STATE OF MICHIGAN

IN THE

SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Murphy, P.J. and O'Connell and Whitbeck, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 146480

-vs-

DUANE E. WILSON,

Defendant-Appellant.

Court of Appeals No. 311253
Macomb County CC No. 2009-002637-FC

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS *AMICUS CURIAE* IN SUPPORT OF THE STATE OF MICHIGAN

PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN

JESSICA R. COOPER
PROSECUTING ATTORNEY
OAKLAND COUNTY

THOMAS R. GRDEN
CHIEF, APPELLATE DIVISION

BY: DANIELLE WALTON (P52042)
Assistant Prosecuting Attorney
Oakland County Prosecutor's Office
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-0656

TABLE OF CONTENTS

INDEX TO AUTHORITIES CITED iv

COUNTERSTATEMENT OF JURISDICTION viii

COUNTERSTATEMENT OF QUESTIONS PRESENTED ix

COUNTERSTATEMENT OF FACTS 1

ARGUMENT:

I. BECAUSE THE VERDICTS AT THE DEFENDANT'S FIRST TRIAL, A GUILTY VERDICT ON FELONY-MURDER AND ACQUITTAL ON THE PREDICATE FELONY, WERE INCONSISTENT, THE DEFENDANT CANNOT SHOW THAT A JURY ACTUALLY DECIDED AN ISSUE IN HIS FAVOR. THEREFORE A FUNDAMENTAL REQUIREMENT OF COLLATERAL ESTOPPEL IS LACKING AND THE CIRCUIT COURT ERRED IN DISMISSING THE DEFENDANT'S FELONY-MURDER CHARGE.

Standard of Review 3

Issue Preservation 3

Discussion 4

A. Summary of the Argument 4

B. The Double Jeopardy Clause allows the prosecution a complete opportunity to convict the defendant of the crimes he committed 4

C. Successive prosecution for both felony-murder and the predicate felony does not violate double jeopardy because each crime possessed an element that the other did not 6

D. The doctrine of collateral estoppel was not implicated because the jury verdicts at the first trial were inconsistent 8

E. Defendant's policy arguments cannot justify extension of collateral estoppel principles to bar re-trial of a crime for which the defendant had previously been convicted 18

F. **This case presents a straightforward application of *United States v Powell,* 469 US 57; 105 S Ct 471; 83 L Ed 2d 461 (1984), *Dunn v United States,* 284 US 390; 52 S Ct 189; 76 L Ed 2d 356 (1932), and *Standefer v United States,* 447 US 10; 100 S Ct 1999; 64 L Ed 2d 689 (1980)** 21

G. **Barring prosecution would allow defendant an unwarranted windfall which would thwart the prosecution's interest in convicting those who violate the law** 23

H. **Conclusion** 24

RELIEF 25

INDEX TO AUTHORITIES CITED

CASES PAGE

Ashe v Swenson, 397 US 436; 90 S Ct 1189; 25 L Ed 2d 469 (1970) 8, 9, 12, 13, 22

Benton v Maryland, 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969) 9

Blockburger v United States, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932) 7

Burks v United States, 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978) 5

Dowling v United States, 493 US 342; 110 S Ct 668; 107 L Ed 2d 708 (1990) 3

Dunn v United States, 284 US 390; 52 S Ct 189; 76 L Ed 2d 356 (1932) 11, 12, 14, 16, 17

Engle v Isaac, 456 US 107; 102 S Ct 1558; 71 L Ed 2d 783 (1982) 19

Evans v Michigan, ___US___; 133 S Ct 1069; 185 L Ed 2d 124 (2013) 5, 16, 17

Evans v United States, 987 A2d 1138 (DC App, 2010) *cert den* ___US___; 131 S Ct 1043; 178 L Ed 2d 867 (2011) 16

Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672; 194 NW2d 693 (1972) 21

Green v United States, 355 US 184; 78 S Ct 221; 2 L Ed 2d 199 (1957) 6, 23

Lockhart v Nelson, 488 US 33; 109 S Ct 285; 102 L Ed 2d 265 (1988) 5

Missouri v Hunter, 459 US 359; 103 S Ct 673; 74 L Ed 2d 535 (1983) 5, 7

North Carolina v Pearce, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969) 5

Ohio v Johnson, 467 US 493; 104 S Ct 2536; 81 L Ed 2d 425 (1984) 5

Oregon v Kennedy, 456 US 667; 102 S Ct 2083; 72 L Ed 2d 416 (1982) 5, 24

Owens v Addison, 2013 US Dist LEXIS 61397 (ND Okla, 2013) 18

People v Burgess, 419 Mich 305; 353 NW2d 444 (1984) 14

People v Cornell, 466 Mich 335; 646 NW2d 127 (2002) 18, 19, 20

People v Garcia, 448 Mich 442; 541 NW2d 683 (1995) 10, 22

People v Gates, 434 Mich 146; 452 NW2d 627 (1990) modified in part on other grounds by 469 Mich 679; 677 NW2d 843 (2004) 3, 4, 11, 22, 24

People v Goss (After Remand), 446 Mich 587; 521 NW2d 312 (1994) 14, 15

People v Hall, 435 Mich 599; 460 NW2d 520 (1990) 19

People v Johnson, 142 Cal App 4th 776; 48 Cal Rptr 439 (2006) 18

People v Jones, 395 Mich 379; 236 NW2d 461 (1975) 20

People v Lewis, 415 Mich 443; 330 NW2d 16 (1982) 14

People v Nutt, 469 Mich 565; 677 NW2d 1 (2004) 5, 6, 7, 20

People v Ream, 481 Mich 223; 750 NW2d 536 (2008) 7, 18

People v Robideau, 419 Mich 458; 355 NW2d 592 (1984) 20

People v Smith, 478 Mich 292; 733 NW2d 351 (2007) 5, 7, 9, 20, 21

People v Torres, 452 Mich 43; 549 NW2d 540 (1996) 6

People v Trakhtenberg, 493 Mich 38; 826 NW2d 136 (2012) 3, 23

People v Vaughn, 409 Mich 463; 295 NW2d 354 (1980) 14

People v Venticinque, 459 Mich 90; 586 NW2d 732 (1998) 21

People v White, 390 Mich 245; 212 NW2d 222 (1973) 20

People v Wilson, 494 Mich 853; 839 NW2d 384 (2013) vi

People v Wilson, unpublished per curiam opinion of the Court of Appeals dec'd May 10, 2011 (Docket No. 296693) 1

