

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Randy Roby — PETITIONER
(Your Name)

vs.

Douglas Demoura — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

1ST District Court of Massachusetts, Federal Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Randy Roby W82686
(Your Name)
NCC1 Gardner
PO Box 466, 500 Colony Rd
(Address)

Gardner, MA, 01440
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

During Roby's trial on December 9-15, 2008, Roby filed a Massachusetts Rule 25 Required Finding of Not Guilty mid-Trial, right when the prosecution rested. During the motion hearing at sidebar, the Trial Judge determined the prosecution Failed to meet their burden of proof by Not proving elements of the crime charged. The Trial Judge Allowed the motion on All 3 accounts, but then added In So much as to convict Roby on other charges,

When this United States Supreme Court has already defined the protocol and limitations in Smith v Massachusetts 125 S Ct 1129 (2005) and Evans v Michigan 133 S.Ct. 1069 (2012), and the ramification of the allowance of a mid-Trial motion in answering a "Yes" or "No" question on a Substantive Determination, defining cause, does not the effect, as defined in Smith and Evans also must be an acquittal "Yes" or "No"? And does a State, pursuant to Smith and Evans, have any authority to make procedural changes to the Smith and Evans Mandate of a Substantive Determination and the Constitutional and Due Process violations that result in this procedural change for Want of a Conviction?

Questions Presented

I, Randy Roby (Roby), the Appellant acting Pro-se in the above captioned and Numbered action, is a person in custody under state court judgement who seeks a determination that the custody violates the Constitution, Laws, or treaties, of the United States.

Roby is raising a question that was either Not Addressed in the Lower Courts, but was raised, or mis-applied Pre-existing Law, or Sanctioned the Lower Courts mis-applied ruling. This ruling will affect a good number of people convicted by the trial courts mis-applications or unreasonably applied Rulings in Smith V Massachusetts 125 S. Ct. 1129 (2005) (Smith) and Evans V Michigan 133 S. Ct. 1069 (2012) (Evans) as decided by this United States Supreme Court.

Roby understands the the Constitution's Due-Process Clause "entitles him to a jury determination that the defendant is guilty beyond a reasonable doubt of [Every Element] of the crime for which the defendant is charged,,, and a State can Not circumvent the protections."

Roby further understands that Pursuant to Smith and Evans, the allowance of a Massachusetts Rule 25 Required Finding of Not Guilty is an acquittal that terminates the case and invokes Double Jeopardy protection, which prohibits any further fact finding.

Roby can prove that during his 2008 re-trial:

- A) A mid-Trial Required Finding of Not Guilty was Timely filed.
- B) In Side bar, the TRIAL Judge ruled that the Commonwealth failed to Meet their burden of Proof.
- C) The trial Judge Allowed the motion on All accounts.

As mandated by Smith and Evans the trial Judge answered the

"Yes" or "No" question and allows the Required finding of Not Guilty motion, but then tries to retain some elements for want of a conviction by amending the indictments to different crimes post-acquittal.

Roby is arguing that the Trial Judge ruled in Favor of Roby by Allowing his Motion which Pursuant to Evans and Smith terminated the case as an acquittal, Removing Jurisdiction from the Courts and is protected by Double Jeopardy from any further fact finding. Roby also argues that his current convictions are the result of facts that are A) have already been determined to have failed to meet the burden of proof and B) are the product of Post-Acquittal fact finding which is impermissible.

The Prosecution contests that the Trial Judge only partially allowed the Required finding of Not Guilty, thus does not constitute as an acquittal.

Roby Petitions this court to make a determination and to clarify the decisions in Smith and Evans and the Commonwealth's application, in the favor of Roby, that the Substantive Ruling of a Required Finding of Not Guilty Superseeds any and all procedural court Rulings, thus rendering the Commonwealth's convictions illegal. The Commonwealth contends that no acquittal was ever allowed, and This United States Supreme Court in Smith and Evans (and All Supporting cases and Authorities contained within) State that "when a a Massachusetts Rule 25 (Federal Rule 29) Required Finding of Not Guilty is allowed, it is equivalent to Jury acquittal. In Roby's case and many others in Massachusetts, Is the Allowance of a Required Finding of Not Guilty, an acquittal? or a procedural Stepping Stone to Procedural want of Conviction?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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note: The Supreme Judicial Court Decision on Roby's Direct Appeal does not include any of Roby's Rule 30(a) motion and the SJC Denied Roby application for Further Appellate Review.

