No. 19-714

In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

WILLIAM R. LANDIS, JR.,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

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The December 24, 2018 unanimous opinion of the Superior Court of the Commonwealth of Pennsylvania, Middle District, is reported at *Commonwealth v. Landis*, 201 A.3d 768 (Pa. Super. 2018) and is reprinted in Petitioner's Appendix. (App. 1). The Superior Court denied rehearing/re-argument without comment on March 5, 2019. (App. 14). The Pennsylvania Supreme Court denied discretionary review, without comment, on September 4, 2019. (App. 24).

JURISDICTION

The decision of the Superior Court of the Commonwealth of Pennsylvania, Middle District, which is the subject of the instant Petition, was entered December 24, 2018. The instant Petition was filed December 3, 2019. Respondent denies this Honorable Court has jurisdiction pursuant to 28 U.S.C. §1257(a) and denies this case satisfies the standard set forth in Supreme Court Rule 10.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part the following:

> " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;"

COUNTERSTATEMENT OF THE CASE

The Commonwealth attempts to invoke the jurisdiction of this Court to review the denial of discretionary review, without comment, by the Pennsylvania Supreme Court of the unanimous published opinion of the Pennsylvania Superior Court affirming the Trial Court's **interlocutory order** (emphasis added) denying the Commonwealth's motion to reinstate Count 2 of the Information charging Respondent with Murder in the Third Degree. (App. 2). Respondent was found NOT GUILTY on Count 2 of the Information by a jury on April 5, 2013, the verdict was recorded, and the jury was dismissed. (App. 3, 19).

The Commonwealth never challenged the NOT GUILTY verdict on Counts 2-4 as being inconsistent or violative of state law prior to the jury being dismissed and did not file any post-trial motion to correct or challenge the NOT GUILTY verdicts on Counts 2-4 even though such a challenge is permitted by the Pennsylvania Rules of Criminal Procedure. (App. 3). The Commonwealth also failed to file a cross-appeal

challenging the verdicts that it now claims are inconsistent or impermissible as a matter of law. (App. 19).

The Commonwealth seeks to characterize Counts 2-4 as "lesser included offenses" however each count was separately charged, the jury was instructed separately on each count, and a verdict was rendered separately on each count. Once the jury was dismissed and the verdicts recorded (at the request of the Commonwealth), the NOT GUILTY findings were the statement of the jury and were not subject to challenge or amendment. *See Commonwealth v. McDaniels*, 886 A.2d 682, 686-87 (Pa. Super. 2005), *appeal denied*, 903 A.2d 537 (Pa. 2006), *cert. denied*, 549 U.S. 960 (2006). (App. 10).

Historically, on April 5, 2013, three years and four months after the Respondent was arraigned on the charges, the Berks County, Pennsylvania, Court of Common Pleas jury rendered a "GUILTY" verdict on Count 1, Murder in the First Degree, and "NOT GUILTY" on Count 2, Murder in the Third Degree, Count 3, Voluntary Manslaughter, and Count 4, Involuntary Manslaughter. (App. 3). Originally, the Information charged Respondent in Counts 3 and 4 with Aggravated Assault but at some point prior to closing arguments, the manslaughter charges were substituted in the place of the aggravated assault charges. (App. 3, 19).

At the same time Respondent faced trial on Counts 1-4 of the Information, Counts 5-30 of the same Information were severed by the Trial Court on April 14,

2010, and Respondent remained at jeopardy on those charges during a presumed second trial. At sentencing on the First Degree Murder charge, the only GUILTY finding by the jury, the Commonwealth and trial counsel for Respondent agreed, and Respondent acknowledged in open court following the Trial Court's colloquy, that Counts 5-30 of the Information would be dismissed without prejudice and that in the event the First Degree Murder conviction were reversed on appeal or through some form of collateral relief, the Commonwealth could reinstate Counts 5-30.