People v Wilson, unpublished per curiam opinion of the Court of Appeals dec'd November 15, 2012 (Docket No. 311253) 2

Pettway v State, 648 So 2d 647 (Ala App, 1994) 18

Price v Georgia, 398 US 323; 90 S Ct 1757; 26 L Ed 2d 300 (1970) 6

Schriro v Farley, 510 US 222; 114 S Ct 783; 127 L Ed 2d 47 (1994) 3

Sealfon v United States, 332 US 575; 68 S Ct 237; 92 L Ed 180 (1948) 8, 22

Standefer v United States, 447 US 10; 100 S Ct 1999; 64 L Ed 2d 689 (1980) 13, 17, 21

State v Kelly, 201 NJ 471; 992 A2d 776 (2010) 17, 18

Tanner v United States, 483 US 107; 107 S Ct 2739; 97 L Ed 2d 90 (1987) 12

Tibbs v Florida, 457 US 31; 102 S Ct 2211; 72 L Ed 2d 652 (1982) 19

Turner v Arkansas, 407 US 366; 92 S Ct 2096; 32 L Ed 2d 798 (1972) 10, 11, 13

United States v Adams, 281 US 202; 50 S Ct 269; 74 L Ed 807 8

United States v Ball, 163 US 662; 16 S Ct 1192; 41 L Ed 300 (1896) 5

United States v Benton, 852 F2d 1456 (CA 6, 1988) 3

United States v DeFrancesco, 449 US 117; 101 S Ct 426; 66 L Ed 2d 328 (1980) 6

United States v Dixon, 509 US 688; 113 S Ct 2849; 125 L Ed 2d 556 (1993) 5, 7

United States v Jones, 404 F Supp 529 (ED Pa, 1975) 18, 20

United States v Loud Hawk, 474 US 302; 106 S Ct 648; 88 L Ed 2d 640 (1986) 19

United States v Martin Linen Supply Co., 430 US 564; 97 S Ct 1349; 51 L Ed 2d 642 (1977) 5

United States v Oppenheimer, 242 US 85; 37 S Ct 68; 61 L Ed 161 (1916) 8

United States v Powell, 469 US 57; 105 S Ct 471; 83 L Ed 2d 461 (1984) 2, 11, 12, 13, 14, 16, 17, 19, 22, 23

United States v Price, 750 F2d 363 (CA 5, 1985) 18

United States v Scott, 437 US 82; 98 S Ct 2187; 57 L Ed 2d 65 (1978) 5, 6

Yeager v United States, 557 US 110; 129 S Ct 2360; 174 L Ed 2d 78 (2009) 15, 16, 17, 18, 22

STATUTES

MCL 750.84 1

MCL 750.110a(2) 1

MCL 750.226 1

MCL 750.227b 1

MCL 750.316(1)(a) 1

MCL 750.316(1)(b) 1

MCL 750.316(1)(g) 7

MCL 750.317 1

MCL 750.349b 1

MCL 763.5 4

MCL 768.32 .... 19, 20

MCL 768.33 4

MISCELLANEOUS AUTHORITIES

Const 1963, art 1, §15 .... 4, 6, 9

Const 1963, art 3, § 2 20

Const 1963, art 7, § 4 21

Griffin, *Untangling Double Jeopardy in Mixed-Verdict Cases,* 63 SMU L Rev, 1033, 1044 n 111 12

Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence after Acquittal,* 58 U Cin L Rev 1 (1989) 22

Restatement (Second) of Judgments §27 (1982) 8

Restatement of Judgments §28 cmt. j. 22

Restatement of Judgments §28(1) 23

Restatement of Judgments §29 cmt. f 21

US Const Amend V 6

COUNTERSTATEMENT OF JURISDICTION

Amicus Curiae adopts Plaintiff-Appellee's statement of jurisdiction. On May 24, 2013 this Court issued the following order:

> On order of the Court, the application for leave to appeal the November 15, 2012 judgment of the Court of Appeals is considered, and it is GRANTED. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

People v Wilson, 494 Mich 853; 839 NW2d 384 (2013).

COUNTERSTATEMENT OF QUESTION PRESENTED

I. WHEN AT HIS FIRST TRIAL THE DEFENDANT WAS CONVICTED OF FELONY-MURDER, A MURDER WHICH OCCURRED DURING THE PERPETRATION OF FIRST-DEGREE OR ATTEMPTED FIRST-DEGREE HOME INVASION, AND ACQUITTED OF FIRST-DEGREE HOME INVASION, AFTER THE CASE WAS REVERSED ON OTHER GROUNDS DID THE TRIAL COURT ERR IN DISMISSING THE DEFENDANT'S FELONY-MURDER CHARGE BASED ON HIS PREVIOUS ACQUITTAL ON THE PREDICATE FELONY?

The trial court:	dismissed the felony-murder charge.
The Court of Appeals:	answers the question, "yes."
Defendant-Appellant:	answers the question, "no".
Plaintiff-Appellee:	answers the question, "yes".
Amicus Curiae:	answers the question, "yes".

COUNTERSTATEMENT OF FACTS

The defendant was originally charged with first-degree murder on two alternate theories-felony-murder (based on the predicate of first-degree or attempted first-degree home invasion) and premeditated murder. MCL 750.316(1)(a) & (b). These charges arose out of the shooting death of Kenyatta Williams in Warren on May 26, 2009. Defendant was also charged with felony-firearm (second offense)(MCL 750.227b), assault with intent to do great bodily harm (MCL 750.84), two counts of unlawful imprisonment (MCL 750.349b), carrying a firearm with unlawful intent (MCL 750.226), and first-degree home invasion. MCL 750.110a(2). At defendant's first trial, a jury found defendant guilty of felony-murder, second-degree murder (MCL 750.317), felony-firearm, assault with intent to do great bodily harm, and two counts of unlawful imprisonment. The jury acquitted the defendant of premeditated murder and first-degree home invasion. The count of carrying a firearm with unlawful intent was dismissed. On appeal, the Court of Appeals vacated defendant's convictions and sentences and remanded for a new trial finding that the court had erred in denying defendant's request for self-representation. *People v Wilson,* unpublished per curiam opinion of the Court of Appeals dec'd May 10, 2011 (Docket No. 296693).

