaughter.

In *Evans v. Michigan*, the Court noted that its "cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." 568 U.S. 313, 318, 133 S.Ct. 1069, 1074–75 (2013) (external citations omitted). "Thus an 'acquittal' includes 'a ruling by the court that the evidence is insufficient to convict,' a 'factual finding [that] necessarily

establish[es] the criminal defendant's lack of criminal culpability,' and any other 'rulin[g] which relate[s] to the ultimate question of guilt or innocence'". *Ibid.* (brackets in original, external citations omitted).

Citing *Evans*, the Ninth Circuit held that the state trial court acquitted Deedy of reckless manslaughter (a lesser-included offense of murder), based on the court's remark "that there was no evidence to support a [reckless] manslaughter instruction, and by refusing to instruct the jury on manslaughter, the trial court determined that the State's proof was insufficient to establish [Deedy's] criminal liability for that offense". App. at 5. As discussed herein below, the court's holding betrays a fundamental misunderstanding of the definition of rulings that constitute acquittals as identified in the Court's cases discussed in *Evans*.

In *Evans*, the petitioner stood trial for "burning 'other real property'"– "an unoccupied house"–in "violation of Mich. Comp. Laws § 750.73". *Id.* at 316, 133 S.Ct. at 1073 (citation in original, punctuation altered). At the close of the State's case, the petitioner made a motion for a "directed verdict of acquittal" and

> . . . pointed the court to the applicable Michigan Criminal Jury Instructions, which listed as the 'Fourth' element of the offense 'that the building was not a dwelling house.' . . . And the commentary to the Instructions [that] emphasized, 'an essential element is that the structure burned is *not* a dwelling house.'

Ibid. (emphasis in original, internal citations omitted, punctuation altered). The petitioner "argued that Mich.

Comp. Laws § 750.72 criminalizes common-law arson, which requires that the structure burned be a dwelling, while the provision under which he was charged, § 750.73, covers all other real property." *Ibid* (external footnote omitted). "Persuaded, the trial court granted the motion[,]" "explain[ing] that the 'testimony [of the homeowner] was this was a dwelling house,' so the nondwelling requirement of § 750.73 was not met." *Ibid*. (internal and external citations omitted, punctuation altered).

Considered in context, and as the Court noted, "'it is plain that the [trial court] . . . evaluated the [State's] evidence and determined that it was legally insufficient to sustain a conviction'". *Evans*, 568 U.S. at 320, 133 S.Ct. at 1075 (external citation omitted, punctuation altered). Here, on the other hand, it is plain that the state trial court was not acquitting Deedy of reckless manslaughter when the court uttered the following remark during the discussion of the "verdict form" (App. at 43): "Both of you [*i.e.*, the government and Deedy] asked that a manslaughter instruction not be given. And from what I can recall of the evidence as to that final shot, I don't think there's any evidence to support manslaughter, anyway." App. at 12. Immediately after the state trial court uttered the remark, the deputy prosecutor and the court had the following exchange:

> [DEPUTY PROSECUTOR FUDO]: Support reckless manslaughter.
>
> THE COURT: Yeah.
>
> [DEPUTY PROSECUTOR FUDO]: Okay.

> THE COURT: I don't think so, not as to that final shot.
>
> [DEPUTY PROSECUTOR FUDO]: Not as to the lethal shot, right?
>
> THE COURT: I'm sorry. The lethal shot. Exactly.

App. at 13.

Unlike *Evans*, the state trial court's remark was clearly not a response to a motion or request by Deedy to acquit him of reckless manslaughter. Context matters and reveals that the foregoing exchange only concerned Deedy's state of mind when he fired the lethal shot–the conduct element of reckless manslaughter. *Evans* left no doubt that with respect to "a judicial acquittal"–"[c]ulpability (i.e., the 'ultimate question of guilt or innocence') is the touchstone, not whether any particular elements were resolved". *Id*. at 324, 133 S.Ct. at 1077–78 (external citation omitted). Accordingly, the state trial court's unsolicited remark was not a resolution of the "'ultimate question of [Deedy's] guilt or innocence'" for reckless manslaughter and the Hawai'i Supreme Court's decision to that effect did not violate the Constitution or laws of the United States. *Evans*, 568 U.S. at 324, 133 S.Ct. at 1077–78 (external citation omitted). *A fortiori*, Deedy's claim with respect to the instructional ruling did not warrant the habeas relief § 2241 provides.

Furthermore, the Court's precedent makes clear that the determination as to whether a defendant is entitled to an instruction on a lesser-included offense is a "procedural safeguard" that does not implicate the

Double Jeopardy Clause. *Beck v. Alabama*, 447 U.S. 625, 637, 100 S.Ct. 2382, 2389 (1980). Unlike an acquittal, the ruling to give or withhold a lesser-included offense instruction does not answer the "'ultimate question of [a defendant's] guilt or innocence'" of the offense. *Evans*, 568 U.S. at 319, 133 S.Ct. at 1075 (citation omitted). "In the federal courts, it has long been 'beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" *Beck*, 447 U.S. at 635, 100 S.Ct. at 2388 (external citation omitted, punctuation altered). The *Beck* court also noted the courts in Hawai'i are among "the state courts that have addressed the issue [and] have unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence warrants it". *Id.* at 635–37 n.12, 100 S.Ct. at 2389 n.12 (external footnote omitted).

"Trial judges are presumed to know the law and to apply it in making their decisions[,]" and therefore the state trial court should be presumed to know that by refusing to charge the jury on the lesser-included offense of reckless manslaughter it was not acquitting Deedy of that offense. *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047, 3057 (1990), *overruled on other grounds Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Pursuant to Hawai'i law, "no person may be convicted of an offense unless the following are proved beyond a reasonable doubt . . . [e]ach element of the offense . . . [and] [t]he state of mind required to establish each element of the offense". *HRS* § 701-114(1) (a) (b). Significantly, when

"recklessness is sufficient to establish an element of an offense . . . that element also is established if, with respect thereto, a person acts intentionally or knowingly." *HRS* § 702-208. "A person commits the offense of manslaughter if . . . [t]he person recklessly causes the death of another person". *HRS* § 707-702(1) (a). Deedy's guilt for reckless manslaughter would require evidence proving each of the following elements and his reckless state of mind as to each: "(1) conduct, (2) attendant circumstances, and (3) results of conduct". *HRS* §§ 702-204, 702-205(a). Accordingly, the state trial court would know Deedy could be guilty of reckless manslaughter even though he intentionally or knowingly fired the lethal shot–the conduct element–and in doing so, he recklessly disregarded the risk that he would cause the death of Mr. Elderts–the result element.

"Foremost among the prerogatives of sovereignty" that the "Constitution leaves in the possession of each State" is the "power to create and enforce a criminal code". *Heath v. Alabama*, 474 U.S. 82, 92–93, 106 S.Ct. 433, 439–40 (1985) (internal and external citations omitted). Absent this Court's immediate intervention, the Ninth Circuit's expansion of judicial acquittals to include the state trial court's decision not to instruct the jury on the lesser-included offense of reckless manslaughter prevents the state of Hawai‘i from exercising its constitutionally-based sovereign authority to enforce its criminal laws.

CONCLUSION

The Ninth Circuit's decision defies the Constitution, usurps the authority of Congress to impose limits on the jurisdiction of lower federal courts, and ignores the well-settled precedent of the Court. To restore Hawai'i's historic right and obligation to maintain peace and order within its confines, the petition for certiorari should be granted and the court's errors summarily corrected.

Respectfully submitted,

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