Respondent's direct appellate review was denied. Respondent timely sought post-conviction collateral review pursuant to Pennsylvania's Post-Conviction Relief Act, 42 Pa.C.S.A. §9541, et seq., charging that his original trial counsel were ineffective for failing to present the testimony of a renowned forensic psychiatrist prepared to testify that Respondent, at the time of the killing of his wife, was suffering under a diminished capacity and thus lacked the specific intent necessary for a jury to convict Respondent of First Degree Murder. (App. 4). Following a two-day evidentiary hearing, the Trial Court vacated the conviction and granted Respondent a new trial. (App. 4).

The Commonwealth unsuccessfully sought to reverse the Trial Court's new trial order for the next 17 months. (App. 4, 20). Respondent does not argue that he cannot be re-tried on Count 1, First Degree Murder. Respondent recognizes, as this Court has recognized countless times before, where a defendant seeks appellate review of a conviction, and his appeal results in a

reversal and new trial, he is subject to the same charge and the same punishment as he was originally. Here, Respondent was convicted of First Degree Murder, sought direct and collateral review of that sole conviction, won a new trial on that sole count, and now faces re-trial on that sole count.

Following the return of the record to the Trial Court after the Commonwealth's nearly two-year unsuccessful appeal, the Commonwealth filed an unopposed motion to reinstate Counts 5-30 based upon the May 15, 2013 agreement, and also moved to reinstate Counts 2-4 the counts upon which the jury had, in 2013, returned NOT GUILTY verdicts. Respondent objected to reinstating Counts 2-4 on the grounds that the jury verdicts of NOT GUILTY on each of these separately charged offenses barred a second prosecution under Double Jeopardy.

The Trial Court agreed with respondent that the final recorded jury verdict of NOT GUILTY as to Count 2, Murder in the Third Degree, barred re-trial based upon the Double Jeopardy clause of the Pennsylvania and U.S. Constitutions and further denied the motion to reinstate Counts 3 and 4 based upon the doctrine of laches. (App. 15). Respondent, following a colloquy during which he specifically, knowingly, and intentionally informed the Court he was not going to waive his Double Jeopardy protection, agreeing that a re-trial was only on the sole count on which the jury returned a "GUILTY" verdict: Murder in the First Degree.

The Commonwealth timely appealed the Trial Court's interlocutory order certifying in its Notice of Appeal pursuant to Pa. R. App. P. 311(d) that "the ruling terminated or substantially handicaps the prosecution of this case."[1] This so-called *Duggar* certification[2] is required in cases where the Commonwealth seeks to appeal in a criminal case "as of right" an interlocutory pre-trial order where the order does not end the entire case. The basis for the *Duggar* certification is not reviewable or subject to challenge.

A panel of the Pennsylvania Superior Court, in a unanimous published opinion, rejected the Commonwealth's challenge to the Trial Court's double jeopardy ruling. (App. 1). The Commonwealth's requests for rehearing and/or re-argument *en banc* and discretionary review in the Pennsylvania Supreme Court were rejected without argument and without comment. (App. 14, 24).

[1] Pa. R. App. P. 311(d) – Commonwealth appeals in criminal cases. – In a criminal case, under the circumstances provided by law, the Commonwealth may take an appeal as of right from an order that does not end the entire case where the Commonwealth certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution.

[2] *Commonwealth v. Duggar*, 486 A.2d 382 (Pa. 1985).

REASONS TO DENY THE PETITION

I. This case is not an appropriate vehicle to consider altering centuries-old double jeopardy jurisprudence attaching special significance to an acquittal

James Madison, in his first version of the double jeopardy clause, wrote that "no person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense." *See* 1 Annals of Cong. 434 (1789).

"The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was deeply won and one that should continue to be highly valued. If such great Constitutional protections are given narrow, grudging application they are deprived of much of their significance." *See Green v. United States*, 355 U.S. 184, 198 (1957).

"Implicit in this," as Justice Blackmun later wrote, "is the thought that if the Government may re-prosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own." *See United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) citing *United States v. Wilson*, 420 U.S. 332, 352 (1975).