On remand, the prosecutor filed an amended information again charging the defendant with felony-murder (based on the predicate of first-degree or attempted first-degree home invasion) and the alternate theory of second-degree murder, felony-firearm (as a second offender), two counts of unlawful imprisonment, assault with intent to do great bodily harm, and carrying a firearm with unlawful intent.

Upon defendant's motion, the circuit court dismissed the felony-murder charge based on the defendant's previous acquittal of first-degree home invasion. The Court of Appeals reversed

the trial court and reinstated the felony-murder charge. *People v Wilson,* unpublished per curiam opinion of the Court of Appeals dec'd November 15, 2012 (Docket No. 311253).

The Court of Appeals found that because the first jury had returned inconsistent verdicts, "[t]his inconsistency negates the applicability of the double jeopardy collateral estoppel principle." The Court determined that an essential component of the doctrine of collateral estoppel was the "assumption that the jury acted rationally and found certain facts in reaching its verdict." *Id.* citing *United States v Powell,* 469 US 57, 68; 105 S Ct 471; 83 L Ed 2d 461 (1984). The Court noted that the jury's verdict on felony-murder revealed that the jurors concluded that the defendant committed the crime of first-degree home invasion, yet the jury acquitted on the charge of first-degree home invasion. The Court determined that though it was the jurors' prerogative to render inconsistent verdicts, "those inconsistencies preclude this Court from identifying which facts, if any, the jury necessarily found with regard to first-degree home invasion." The Court ultimately concluded that "[a]bsent an indication on the record of a necessarily decided ultimate fact, the double jeopardy collateral estoppel principle does not apply." *Id.*

Defendant appealed and this Court granted leave.

ARGUMENT

I. BECAUSE THE VERDICTS AT THE DEFENDANT'S FIRST TRIAL, A GUILTY VERDICT ON FELONY-MURDER AND ACQUITTAL ON THE PREDICATE FELONY, WERE INCONSISTENT, THE DEFENDANT CANNOT SHOW THAT A JURY ACTUALLY DECIDED AN ISSUE IN HIS FAVOR. THEREFORE A FUNDAMENTAL REQUIREMENT OF COLLATERAL ESTOPPEL IS LACKING AND THE CIRCUIT COURT ERRED IN DISMISSING THE DEFENDANT'S FELONY-MURDER CHARGE.

Issue Preservation:

The prosecution objected to dismissal of the felony-murder charge.

Standard of Review

"This Court reviews de novo the application of a legal doctrine, including collateral estoppel." *People v Trakhtenberg,* 493 Mich 38, 47; 826 NW2d 136 (2012). The burden is on the defendant to demonstrate that the issue whose re-litigation he seeks to foreclose was actually decided in the first proceeding. *Dowling v United States,* 493 US 342, 350-351; 110 S Ct 668; 107 L Ed 2d 708 (1990); *Schriro v Farley,* 510 US 222, 232; 114 S Ct 783; 127 L Ed 2d 47 (1994); *Trakhtenberg, supra* at 48 (indicating "The proponent of the application of collateral estoppel must show that [] a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment. . ." (internal citation omitted)(emphasis provided)); *People v Gates,* 434 Mich 146, 158; 452 NW2d 627 (1990)[modified in part on other grounds by 469 Mich 679; 677 NW2d 843 (2004)](indicating, "Collateral estoppel applies only where the basis of the prior judgment can be ascertained, clearly, definitely, and unequivocally.")[1]

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[1] See also: *United States v Benton,* 852 F2d 1456, 1466-1467 (CA 6, 1988)(indicating that the defendant bears the burden of proving by "convincing and competent" evidence that the jury in the prior trial necessarily determined the factual issue he seeks to foreclose.)

Discussion

A. Summary of the Argument

When a jury renders inconsistent verdicts, a fundamental requirement for application of collateral estoppel principles is lacking. A defendant cannot show that the jury actually decided an issue in his favor. In this case after the defendant's first trial the jurors convicted the defendant of felony-murder, commission of a murder in the course of an attempted or completed first-degree home invasion, and acquitted the defendant of first-degree home invasion. These verdicts were inherently inconsistent and therefore, collateral estoppel principles cannot apply to preclude re-trial of the felony-murder charge. For collateral estoppel to apply the defendant must show "clearly, definitely, and unequivocally" that the jury "necessarily decided" that the defendant was not guilty of the felony-murder. *Gates, supra.* This issue was not necessarily decided in defendant's favor because the previous jury convicted the defendant of felony-murder. The trial court erred by dismissing the felony-murder charge.

B. The Double Jeopardy Clause allows the prosecution a complete opportunity to convict the defendant of the crimes he committed.

The Double Jeopardy Clause of the United States Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." US Const, Am V. The Michigan Constitution also indicates, "No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, §15.[2] The Clause protects a defendant against "a

[2] See also: MCL 763.5 (indicating, "No person shall be held to answer on a second charge or indictment for any offense for which he has been acquitted upon the facts and merits of the former trial but such acquittal may be pleaded or given in evidence by him in bar of any subsequent prosecution for the same offense."); MCL 768.33 (indicating, "When a defendant shall be acquitted or convicted upon any
(FOOTNOTE CONT'D NEXT PAGE)

second prosecution for the same offense" after acquittal or conviction and against multiple punishments for the same offense. *North Carolina v Pearce,* 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969). The Double Jeopardy Clause "affords the defendant who obtains a judgment of acquittal . . . absolute immunity from further prosecution for the same offense." *Lockhart v Nelson,* 488 US 33, 39; 109 S Ct 285; 102 L Ed 2d 265 (1988) See also: *Evans v Michigan,* ___US___; 133 S Ct 1069; 185 L Ed 2d 124 (2013); *United States v Scott,* 437 US 82, 91; 98 S Ct 2187; 57 L Ed 2d 65 (1978); *United States v Martin Linen Supply Co.,* 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977); *United States v Ball,* 163 US 662, 671; 16 S Ct 1192; 41 L Ed 300 (1896). "In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy -- protection against cumulative punishments -- is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Ohio v Johnson*, 467 US 493, 499; 104 S Ct 2536; 81 L Ed 2d 425 (1984); *Missouri v Hunter,* 459 US 359, 366, 368; 103 S Ct 673; 74 L Ed 2d 535 (1983). This Court has construed successive prosecution claims as well as multiple punishment claims consistently with federal jurisprudence. *People v Nutt,* 469 Mich 565, 597; 677 NW2d 1 (2004); *People v Smith,* 478 Mich 292, 314-316; 733 NW2d 351 (2007).