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at Case # 17-1928; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☒ reported at Case # 14-12832 - IT; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

☒ reported at Case # FAR - 23807; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Massachusetts Appeals Court court appears at Appendix D to the petition and is

☒ reported at Case # 2013-P-1838; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 5, 2018.

☒ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 5, 2018, and a copy of the order denying rehearing appears at Appendix A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was Dec 22, 2015. A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: Dec 22, 2015, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

No

In The
Supreme Court of the United States

Randy Roby
Petitioner

V

Douglas Demoura
Respondent

On Petition For Writ of Certiorari
First Circuit Federal Court of Appeals

Memorandum of Law
In Support of Roby's
Petition For Writ of
Certiorari

Randy Roby W82686
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Roby's Appendix (RA #s)

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Federal Appeals Court of Massachusetts

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Massachusetts Supreme Judicial Court (Rule 30(a))

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- RA005 Original Indictments (1-6)
- RA006 Rule 25 Motions, Required Finding of Not Guilty (1-3)
- RA007 Jury Verdict Slip (-5)
- RA008 Rule 25 Sidebar discussion and Ruling (1-17)

Petitioner's Memorandum of Law in
Support of his Petition For Writ of
Certiorari

I, Randy Roby, the petitioner acting pro-se in this matter in the above Captioned and Numbered action, Hereby submit his memorandum of Law, in support of his petition for writ of Certiorari to Appeal the 1st Circuit Federal District court's improper ruling and denial of Roby's Writ of Habeas Corpus, and the Federal Appeals Court's denial of a Certificate of appealability. The denial of Claims One, Two, and Three will undermine the very Fabric of the Required Finding of Not Guilty as defined by Smith V Massachusetts and Evans V Michigan and this United States Supreme Court, and denies Roby of his Constitutional Guaranteed Protections. This Petition must be Allowed in Favor of Roby and many others whom have been convicted post-acquittal.

Claims Made

Claim One

The trial Court determined, that the Commonwealth did not meet their burden of proof and Allowed the petitioners (Roby) Motion for Required Finding of Not Guilty on All Accounts. But did not release Roby post-acquittal in Violation of his Due-process rights of the Fifth, Sixth and Fourteenth Amendment rights of United States Constitution.

Claim Two:

Roby was convicted on offenses that he was not indicted for after jeopardy attached to the original indictments, and after the Required Finding of not guilty was allowed, in violation of Roby's Due-Process Clause, the Double Jeopardy Clause, and the Fifth, Sixth, and Fourteenth Amendment Rights of the United States Constitution.

Claim three:

Roby is claiming Ineffective assistance of Counsel because Both, Roby's trial counsel, and Roby's Appeals counsel's effectiuness fell below the Standard of Strickland, when Roby's trial counsel failed to object or argue the Post-acquittal Proceedings as being Unconstitutional, and Roby's Appeals counsel failed to raise or argue these same Post-Acquittal Unconstitutional proceeding. Even after Roby repeatedly requested, and supplied current case law in support of Roby's claims, in violation of the standard set fourth in Strickland, the Due-Process Clause, the Double Jeopardy clause and the Fifth, Sixth, and Fourteenth Amendment Rights of the United States Constitution,

All of these three claims are resulting in the Action of the Trial Judge's Allowance of Roby's Required Finding of Not Guilty as defined by this United States Supreme Court in Smith v Massachusetts and Evans v Michigan and their supporting Authorities.