Consistent with this holding, this Court has repeatedly declared that a **jury's verdict of acquittal** is accorded "absolute finality." *See DiFrancesco*, 449 U.S. at 129-30 **("We necessarily afford absolute**

finality to a jury's verdict of acquittal – no matter how erroneous its decision.") (emphasis added); *United States v. Scott*, 437 U.S. 82, 105 (1978) (To permit a **second trial after an acquittal, however mistaken the acquittal may have been** would present an unacceptably high risk that the Government . . . might wear down the defendant so that "even though innocent he may be found guilty.") (emphasis added); *Jackson v. Virginia*, 443 U.S. 307, 317 n. 10 (1979) **(the jury's verdict of NOT GUILTY is "unassailable" even though it might be "unreasonable.")** (emphasis added); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) **("double jeopardy bars re-trial following a court-decreed acquittal even if based on an egregiously erroneous foundation.")** (emphasis added); *Evans v. Michigan*, 568 U.S. 313, 324 (2013) **(the judgment of acquittal "however erroneous it was, precludes re-prosecution on this charge . . . ")**; *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) ("**Once a defendant is placed in jeopardy for an offense, and jeopardy terminates** with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense.") (emphasis added); *United States v. Ball*, 163 U.S. 580 (1824) **("a verdict of acquittal could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.")**; *Bullington v. Missouri*, 451 U.S. 430, 442 (1981) **("A verdict of NOT GUILTY is accorded absolute finality – no matter how erroneous its decision.")** (emphasis added); *Sanabria v. United States*, 437 U.S. 54, 64 (1978) **("Where a**

defendant has been found NOT GUILTY at trial, he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous.").

Double jeopardy is implicated, as a policy matter, when re-prosecution is attempted after final judgment is reached in a previous trial. *See Commonwealth v. Bolden*, 472 Pa. 602, 620 (Pa. 1977). The jury in the underlying first trial returned a verdict of NOT GUILTY on Count 3, murder in the Third Degree. This verdict was accepted by the Court, recorded at the request of the Commonwealth, and the jury dismissed. Pursuant to Pennsylvania law, this verdict is an acquittal.[3]

There is no set of facts under which this final verdict was an acquittal which is afforded absolute finality and is unreviewable no matter how erroneous it may be. *See Commonwealth v. Gibbons*, 784 A.2d 776 (Pa. 2001) ("[A] defendant is acquitted, and thus protected by double jeopardy, when the ruling, in whatever form, actually represents a resolution in the defendant's favor, correct or not, of some or all of the factual elements of the offense charged.").

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[3] Commonwealth's statutory codification of the double jeopardy provision, 18 Pa.C.S.A. §109(1) reads: When a prosecution is for a violation of the same statutes and is based on the same facts as a former prosecution, it is barred by such former prosecution under the following circumstances: (1) **The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of NOT GUILTY by the trier of fact** or in a determination that there was insufficient evidence to warrant a conviction. (emphasis added).

The Commonwealth agrees with the fundamental jurisprudence of this Court that "unlike convictions, acquittals terminate the initial jeopardy, thus subjecting a defendant to a post-acquittal factfinding process regarding guilt or innocence violates the Double Jeopardy Clause." *See Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986). Yet despite this admission, the Commonwealth suggests the jury's verdict of NOT GUILTY after the trial was an acquittal in form only. Such a conclusion is absurd.

The Commonwealth suggests there is some alternative "interpretation" of the application of this Court's settled double jeopardy jurisprudence but attempting to equate this Court's holdings in *Blueford v. Arkansas*, 566 U.S. 599 (2012) and *Poland v. Arizona*, 476 U.S. 147 (1986) with the instant matter is unavailing. These cases are wholly distinguishable and inapplicable to the present case.

In *Blueford*, this Court considered whether the declaration of the jury foreperson of a preliminary vote by the jury finding the defendant NOT GUILTY on two counts of murder announced during its ongoing deliberations was the equivalent of an acquittal. This Court correctly ruled it was not an acquittal because it was not a final decision of the jury. Any suggestion by the Commonwealth that *Blueford* has any application in this case is without merit and should be rejected.