Despite rules against successive prosecutions, the Double Jeopardy Clause "does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding." *Oregon v Kennedy,* 456 US 667, 672; 102 S Ct 2083; 72 L Ed 2d 416 (1982). See also: *Burks v United States,* 437 US 1, 15; 98 S Ct 2141; 57 L Ed 2d 1 (1978); *Green v United States,* 355 US 184, 189; 78 S Ct 221; 2 L Ed 2d 199

(FOOTNOTE CONT'D FROM PREVIOUS PAGE)
indictment for an offense, consisting of different degrees, he shall not thereafter be tried or convicted for a different degree of the same offense; nor shall he be tried or convicted for any attempt to commit the offense charged in the indictment or to commit any degree of such offense.")

(1957)(allowing retrial after the defendant has obtained reversal of his conviction because of trial error.) In accord: *People v Torres,* 452 Mich 43, 63; 549 NW2d 540 (1996). The Double Jeopardy Clause does not guarantee an error-free trial. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to cause reversible error in the proceedings leading to conviction." *United States v DeFrancesco,* 449 US 117, 131; 101 S Ct 426; 66 L Ed 2d 328 (1980)(quoting *United States v Tateo,* 377 US 463, 466; 84 S Ct 1587; 12 L Ed 2d 448 (1964)). In like manner, "to require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *DeFrancesco, supra* citing *Scott, supra,* 437 US at 91. In these situations, the "criminal proceedings against [the] accused have not run their full course." *Price v Georgia,* 398 US 323, 326; 90 S Ct 1757; 26 L Ed 2d 300 (1970).

Because the defendant was the party who (through his appeal) was requesting a new trial, and that request was granted by the appellate courts, double jeopardy does not prohibit a new trial on the felony-murder charge.

C. Successive prosecution for both felony-murder and the predicate felony does not violate double jeopardy because each crime possessed an element that the other did not.

The Double Jeopardy Clause also by its terms applies only to multiple jeopardy "for the same offence." US Const Amend V; See also Const 1963, art 1, §15. As a matter of history, the Double Jeopardy Clause was intended to embody the common-law pleas of "auterfois acquit" and "auterfoit convict," which likewise were offense specific. *Nutt, supra* at 576-577.

Application of the same-elements test, commonly known as the "*Blockburger*[3] test," is the well-established method of defining the Fifth Amendment term "same offence." *United States v Dixon*, 509 US 688, 676, 704; 113 S Ct 2849; 125 L Ed 2d 556 (1993). The test focuses on the statutory elements of the offense. *Id.* If each requires proof of an element that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. In sum, an offense does not constitute the "same offence" for purposes of the successive prosecution and multiple punishment if each offense requires proof of an element that the other does not.[4] *Nutt, supra* at 576, 595; *Smith, supra* at 304, 316.

Applying the *Blockburger* test, this Court in *People v Ream,* 481 Mich 223, 225-226; 750 NW2d 536 (2008) found that felony-murder and the predicate, in that case first-degree criminal sexual conduct, did not constitute the same offense and therefore the *Blockburger* test was not violated and multiple punishment was allowed. This Court noted that the *Blockburger* test "focuses on the abstract legal elements" (*Id.* at 235) and when looking at the abstract legal elements of felony-murder, "[f]irst-degree felony murder does not necessarily require proof of a sexual penetration because first-degree felony murder can be committed without also committing first-degree criminal sexual conduct. First-degree murder is the killing of a human being with malice, 'while committing, attempting to commit, or assisting in the commission of *any* of the felonies specifically enumerated in [MCL 750.316(1)(g).'" (emphasis original)(citation omitted) *Id.* at 242. This Court found it was possible to commit the crime of felony-murder without

[3] *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

[4] In the context of multiple punishment, however, courts first look to determine whether the Legislature expressed a clear intention that multiple punishments be imposed. Where the Legislature does clearly intend to impose such multiple punishments, imposition of such sentences does not violate the Constitution even if the *Blockburger* test would preclude multiple punishment. *Missouri v Hunter, supra*; *Smith, supra* at 316.

necessarily committing first-degree criminal sexual conduct because any number of offenses could theoretically serve as a predicate. *Id.* Therefore the *Blockburger* test was not violated.

Because felony-murder and the predicate felony do not constitute the same offense, in this case as well, both successive prosecution and multiple punishment are permitted. Defense counsel does not argue otherwise.

D. The doctrine of collateral estoppel was not implicated because the jury verdicts at the first trial were inconsistent.

The doctrine of collateral estoppel was first developed in civil litigation. This doctrine precludes a party from re-litigating an issue previously decided in another action, "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments §27 (1982). The Court first applied the doctrine to bar a federal prosecution in 1916 in *United States v Oppenheimer,* 242 US 85; 37 S Ct 68; 61 L Ed 161 (1916). See: *Ashe v Swenson,* 397 US 436, 443; 90 S Ct 1189; 25 L Ed 2d 469 (1970). In *Oppenheimer* the Court held that a judge's order dismissing a case on statute of limitations grounds, barred a second prosecution. 242 US at 87-88. *United States v Oppenheimer, supra* was followed by *United States v Adams,* 281 US 202; 50 S Ct 269; 74 L Ed 807 (1930) and *Sealfon v United States,* 332 US 575; 68 S Ct 237; 92 L Ed 180 (1948). In *Adams* the Court held that a second prosecution was not estopped because the grounds for the previous acquittal were ambiguous. 281 US at 205. In *Sealfon,* the Court held that the defendant's acquittal on conspiracy charges barred prosecution for aiding and abetting his alleged co-conspirator in perpetrating the substantive offense. 332 US at 579-590. However, each of these cases were decided on non-constitutional grounds.

Although the text and common-law origins of the Double Jeopardy Clause suggest that it prohibits successive prosecutions only for the same offense, the United States Supreme Court in *Ashe v Swenson* held that it also embodies collateral estoppel, which prohibits a successive prosecution on a related offense if an acquittal in the initial prosecution necessarily decided a factual issue in the defendant's favor that the prosecution must prove to convict him of the related offense. 397 US at 443-446.