Statement of Facts and Prior Proceedings

Procedural and Factual Background

In November 2001, Roby was indicted on Six Identically Worded indictments. (3 for "Nancy") and 3 for "Tora") ["Nancy" and "Tora" are Pseudonymously given names to the two half sisters]

Roby was convicted on Counts 001-003 (Nancy) and Counts 005-006 (Tora), and was found Not Guilty on Count 004 (Tora), on November of 2003. (RA005-11-6))

In October of 2004, Roby won a Rule 30 for procedural and ineffective assistance of counsel based on the testimony of a junior Lawyer in Roby's Attorney firm for inappropriate conduct resulting on his trial attorney being dis-barrred. Roby was released from Court at that Time. (Case # ESCR 2001-0124) Note: This First Trial set locations to every indictment which were not Repeated in the Second Trial,

In December 2008, the petitioner Roby was re-tried at Salem Superior Court on Five identically worded indictments (Exhibit 5), under MGL, ch. 265 § 22A ie Rape of a child with Force.

Roby, at the close of the Prosecution's case, mid-Trial, Filed a Massachusetts Rule 25 Required Finding of Not Guilty (Exhibit 6-1). The Trial Judge determined during the side bar hearing, that the prosecution failed to muster their burden of Proof to legally sustain a conviction to the Latimer Standard, and allowed the motion on all 5 accounts (Exhibit 6-1). The trial Judge then amended, the post-acquittal indictments to lesser included crimes without telling the jury untill he had to Submit them to the jury for deliberation.

During Roby's Direct Appeal, Roby's Appeals counsel argued that a defined location (a place in Peabody in Roby's vehicle) testimony to one indictment was changed to another location (Bedroom) which changed (Tora's) Testimony as well as an overabundance of alleged bad Acts evidence that eventually got thrown out for the reason of A) Amending of location between trials, and B) Amending (Substantially) of the indictments Post-Acquittal to different crimes, are so similar in argument, Roby was forced to merge his direct appeal and his Rule 30(a) in the district court.

The Supreme Judicial Court (SJC) reviewed the petitioners direct appeal only and not Roby's Rule 30 claims.

The Supreme Judicial Court's Ruling that the post-acquittal amendments resulted as "Reversible" in connection with evidentiary rulings and refused to grant a new trial involving Tora's cross examination, and the admission of unfounded prior bad acts evidence. On June 4, 2012 the SJC affirmed the conviction in full.

On April 8, 2013 the Petitioner Collaterally attacked his conviction pursuant to Mass R. Crim. P. ss 30(a). Advancing what in substance amounts to a multi-faceted, single argument which shows that All arguments contained in both the Supreme Judicial Courts decision and Massachusetts Appeals Court decision of Roby's Rule 30(a) can not stand because their entire foundation of their decisions are based on A) The facts presented during the Prosecution argument which the Trial Judge determined that prosecution failed to master their burden of Proof to legally Sustain a conviction to the Latimer Standard, or B) was founded on post-acquittal fact Finding in violation of Roby's Due-Process, Double Jeopardy and Constitutional Rights.

Rather than releasing Roby at his acquittal, the trial Judge, for want of a conviction, Amended the already acquitted indictments to different crimes to convict him on different Crimes (lesser included). In doing so, the Trial Judge unreasonably applied pre-existing United States Supreme Court decisions as in *Smith V Massachusetts* and *Massachusetts Rule 25(a) and (b)(2)*, which defines what the court can and can not do.

Roby filed his Rule 30(a) in Salem Superior Court where the court was made aware of the Constitutional issues argued and denied Roby's motion. Roby timely filed in the appeals court (See 2013-P-1838, Commonwealth V Roby 87 Mass App Ct 1136), where the Commonwealth opposed their claims with a Massachusetts Rule 1:28 case Commonwealth V Roman 79 Mass App Ct 1102 (2011) WL 816631 (Proof of another victim of this procedural practice of a Rule 25).