In *Poland*, the issue concerned application of double jeopardy to a capital re-sentencing, specifically, the finding of aggravating circumstances warranting

death. The defendant's guilt phase conviction was overturned and he was convicted again on re-trial. When it came time for sentencing, the jury again found aggravating circumstances and sentenced defendant to death.

On appeal, the issue was whether the appellate court's finding of insufficient evidence to support one of the two aggravating factors did this equate to an acquittal and thus double jeopardy barred the jury's consideration of the particular factor. The issue was when the guilt phase verdict is overturned, does it follow that the prior sentence, too, is wiped clean so the double jeopardy bar does not apply to both proceedings.

None of this analysis has anything to do with the instant "dispute" because the issue here is not about whether Respondent can be re-tried for First Degree murder – Respondent concedes this is permissible – but whether, as the Commonwealth hopes, the NOT GUILTY finding is a legal nullity and because the First Degree conviction was overturned, so, too, were the NOT GUILTY findings. There is absolutely no precedent in this Court to support such an absurd finding and there is no reason for this Court to entertain such a never-before-seen application of the double jeopardy bar.

Neither of these cases is applicable to the present case where the jury announced a final verdict of NOT GUILTY, that verdict was recorded, and the jury was dismissed. The unanimous decision of the Pennsylvania Superior Court is not in any way inconsistent with

Blueford or *Poland* because neither of those two cases are applicable in the first place.

The Commonwealth attempts, through some creative legal gymnastics, to suggest because the elements of Third-Degree murder are part of First-Degree murder, a reversal on the First-Degree verdict wipes out the NOT GUILTY verdict on Third Degree murder. There is no legal basis for this conclusion but even if it was possible, is not the inverse also true? Who is to say that the Third Degree NOT GUILTY verdict was incorrect as the Commonwealth suggests? If the jury found Respondent NOT GUILTY of Third-Degree murder, then it must also have found Respondent NOT GUILTY of First-Degree murder under the creative elements analysis the Commonwealth avers here.[4]

Of course this analysis ignores, as it must, the fact that each count was charged separately, the judge instructed the jury on each count separately, the verdict slip included lines for a separate verdict on each count, the jury rendered a separate verdict on each count, and

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[4] It is noted here that the Pennsylvania Supreme Court's holding in *Commonwealth v. Roberts*, 399 A.2d 404, 405 (Pa. 1979) stands for the proposition that Respondent was entitled to dismissal of the First-Degree murder charge because "one who is acquitted of lesser degree[s] of homicide, namely murder in the Third Degree, voluntary manslaughter, and involuntary manslaughter, cannot be retried on a charge of [First] Degree murder arising from the same factual situation." Respondent, however, recognizes this holding is inconsistent with this Court's double jeopardy jurisprudence that double jeopardy is inapplicable where the guilty verdict is later overturned on appeal because in that instance, jeopardy is not said to end.

the Court accepted and recorded, at the Commonwealth's request, the final verdicts on each count.

A jury's verdict of acquittal is accorded "absolute finality." *See DiFrancesco*, 449 U.S. at 129-30. Respondent was acquitted at trial and jeopardy ended once the verdict was recorded and the jury dismissed. This case is not the appropriate vehicle to reconsider whether double jeopardy applies to these facts or, alternatively, to establish another exception to the general principles that have guided this Court's jurisprudence for nearly two centuries.

II. This case is not an appropriate vehicle to review, for the first time, the question of whether there can ever be an implied waiver of a fundamental individual Constitutional right

The Commonwealth alternatively attempts to rehash the same argument rejected unanimously in the state courts below that Respondent's notice of an intent to present evidence of diminished capacity at the re-trial of First Degree murder requires Respondent to admit guilt to Third-Degree murder and to force a waiver of his double jeopardy protection against being tried again following an acquittal. Neither position has any supportive precedent in this Court or elsewhere and this is not the case to review this issue.

This Honorable Court is reminded that this particular "issue of first impression" is before this Court because the Commonwealth's prosecutors, years ago,

failed to correct or object to a verdict that, until now, they appeared perfectly happy with.