Michigan has not accorded independent constitutional protection to collateral estoppel claims under its own constitution nor is defendant arguing that Michigan provides additional protection. "Th[e] conclusion that the Michigan Constitution affords greater protection than the Fifth Amendment has no basis in the language of Const 1963, art 1, §15, the common understanding of that language by the ratifiers, or under Michigan caselaw as it existed at the time of the ratification." *Smith, supra* at 314. As this Court stated in *Nutt,* "collateral estoppel and joinder are discrete, nonconstitutional concepts that should not be conflated with the Constitutional double jeopardy protection." *Id.* at 592 n 28. However, since the United States Supreme Court in *Ashe* determined that the doctrine of collateral estoppel was embodied in the Double Jeopardy Clause of the Fifth Amendment which had been applied to the states by *Benton v Maryland,* 395 US 784, 794; 89 S Ct 2056; 23 L Ed 2d 707 (1969), federal constitutional jurisprudence governs this question.

In *Ashe v Swenson,* the Court found that the prosecution was estopped from prosecuting the defendant a second time. In *Ashe,* a group of masked men robbed six men playing poker in a home. 397 US at 437. The defendant was initially prosecuted for robbing one of the poker players, but the jury acquitted him. The State then brought to trial a second prosecution against the defendant for robbing a different poker player. 397 US at 438-440. Reversing the defendant's

conviction, the Supreme Court held that collateral estoppel barred the second prosecution because the jury's acquittal in the first prosecution must have rested on a finding that the defendant was not one of the robbers. 397 US at 445-446. The Court noted that *Ashe* involved a deliberate strategy by the State to sequentially prosecute multiple offenses arising out of the same criminal episode after the first prosecution had been unsuccessful. The Court concluded that such successive prosecutions involved the kind of government oppression that the Double Jeopardy Clause forbids. 397 US at 447.

Turner v Arkansas, 407 US 366; 92 S Ct 2096; 32 L Ed 2d 798 (1972) concerned a straight-forward application of *Ashe.* In *Turner* the defendant was charged with Arkansas' version of felony-murder, a murder occurring during the course of the crime of robbery. *Id.* After the jury acquitted defendant of felony-murder, the defendant was charged with robbery. 407 US at 367. The United States Supreme Court indicated that the case was squarely controlled by *Ashe,* because the only logical conclusion was that the jury which had previously acquitted the defendant had determined that he was not present at the scene of the murder and robbery. 407 US at 369-370.

People v Garcia, 448 Mich 442; 541 NW2d 683 (1995) is similar to *Turner.* In *Garcia,* the defendant was charged with felony-murder and felony-firearm and was convicted of second-degree murder and felony-firearm. *Id.* at 444-445. Both convictions were reversed on appeal due to errors with the jury verdict form. *Id.* at 446. On remand, the prosecution charged the defendant with second-degree murder, armed robbery and felony firearm. *Id.* At his second trial, defendant was only convicted of armed robbery. *Id.* The Court of Appeals reversed his conviction indicating that the first jury's conviction solely of second-degree murder rather than felony-murder estopped a subsequent charge of armed robbery. *Id.* The Supreme Court, by equal

division, affirmed the Court of Appeals citing *Turner v Arkansas*. *Id.* at 477-487, 496-502. Justice Brickley noted, however, that "*Ashe* requires that an appellate court determine, after a thorough search of the trial record, what issues a jury *must* have decided in reaching its verdict. If the jury *might* not have decided an issue, it will not be foreclosed." (emphasis original) *Id.* at 497 (Opinion by Brickley, J.).

This Court in *Gates, supra* reiterated Justice Brickley's observation that collateral estoppel precludes relitigation of an issue only when it was actually litigated and necessarily determined. *Id.* at 154, 158. This Court found that the finding of no jurisdiction in an abuse and neglect case in probate [now family] court did not mean that the jury necessarily determined that the defendant was not guilty of criminal sexual conduct. *Id.* at 159-160. Therefore, criminal charges were not barred despite the fact that the jury in the abuse and neglect case found that the court lacked jurisdiction over the child. This Court indicated, "Collateral estoppel applies only where the basis of the prior judgment can be ascertained, clearly, definitely, and unequivocally." *Id.* at 158.

For this reason an inconsistency in verdicts vitiates "the assumption that the jury acted rationally" which is a necessary predicate for collateral estoppel. *United States v Powell,* 469 US 57, 68; 105 S Ct 471; 83 L Ed 2d 461 (1984). In *Dunn v United States,* 284 US 390; 52 S Ct 189; 76 L Ed 2d 356 (1932), the defendant was convicted of maintaining a public nuisance by keeping intoxicating liquor for sale at a specified place but acquitted of unlawful possession and sale of liquor. 284 US at 391-392. Defendant argued that he was entitled to a new trial due to the inconsistency in verdicts. 284 US at 392. However, in an opinion written by Justice Holmes, the Court said that, "the most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show

that they were not convinced of the defendant's guilt." 284 US at 393 citing *Steckler v United States,* 7 F2d 59, 60 (CA 2, 1925). The Court indicated that the verdict might have been the result of compromise or mistake or rendering lenity (284 US at 393-394) but that "verdicts cannot be upset by speculation or inquiry into such matters." 284 US at 394.

In *Powell,* (a post-*Ashe v Swenson* case) the jury acquitted the defendant on two drug charges, but found her guilty on charges that she used a telephone to commit or to facilitate those drug charges. 469 US at 59-60. The defendant argued that "collateral estoppel should apply . . . to preclude acceptance of a guilty verdict on a telephone facilitation count where the jury acquits the defendant on the predicate felony." 469 US at 64. The United States Supreme Court in a unanimous opinion written by Chief Justice Rehnquist, however, rejected that argument.

The Court in *Powell* characterized the *Dunn* doctrine as having four parts 1) courts are prohibited from attempting to interpret the reasons for a jury's acquittal, 2) the jury's power of leniency is fundamentally important and entitled to protection, 3) courts cannot speculate about what went on during jury deliberations,[5] and 4) existing sufficiency of the evidence review for the convicted count is an adequate safeguard against factually erroneous verdicts. 469 US at 64-69.