On June 30, 2014, while Roby's Appeal was pending in the Massachusetts Appeals Court, Roby now lacking in legal assistance filed the petition for Writ of Habeas Corpus. On March 26, 2015, Roby also filed a motion for the district court to Review his Rule 30(a) still pending before the Massachusetts Appeals Court. Roby's intent was to "alert the Federal district Court" of the seriousness of the similar issues of A) being convicted of crimes of which he was not charged with, and B) Amending of the indictments substantially mid-Trial, and C) Double Jeopardy Violations as well as Constitutional Violations, that are common yet different between both Roby's Direct Appeal and Roby's Rule 30(a), so that that Roby would not, due to the lack of legal knowledge jeopardize his ability to pursue these important arguments.

the denial of Roby's Rule 30(a) was affirmed by the Massachusetts Appeals Court as a Rule 1:28 case on July 14, 2015, and Further Appellate review was denied by the Supreme Judicial Court on December 22, 2015 (See Commonwealth v Roby WL 4249188)

Over the prosecutions Objection, the District Court allowed Roby to Amend his petition to include his Rule 30(a) Arguments. Roby did so not knowing what was required to Properly argue All claims without any Legal assistance. Presented at the beginning of this petition, And Roby Reminds this Court that the issues presented in both his Direct Appeal and his Rule 30(a) are part of the record as submitted into the Last Court to make a ruling on the merits of this case. and is the heart of Roby's claims under the umbrella of Constitutional Law, Due-Process Law, Double Jeopardy Law as described in Smith and Evans. These arguments were decided by the Federal District Court of Massachusetts on Aug 4, 2017

Roby then filed for a reconsideration for a certificate of Appeal ~~of~~ ^{on} appealability and was denied Aug 4, 2017

Roby Timely filed in the Federal Appeals Court of Massachusetts on Sept 14 2017, and was denied Certificate of Appealability (See Appendix A)

Argument

Roby is referring to the Rules of the United States Supreme Court, in referencing Rule 10(a) that "The United States appeals court has entered a decision in conflict with the" United States Supreme Court "that has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this courts supervisory power."

and Rule 10(c) "A State court or United States Court of Appeals has decided an important question of Federal law that has not been, but should be, settled by this court, or has decided an important Federal question in a way that conflicts with relevant decisions of this court."

Roby will show this conflict on the allowance of a Massachusetts Rule 25 "Required Finding of Not Guilty (Federal Rule 29) and the States procedural application of that law conflicts drastically with the decisions of this court in Smith and Evans, and the mandates prescribed. Roby will also show that the States Primary argument is a Rule 1:28 case, which is in itself no authority, that shows another illegal conviction using a Required Finding of Not Guilty in the same manner as Roby.

In Setting his argument to the United States Court of Appeals, Roby set fourth the pre-conditions for issuance of a certificate of Appealability (COA), under 28 U.S.C. § 2253 (c), "That Congress expressed no intention to allow a trial court procedural error to bar vindication of Substantial Constitutional rights to appeal. Slack v McDaniel 529 U.S. 473, 483-84 (2000). To obtain a COA under 2253 (c), a habeas petitioner must make a substantial showing of the denial of a constitution of Right, a demonstration that, under Barefoot v Estelle 463 U.S. 880, 983 (1983), "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner, or that the issues presented were "adequate to deserve encouragement to proceed further" Quoting (Slack).

In addition "A decision is contrary to clearly established Law if the state Court or District Court "Applies a rule that Contradicts the Governing Law Set fourth in [Supreme Court] cases". Williams v T aylor 529 U.S. 362, 405 (2000), which is also being

Quoted by Barefoot V Estelle 463 U.S. at 893 and N.Y. "[sum[ming] up" the substantial showing'". Standard)

Where, as here, the district court has rejected the constitutional claims on the merits, the showing required to satisfy 28 U.S.C. § 2253(c) is straight forward: "The Petitioner must demonstrate that reasonable jurists would find the district court's assessment of the Constitutional claims debatable or wrong. Slack V McDaniel 529 U.S., at 483-84. The Instant case presents such a case situation.

A) Roby Claims One and Two as framed on his Rule 30(a) as submitted, and his amended brief also as submitted, likely alerted the State Courts that a Federal Question was being presented, thereby Exhausting Same; And, this Courts Assessment Regarding those claims is Debateable or Wrong.