The Commonwealth's position grants to its prosecutor the unilateral power to force Respondent to waive, involuntarily, his fundamental double jeopardy protection and at the same time to eviscerate the due process right of every defendant to present a full and complete defense. To deny Respondent the right to present a complete defense because the Commonwealth failed to correct its own mistake five-and-one-half years ago runs afoul of every conceivable measure of fundamental fairness.

The Commonwealth's premise here is wrong: Respondent is not asking to be convicted of Third-Degree murder. Simply put, absent the requisite *mens rea*, a defendant cannot be convicted of First-Degree murder. Raising the possibility of presenting evidence of diminished capacity is only available to someone charged with First-Degree murder and is directed solely at the element of premeditation.

The Commonwealth vastly overstates the effect of presenting this particular defense, specifically, that somehow this defense necessarily frees the Commonwealth of its high burden of proving its case beyond a reasonable doubt. The Commonwealth concedes a new trial is necessary but then argues in essence that no trial is necessary because the diminished capacity defense results in a conviction for Third-Degree murder.[5]

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[5] The Commonwealth, at the same time it is arguing that a diminished capacity defense necessarily requires a defendant

Such a conclusion is an incorrect reading of the law and, if accepted, renders all due process protections irrelevant. There is no decision from this Court that would support this extraordinary proposition.

The Commonwealth relies upon *Commonwealth v. Larkins*, 829 A.2d 203 (Pa. Super. 2003), *appeal denied*, 870 A.2d 321 (Pa. 2005) to support its contention that double jeopardy can be waived. The Trial Court and the Pennsylvania Superior Court both recognized *Larkins* was inapplicable to the present case. In *Larkins*, the defendant was convicted of First-Degree murder and acquitted of Third-Degree murder and manslaughter. Upon appeal, his First-Degree conviction was overturned.

On re-trial, Larkins requested the Court instruct the jury on Third-Degree murder and manslaughter even though he was acquitted on those charges previously. The trial court refused, reasoning that instructing the jury on these charges, when the defendant was acquitted previously on those charges, violated double jeopardy. *See Larkins*, 829 A.2d at 1204. He was again convicted but argued on appeal that double jeopardy was waivable and he should have been able to have the Court instruct the jury on Third-Degree murder and manslaughter. By not giving those instructions, the Court denied him a fair trial. *Id.*, at 1205.

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concede guilt to Third-Degree murder, the Commonwealth admits presenting the diminished capacity defense gives a jury "the option of finding guilt." It is either one or the other but cannot be both.

True, a defendant in theory can waive his rights, such as the right to counsel, the right against self-incrimination, or the right to the protection against double jeopardy, among other fundamental Constitutional rights, but any waiver must be voluntary, knowing, intelligent and explicit and cannot be inferred or implied. *See Boykin v. Alabama*, 395 U.S. 238, 244 (1969); *see also Gonzalez v. United States*, 483 U.S. 390 (2008) (Scalia, J., concurring). Waiver must be the result of a deliberate choice and in this case, Respondent expressly told the Trial Court he was NOT waiving his double jeopardy protection and either the Commonwealth or the Court cannot force Respondent to do something he has expressly rejected. There is no basis in the law for this position.

The Commonwealth's practical challenge in this case is one of its own making. The Commonwealth's position requires Respondent to give up a fundamental right – the protection of double jeopardy – in order to exercise another – the due process right to present a full defense. This is a classic example of the Unconstitutional Conditions doctrine and violates Respondent's due process. The Commonwealth speculates about an issue the lower state court and the Trial Court specifically found was premature, which is not unusual in reviewing interlocutory non-final orders. This Court should reject this Petition on this basis.

This Court has expressed that a defendant's due process right is, at its core, **"**the right to a fair opportunity to defend against the State's accusations." *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). To

validate the Commonwealth's position in this case – Respondent cannot present a diminished capacity defense unless he waives his double jeopardy right – would be to violate the essential fairness that due process requires.

CONCLUSION

Based on the foregoing, Respondent requests this Honorable Court DENY the Petition for a Writ of Certiorari.

Dated: Altamonte Springs, Florida
January 29, 2020

Respectfully submitted,

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