The Court in *Powell* also explained that the inconsistent verdicts "should not necessarily be interpreted as a windfall to the Government at the defendant's expense" because it is "equally

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[5] *Powell* and *Dunn* reiterated the "near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict." *Tanner v United States*, 483 US 107, 117; 107 S Ct 2739; 97 L Ed 2d 90 (1987), citing 8 Wigmore, Evidence (McNaughton rev ed, 1961), § 2352, pp 696-697. This absolute, the so-called Mansfield's Rule, against impeaching a jury's verdict has been widely accepted for over two hundred years; as long ago as 1785. Griffin, *Untangling Double Jeopardy in Mixed-Verdict Cases,* 63 SMU L Rev, 1033, 1044 n 111. Therefore, as indicated by *Dunn* and *Powell,* to allow inquiry into the basis for the jurors' verdict of acquittal is contrary to the "near-universal and firmly established common-law rule in the United States," (*Tanner,* 483 US at 117), would adversely affect finality, and would subject jurors to potential harassment after discharge from service.

possible" that the acquittal was the result of "mistake, compromise, or lenity." *Powell,* 469 US at 65, 68. When the jury returns an acquittal on one count that is inconsistent with a guilty verdict on another count the Court observed, it is impossible to tell which verdict "the jury 'really meant.'" *Powell,* 469 US at 68. "[A]ll we know is that the verdicts are inconsistent," and, "[o]nce that is established[,] principles of collateral estoppel-which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict-are no longer useful." *Id.*

Powell's conclusion that a rational jury decision is a necessary predicate for applying collateral estoppel follows from *Ashe* and *Turner.* In *Ashe,* the Court stated that, to determine whether collateral estoppel applies, a court must "examine the record of [the] prior proceeding," taking into account all "relevant matters," and "conclude whether a *rational* jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." (citation omitted)(emphasis added) *Ashe,* 397 US at 444. Focusing the inquiry on what a rational jury could have done only makes sense if it is reasonable to presume that the jury in fact acted rationally.

A rule that collateral estoppel does not apply when the prior verdict reflects inconsistent determinations is also supported by the United States Supreme Court's decision in *Standefer v United States,* 447 US 10; 100 S Ct 1999; 64 L Ed 2d 689 (1980). In *Standefer,* the principal was acquitted of an offense and the defendant, who was charged with aiding and abetting, sought to invoke the doctrine of collateral estoppel to vacate his conviction. 447 US at 11, 13. The United States Supreme Court held that non-mutual collateral estoppel did not apply against the government in that case. 447 US at 25. Moreover, the particular jury verdict for which the defendant was seeking preclusive effect rendered in the trial of the principal, included convictions on some counts that were inconsistent with acquittals on other counts. 447 US at 23,

n 17. The Court stated that "[t]his inconsistency [was] reason, in itself, for not giving preclusive effect to the acquittals." *Id.*

It is well-established in Michigan law as well that an inconsistent verdict on a multi-count information does not require reversal of defendant's conviction. *People v Vaughn,* 409 Mich 463, 465-466; 295 NW2d 354 (1980). See also: *People v Goss (After Remand),* 446 Mich 587, 597-598; 521 NW2d 312 (1994); *People v Burgess,* 419 Mich 305, 310; 353 NW2d 444 (1984); *People v Lewis,* 415 Mich 443; 330 NW2d 16 (1982). This Court, echoing many of the comments made by the United States Supreme Court in *Dunn v United States, supra* and *United States v Powell, supra* found that juries were not held to any rules of logic nor were they required to explain their decisions. This Court commented that the jury also had the capacity to render leniency and that the "mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility." *Vaughn, supra* at 465-466. This Court indicated that because it was unable to know just how the jury reached their conclusion, whether the result of compassion or compromise, "it is unrealistic to believe that a jury would intend that an acquittal on one count and a conviction on another would serve as the reason for defendant's release." *Id.*

This Court also noted in *Lewis,* that if the jury had been confused, then the confusion taints the not guilty verdict as well as the guilty verdict. The Court determined that jury confusion is not a reason to set aside the verdict of conviction and to uphold the verdict of acquittal but rather would argue for setting aside *both* verdicts with a new trial on both. *Lewis, supra* at 450 n 9. The Court also noted that if the jury compromised, "[a] compromise is indivisible. We cannot properly enforce only part of it." *Id.* at 453.

In *Goss, supra* for instance, even though the defendant had been previously convicted of the predicate, this Court found, despite the arguments of the prosecution, that the defendant was not estopped from re-litigating the issue at the second trial. *Goss, supra* at 590-610 (Opinion by Levin, J.), 610-622 (Opinion by Brickley, J.). At the first trial the defendant had been convicted of armed robbery and first degree murder. *Id.* at 590. This Court affirmed the armed robbery conviction but reversed defendant's felony-murder conviction due to instructional error. *Id.* Before the second trial the prosecution sought to estop the defendant from claiming that he was not guilty of committing the armed robbery (an element of the felony-murder charge). *Id.* at 590-591. This Court disagreed. Justice Levin for instance noted that the jury was entitled to come to inconsistent conclusions, therefore the second jury should be able to re-decide the issue. *Id.* at 597-610. Yet even though *the defendant* would be allowed to re-litigate an issue *that the jury necessarily decided against him*, he now wishes to preclude *the prosecution* from re-litigating an issue *that the jury by one of its verdicts decided in the prosecution's favor*.

The United States Supreme Court in *Yeager v United States,* 557 US 110; 129 S Ct 2360; 174 L Ed 2d 78 (2009), recently re-affirmed the validity of *Powell,* but distinguished *Powell* from the circumstances in *Yeager,* a case which arose out of the business dealings related to Enron. 557 US at 112-113. Yeager was charged with 126 counts involving conspiracy, securities fraud, wire fraud, insider trading and money laundering. 557 US at 113-114. After a thirteen-week trial the jury acquitted Yeager of the fraud and conspiracy counts but failed to reach a verdict on the insider trading and money laundering counts. 557 US at 115. The Court's majority opinion written by Justice Stevens held that collateral estoppel principles were implicated. 557 US at 120. The Court held that the verdicts were not inconsistent because a court cannot decipher what a hung count represents, "Because a jury speaks only through its verdict, its failure to reach

a verdict cannot--by negative implication--yield a piece of information that helps put together the trial puzzle." 557 US at 121. The Court concluded, "the consideration of hung counts has no place in the issue-preclusion analysis." 557 US at 122.