The United States Constitutional Law clearly defines the Standard:

" Under the Due Process clause of the Federal Constitutional Fourteenth Amendment, and under the Constitution's Sixth Amendment, of a right to a jury determination, a criminal defendant is entitled to a jury determination that a defendant is guilty beyond a reasonable doubt of "Every Element" of the crime with which the defendant is charged. Where the Historic foundation for the United States Supreme Courts

recognition of these principles extend down Centuries into Common Law, a State "Can not" circumvent these protections by redefining the elements that constitute different crimes by characterizing them as factors that bear Solely on the extent of punishment, that States must prove "that a defendant is guilty of every element of the crime with which he is charged beyond a reasonable doubt." Constitutional Law 840.3, 841, 848

Roby is Not challenging the original indictments, nor is he challenging whether or not a state can adjust to lesser included crimes mid-trial. Roby is contending that due to the facts of this case, and the nature and authority of a Required finding of not Guilty when allowed, the Federal Rule 29 and the Massachusetts Rule 25 are the same, and can not be the "platform" to administer lesser included crimes simply by the pre-existing laws like Smith V Massachusetts 543 US 462 (2005), 125 S Ct. 1129 and Evans V Michigan 133 S.Ct. 1069 (2012) use cases like:

- Sanabria V United States 437 US 54 (Sanabria)
- Rumsey V, 467 US @203, 211 (Rumsey)
- United States V Bah 163 US 662 (Bah)
- Fong Foo V United States 369 U.S. 141 (1962) (Fong Foo)
- United States V Scott 473 U.S. 82 (1978) (Scott)
- United States V Martin Linen Supply Co 430 US 564 (Martin Linen)
- Gonzalez V Justices of Mun Court 420 F 3d 5

are all case authority referred to in both Smith (supre) and

Evans (supra). Smith is a case that the United States Supreme court, very specifically, explained the use and the resulting affects, when a Required finding of Not Guilty is used. Lets review:

"Given that the criminal - Procedure rule directed the Trial Judge to enter a finding of not guilty if the evidence was insufficient as a matter of Law to Legally sustain a conviction, an order entering such a finding, met the definition of 'acquittal' that the United States Supreme Court's cases had consistently used. For Such an order actually represents a 'resolution', correct or Not, of some or all of the factual elements of the offense charged." Smith v Massachusetts 125 S Ct 1129 160 LED 2D 914 @ 914. (2005)

Fact: the defence counsel filed a mid-Trial Rule 25 (Required finding of not Guilty). when the Commonwealth rested.

Fact: The trial Judge determined that the Commonwealth failed to muster burden of proof on ^{at least one} ~~every~~ element of each of the indictments (3 counts for Nancy and 2 counts for Toria)

Fact: Trial Judge Allowed the midTrial. Rule 25 required Finding of Not Guilty, on all 5 accounts, (see ~~S.A. 463-477~~),
RA006-1

Let us continue:

" the State (Massachusetts) had Patterned this criminal

procedure Rule 29 of the Federal Rules of Criminal Procedure, as to which the Supreme Court had held for Double Jeopardy purposes, that

- a) a Rule 29 judgement of acquittal was a substantive determination that the Prosecution had failed to carry its burden; and
- b) Thus, even when a jury was the primary fact finder, the trial judge still resolved elements of the offence in granting a Rule 29 motion in the absence of a jury verdict. " Quoting Smith (supra)

This is clearly defining the Massachusetts Rule 25 is modeled after the Federal Rule 29 and contains the same powers and authority. However in the Smith case, the State court "Misunderstood" the evidence and reversed the ruling. and completely misunderstood the authority.