The Court noted, however, the conclusion in *Powell* was required to give full effect to the jury's verdicts, but Yeager did not involve two verdicts. 557 US at 124. The Court indicated that in *Powell,* and in *Dunn,* the Court was faced with inconsistent verdicts and the Court "refused to impugn the legitimacy of either verdict." 557 US at 125. In *Yeager,* however, there was "merely a suggestion that the jury may have acted irrationally." *Id.*

Several federal and state court decisions after *Yeager* re-affirmed the proposition that inconsistent verdicts do not implicate collateral estoppel principles. The case of *Evans v United States,* 987 A2d 1138 (DC App, 2010) *cert den* ___US___;131 S Ct 1043; 178 L Ed 2d 867 (2011) which applied both *Powell, supra* and *Yeager, supra* presents similar facts to this case. In *Evans,* the defendant was convicted at his first trial of the district's version of felony-murder, first-degree murder in the perpetration of the crime of second-degree burglary while armed, but was found not guilty of the predicate, second-degree burglary while armed. *Evans, supra* at 1140. A new trial was declared and the appellate court found that the felony-murder charge was not barred by collateral estoppel principles. *Id.*

The *Evans* Court cited *Yeager v United States,* indicating "a logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict." *Evans, supra* at 1140 citing *Yeager v United States,* 129 S Ct at 2362. The Court indicated that it was defendant's burden to show that the jury necessarily decided an issue in his favor, and the defendant's burden was particularly difficult to satisfy when the jury reached inconsistent verdicts. "Such verdicts whether based on error, confusion, or a desire to compromise, give little

guidance as to the jury's factual findings." *Id.* at 1142 citing *United States v Citron,* 853 F2d 1055, 1058 (CA 2, 1988). The Court noted that *Yeager* did not undermine this analysis because the distinguishing feature in *Yeager* was that the jury had acquitted on some counts and hung on others. The Court treated the jury's inability to reach a verdict as a "non-event" and was dissimilar from the situation presented in *Powell,* where "respect for the jury's verdict counseled giving each verdict full effect, however inconsistent." *Id.* citing *Yeager v United States,* 129 S Ct at 2369. The Court in *Evans* concluded that "[i]n this case, of course, there *are* inconsistent verdicts, and our analysis is governed by *Powell, Standefer,* and *Dunn.* Principles of double jeopardy and collateral estoppel do not preclude retrial of appellant for felony murder . . ." (emphasis original) *Id.*

State v Kelly, 201 NJ 471; 992 A2d 776 (2010) where the defendant was charged with felony-murder, armed robbery and various weapons offenses, also involved an application of *Powell* and *Yeager.* At defendant's first trial he was convicted of felony-murder and armed robbery but acquitted of committing those crimes with certain weapons. *Id.* at 475. In *Kelly,* the court also indicated that because the verdicts at the defendant's first trial concerning the weapons offenses on one hand and the verdicts of armed robbery and murder with those weapons on the other hand were inconsistent, defendant could not establish that the jury determined an ultimate fact which precluded a retrial of the reversed convictions. *Id.* at 483-484.

Kelly noted that the United States Supreme Court had acknowledged that, given contradictory verdicts, no amount of rational exegesis might explain the actions of the jury. *Id.* at 487. The Court concluded that in cases of inconsistent verdicts returned by the same jury at the same trial, the doctrine of collateral estoppel or issue preclusion had no meaning, because it could not be determined why the jury determined an acquittal. *Id.* at 487-488. The Court

indicated that the burden is on the defendant to prove the issue sought to be precluded was actually decided at the first trial which he could not do given the inconsistent verdicts. *Id.* at 488. The *Kelly* Court also distinguished *Yeager* holding it had "no application to a case, such as here, involving an inconsistent verdict of acquittals and convictions returned by the same jury." *Id.* at 494.

Also in *Owens v Addison,* 2013 US Dist LEXIS 61397 (ND Okla, 2013), a habeas action, when petitioner had been convicted in state court of felony-murder and acquitted of the predicate at the first trial and his case was reversed, the court found that re-trial on the felony-murder was not precluded. The Court indicated "the first jury returned inconsistent verdicts and did not resolve an issue of ultimate fact in favor of Petitioner. Thus collateral estoppel cannot apply to bar Petitioner's retrial."[6] *Id.* (* 22-23).

E. Defendant's policy arguments cannot justify extension of collateral estoppel principles to bar re-trial of a crime for which the defendant had previously been convicted.

Defense counsel contends that the trial court properly afforded him relief since the prosecution charged him with both felony-murder and first-degree home invasion degree notwithstanding the fact that home invasion also served as the predicate offense. Defense counsel admits that multiple punishment and successive prosecution are allowed by this Court's opinion in *Ream, supra* but contends that the charging of the defendant by the prosecution with the predicate was meant to circumvent *People v Cornell,* 466 Mich 335; 646 NW2d 127 (2002).

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[6] Several pre-*Yeager* decisions had also found similarly. *United States v Price,* 750 F2d 363, 366 (CA 5, 1985); *United States v Jones,* 404 F Supp 529, 544 (ED Pa, 1975); *People v Johnson,* 142 Cal App 4th 776, 788; 48 Cal Rptr 439 (2006); *Pettway v State,* 648 So 2d 647, 648-650 (Ala App, 1994).

Counsel intimates that it is unfair that solely the prosecution could make the decision regarding how many and which charges defendant would face.[7]

In *People v Cornell,* this Court construed MCL 768.32[8] which governs when a court may instruct a jury on a lesser offense. In the years preceding *Cornell, supra* trial courts had been permitted to instruct juries not only on offenses which were necessarily included within the charged offense but also on offenses which were merely related to the offense with which the defendant had been charged. *Id.* at 344-353. This Court in *Cornell, supra* found that the previous opinions had misconstrued the plain language of MCL 768.32 which solely allowed the court to instruct on offenses whose elements were necessarily included in the offense the prosecution had charged. *Id.* at 353-358. After *Cornell,* the prosecution is assured that a jury will not consider any offense except the offenses charged by the prosecution and their necessarily included lessers

[7] Prosecutors have substantial incentives not to overcharge in order to avoid jury confusion and the potential for mistrials on all the counts. Though it is possible that new evidence may make the prosecution's case stronger during a second trial, "[i]t is also possible . . . that the passage of time and experience of defense counsel will weaken the prosecution's presentation." *Tibbs v Florida,* 457 US 31, 43 n 19; 102 S Ct 2211; 72 L Ed 2d 652 (1982). A second trial "entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences . . ." (citations omitted) *People v Hall,* 435 Mich 599, 614; 460 NW2d 520 (1990). A second trial "may reward the accused with complete freedom from prosecution and thereby cost society the right to punish admitted offenders." *Id.* See also: *United States v Loud Hawk,* 474 US 302, 315; 106 S Ct 648; 88 L Ed 2d 640 (1986)("The passage of time may make it difficult or impossible for the Government to carry [its] burden [of proving its case beyond a reasonable doubt]."); *Engle v Isaac,* 456 US 107, 127-138; 102 S Ct 1558; 71 L Ed 2d 783 (1982)("Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible.")