- " c) The States (Massachusetts) Characterization of the State Criminal Procedure, rules a Required Finding of Not Guilty as a Legal, Rather than a factual determination was, as a matter of Law, Not Binding on the Supreme Court." Quoting Smith (supra)

This clearly^{is} an unreasonable application of Pre-existing Law. The United States Supreme Court then Corrected the Commonwealth's understanding by stating:

" D) Instead, what mattered was that, as the state Criminal Procedure rule authorized the trial Judge to evaluate the Prosecutions evidence, and determine that it was legally insufficient to sustain a conviction." Quoting Smith (Supra)

Smith brings a question of appealability and finality into the frequently abused Process where Smith explains:

" Under the United States Supreme Court's cases concerning Double Jeopardy Clause of the Federal Constitution's Fifth Amendment, there is a single exception to the principle that an acquittal by a Judge precludes a re-examination of guilt no less than an acquittal by a jury. Which exception is that, when a jury returns a verdict of guilty, and the trial Judge, (or Appellate Judge), Sets aside that verdict and enters a judgement of acquittal. The Double Jeopardy Clause does not preclude a prosecution appeal to re-instate the Jury verdict of Guilty." Quoting Smith (supra)

Interesting that here smith clearly states there is

only one condition when the Trial Judge can over-ride a verdict or re-examine a Rule 25 ruling, and that is [Post Verdict] of Guilty of the Actual indictments. Yet in Roby's case, the Trial Judge is performing these very acts mid-Trial. Lets See what Smith says.

"However, if the Prosecution has not yet Obtained a conviction, [then further Post-acquittal proceedings to secure one are impermissible], as subjecting a defendant to post-acquittal fact finding proceedings going to Guilt or innocence violates the double Jeopardy Clause." Quoting Smith (supra)

So, the United States Supreme Court makes very clear that the moment the Rule 25 Required Finding of Not Guilty is allowed, the effects of the Motion apply immediately. And one of those effects is Double Jeopardy Protection. Lets See what Smith has to say about Double Jeopardy.

"Any contention that Double Jeopardy Clause of the Federal Constitution's Fifth Amendment, must itself (even absent provision by a State) leave open a way of correcting a trial Courts Legal errors <919> odds with the well established Rule that the Clause's bar will attach to a criminal defendant's Pre-Verdict acquittal that is 'potently wrong in law' as:

- 1) Requiring someone to defend against a charge of which the person has already

been acquitted, is prejudice *per se*, for purposes of Double Jeopardy Clause, even when the acquittal was erroneous because the evidence was sufficient.'

B) The United States Supreme Court's Double Jeopardy Case Cases make clear that an acquittal bars the prosecution from seeking another opportunity to supply evidence which the prosecution failed to muster before jeopardy terminated."
Quoting Smith (Supre)

Lets Look at Case Annotations of Double Jeopardy:

United States Constitution

* Case Annotations

§ 111 Double Jeopardy

§ 73 Miscellaneous

"A) Trial Judge's order entering finding of Not Guilty under Mass. Rule. Crim. Proc. 25(a) meets definition of acquittal that the United States Supreme Court's Double-Jeopardy cases have constantly used, it actually represents resolution, correct or not, of some or all of the elements of the offense charged."

Smith v Massachusetts 125 S. Ct. 1129

"B) If, after facially unqualified mid-trial dismissal of

one count, Trial has proceeded to defendant's introduction of evidence, acquittal "must be treated a final", unless availability of re-consideration has been plainly established by pre-existing Rule or case authority expressly applicable to mid-Trial rulings on sufficiency of Evidence." @ Smith v Massachusetts

c) Commonwealth failed to show under State Procedure as it existed at that time of petitioner's Trial, Trial Court's Ruling on Motion for Required Finding of Not Guilty under Mass. Rule. Crim. Proc. 25(a) was automatically, or even presumptively nonfinal, therefore, "acquittals had to be treated as final to avoid violation of Double Jeopardy Clause." Smith v Massachusetts

d) U.S. Supreme Court's decision in Smith v Massachusetts did not alter definition of acquittal that was previously articulated by the U.S. Supreme Court in Martin Linen which rested on functional approach:

Thus, Court reinstated its prior decision that Petitioner's pending prosecution was not a barred by Double Jeopardy where State Trial Court deliberately and misleadingly characterized dismissal for want of prosecution as judgement of acquittal under Mass. Rule, Crim. Proc. 25' Gonzalez v Justices of Mass. Court"

When a single case, is the case of authority on three out of four defining case issues, and is the main topic in the fourth for the United States Constitution, All Lower courts better pay attention to this president Authority.

In 2002, Again the issue of acquittal / Double Jeopardy come up again in Evans v Michigan 133 S.Ct. 1069 (Evans)

"Here, it is plain that the [trial judge] in Evans evaluated the [state's] evidence and determined that it was legally insufficient to sustain a conviction (Martin Linen).

The trial court granted Evans's motion under a Rule that requires the court to "direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support a conviction" (Michigan Rule...), And the Court's oral Ruling Leaves no doubt that its determination on the basis of "the testimony" that the state had presented. (Mich...) This ruling was not a dismissal on a procedural Ground unrelated to factual guilt or innocence, like the question of preindictment delay in "Scott", but rather a determination that the state had failed to prove its case. Under Our Precedents, then, Evans Was Acquitted!" Evans (Supra)

Evans was acquitted and released. Roby's case is also a case where the State failed to prove its case, and his Required finding of Not Guilty motion was allowed on all charges, Roby's case Must be decided the same!

Evans goes on and talks about the Authority of the Required finding Ruling by Saying,

"Retrial following a court decreed acquittal is barred, even if the acquittal is:

A) based upon egregiously erroneous foundation

Fong Foo V United States 369 U.S. 141, 143

B) Such an erroneous decision to exclude evidence

Sanabria V United States 437 U.S. 54

C) A mistaken understanding of what evidence could suffice to sustain a conviction.

Smith V Massachusetts 543 U.S. 462

D) Or misconstruction of the Statute defining the requirements to Convict.

Arizona V Rumsey 467 U.S. 203

In Contrast to procedural rulings, which lead to dismissals or mistrials on basis unrelated to factual guilt or innocent, acquittals are "Substantive Rulings" that "conclude proceedings absolutely", and thus Raise significant Double Jeopardy concerns." Quoting Evans (supra)

And SAs in Evans Roby's case and arguments match, and must be applied here also

"Evans acquittal was a product of an erroneous

interpretation of governing legal principles, but that error affects only the accuracy of the determination of the acquittal, "Not its essential character!" See:

Scott v United States 437 U.S. 82 "

Quoting: Evans v Michigan 133 S. Ct. 1069

We have just read about the events and authority the allowance of a Moss Gen Rule Crim Proc 25(e) to an indictment that includes the Judges determination of the States evidence. The Allowance of this motion:

- is equivalent to a jury acquittal. (Smith Supra)
- Concludes proceedings absolutely. (Smith Supra, Evans)
- Removes Jurisdiction from the Courts. (Smith Supra)
- Can Not be re-examined once allowed and final. (Smith, Evans)
- Double Jeopardy Attacks. (Smith, Evans)
- Once final can Not be argued in Appeal. (Evans, Smith)
- This ruling does not care for what error was made in determining this motion, the fact remains that it is an acquittal! (Evans) (Scott)
- Roby can not be convicted on acquitted indictments!

Roby's claim three: that the trial counsel and the direct Appeals Counsel were ineffective assistance of Counsel were ineffective for their failure to protect Roby's Federal and Constitutional Rights Regarding all the issues presented here in this Motion and on illegal convictions resulting on

erroneous procedural errors stemming from Roby's court decreed mid-Trial acquittal, that resulted in an illegal conviction based on a conviction of a court with no jurisdiction and no standing indictments post-acquittal to amend, or send to the jury. Roby contends the his Trial outcome, his direct Appeal decision in the SJC, and his Rule 30(c) appeal decision in the Mass. Appeals Court, as well as the current decision can Not Stand? Without Violating Double Jeopardy Protection Law. For Any other decision other than what is perscribed by Smith (Supra) or Evans (Supra), would destroy the very character and fabric of Acquittal and Double Jeopardy Laws, as set forth in these president cases, by the United States Supreme Court.

There is no question that Roby has shown that this district Court has decided an important federal Question in a way that conflicts with relevant decisions of this ~~to~~ United States Supreme Court. And Roby has met the showing of a denial of Constitutional right, by showing that all these topics "when presented to reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner, or that the issues presented were "adequate to deserve encouragement to proceed further," quoting Barefoot V Estelle 463 U.S. at 893 and n.4 ("Summing up" the "Substantial Showing" Standard).

Roby has also shown this court, that the trial outcome, the Supreme Judicial Court's decision on his Direct Appeal, and the Appeals Court decision on Roby's Rule 30(a), along with the Federal District Court for Massachusetts's Decision all argue that the current trial outcome, which is in direct contradiction to Smith and Evans, and other Pre-established Governing Law Set forth in Supreme Court Cases.

"A decision is contrary to clearly established Law if the State Court 'Applies a rule that is contrary and contradicts the Governing Law Set forth in [Supreme Court] cases'".

Williams V Tayler 529 U.S. 362, 405 (2000)

Roby has shown that the Commonwealth clearly is in error of their interpretation of these Pre-established Law by showing that A) the Commonwealth's decision was resulting from "a Misconstruction of the Statute defining the requirements to Convict" Quoting Evans Referencing Arizona V Rumsey 467 US 203, and B) "A mistaken understanding of what evidence could suffice to Sustain a Conviction Smith V Massachusetts 543 U.S. 54" Quoting Evans.

These Cases direct the trial Court to evaluate the evidence and Determine a "Yes" or "No" answer. Did the Commonwealth meet their Burden of Proof to legally sustain a conviction to the Lotimer Standard? If the answer is Yes, then the trial continues and the motion is Denied. But if the answer is No, (as in Roby's Mid-Trial Motion) the

Court is mandated to allow the Required finding of not guilty motion. That Motion is not a procedural determination but a Factual determination that Terminates the Case absolutely on the indictments in which the Court Allowed.

Evans makes very clear that regardless of how the trial Court erred, it doesn't matter. the error only effects the accuracy of the determination of the acquittal, Not it's Essential Character." See Scott V United States 437 U.S. 82 Quoting Evans V Michigan 133 S.Ct. 1069.

All the Following Procedural events are Post acquittal and thus are Fruits of the Poisonous Tree which, and are not Limited to:

- Amendment of Indictments (Post acquittal).
- Further Fact Finding (Impermissible).
- Jury Verdicts and Conviction (Illegal)
(for a court that has no Jurisdiction has no Authority).
- Illegal imprisonment (imprisoned on illegal Convictions).
- Deprived of his Freedom (as defined by the outcome Mandate in the pre-existing Federal Law),
- And the numerous Constitutional Violations resulting from the trial Courts erroronous practicess.

For all these reasons contained in this argument, this Court, must rule in favor of the Appellant, for if this court does not, will result in major Constitutional Violations and opens the Door for State Practices that will tare the fabric in which these Required Finding of Not Guilty Rulings

are founded upon.

Roby also claims that both his trial Counsel, and his Direct Appeal Counsel, failed to muster the standard set fourth in Strickland, for their action and responsibilities fell short of the Strickland Standard when his trial attorney did not object nor persue arguments protecting Roby's Constitutional rights to Due Process and Doublejeopardy when the Trial Judge made his post-acquittal procedural Substantutive omendment to Roby's indictments; And Roby's Direct Appeals counsel for her failure to argue or persue the Same in Roby's Direct Appeal, even after Roby, multipul times brought cases to her pleading his case. Another intresting point is a conflict of Intrest where both Roby's Trial Counsel and his Appeals counsel were both employed by CPCS (Center for Public Counsel Services)

Conclusion

For All these Reasons, this court must make a Declaration in favor of Roby's Motion and Question to this Court, and Grant Roby Certiorari

Date: June 1, 2018

Respectfully Submitted

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: June 1, 2018