Also, a prosecutor who loads down her case with unnecessary charges makes the case more difficult for the jury to comprehend and increases the likelihood that the jury will acquit the defendant "through mistaken, compromise or lenity." *Powell,* 469 US at 65. Prosecutors are unlikely to add charges that may increase the likelihood of acquittals on some counts in order to evade the collateral estoppel consequences of an acquittal on those counts.

[8] MCL 768.32 states in pertinent part:

> (1) Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense. . .

if supported by the evidence. Therefore, the prosecution's conduct in this case, charging the defendant with both the felony-murder and the predicate (which would have been considered a cognate), was *consistent* with this Court's opinion in *Cornell, supra.*

Furthermore, one of the points made by this Court in *Cornell, supra* was that the previous construction of MCL 768.32 by the courts had impermissibly intruded on the power of the executive branch. This Court noted Justice Coleman's previous dissent in *People v Jones,* 395 Mich 379, 406; 236 NW2d 461 (1975), where she indicated "the decision to charge a person with a crime was the prosecutor's responsibility and the Court had held that courts may not interfere with that process."[9] *Cornell, supra* at 347, 353 citing *Jones, supra* at 406 (Coleman, J.)(dissenting).

It was solely within the prosecution's executive function to decide to charge the defendant with both felony-murder and the predicate felony. The power to charge criminal offenses is vested in the prosecution which is part of the executive branch. "The powers of government are divided into three branches: legislative, executive and judicial and no person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. The prosecutor is a

[9] This Court in *People v Nutt, supra* made a similar observation. In *Nutt,* this Court overruled the previous decision of *People v White,* 390 Mich 245; 212 NW2d 222 (1973) which had adopted a transactional test for double jeopardy which barred all charges arising out of the same transaction unless they were charged in a single prosecution. *Id.* at 568. This Court in *Nutt* found that "by abandoning the same-elements test, the *White* Court ignored the ratifiers' common understanding of the 'same offense' term in our Constitution" (*Id.* at 568) and substituted its "own notions of prosecutorial policy" when "conflate[ing] the constitutional double jeopardy protection with a self-created procedural mandatory joinder rule." *Id.* at 596

This Court concluded similarly in *People v Smith, supra.* This Court in *Smith* overturned the previous case of *People v Robideau,* 419 Mich 458; 355 NW2d 592 (1984) which this Court found had also impermissibly strayed from the "same elements" double jeopardy test. *Id.* at 314-316, 319-323. This Court indicated that "in addition to restoring the law to what the ratifiers of the constitution manifestly intended . . . it will make it more likely that policy and prosecutorial judgments assigned by our constitution to the legislative and executive branches are undertaken by those branches. . ." *Id.* at 323.

constitutional officer whose duties are as provided by law. Const 1963, art 7, § 4. The conduct of a prosecution on behalf of the people by the prosecutor is an executive act. "The prosecutor is the chief law enforcement officer of the county" and is vested with broad charging discretion. *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683-684; 194 NW2d 693 (1972). See also: *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998)(indicating, that it is well settled that "the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor.") The prosecution could reasonably have deduced that its approach to charging "will better ensure that [the] criminal perpetrator[is] punished for *all,* not merely *some,* of [his] offenses." (emphasis original) *Smith, supra* at 323. And if defendant's arguments carry any weight in answering the *constitutional* question, the controlling policy should be the public's interest in having a full and fair opportunity for a conviction.

F. This case presents a straightforward application of *United States v Powell,* 469 US 57; 105 S Ct 471; 83 L Ed 2d 461 (1984), *Dunn v United States,* 284 US 390; 52 S Ct 189; 76 L Ed 2d 356 (1932), and *Standefer v United States,* 447 US 10; 100 S Ct 1999; 64 L Ed 2d 689 (1980).

Because the jury rendered inconsistent verdicts at the first trial, retrial of the convicted count is permitted. Collateral estoppel principles were not implicated because the defendant has not proven that the jury decided an issue in his favor. As *Standefer* made clear, collateral estoppel "is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct." 447 US at 23, n 18. "Where a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted." Restatement of Judgments §29 cmt. f. Indeed in civil cases, courts may decline to apply collateral estoppel where it is "evident from the jury's verdict that the verdict was the result of compromise" rather than a rational decision that accords with jury instructions

and the law. Restatement of Judgments §28 cmt. j. When the records indicate that the same jury reached inconsistent determinations on an issue, a court cannot conclude that the issue was "necessarily determined" against the prosecution, as is required to support a later holding of collateral estoppel.

"Inconsistent verdicts therefore present a situation where 'error' in the sense that jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored." *Powell,* 469 US at 68. The Supreme Court has held that the acquittal flows either from mistake, compromise, or lenity. The acquittal is therefore devoid of any identifiable issue-resolving significance when seen against the backdrop of the inconsistent and constitutionally valid conviction. Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence after Acquittal,* 58 U Cin L Rev 1, 42 (1989).

Furthermore, this case is distinguishable from such cases such as *Ashe, Yeager,* and *Garcia* because those cases did not deal with conflicting verdicts, only a prior verdict of acquittal. The contention that convicted counts should not be considered in collateral estoppel analysis is at odds with *Ashe. Ashe* emphasized that, to determine whether a defendant's prosecution is barred by the collateral estoppel component of the Double Jeopardy Clause, a court must "examine the record of [the] prior proceedings, taking into account the pleadings, evidence, charge and other relevant matters." (citation omitted) 397 US at 444. Refusal to consider the fact that the jury convicted on felony-murder would flout the Supreme Court's plain command that the collateral estoppel inquiry consider "all the circumstances" of that proceeding. *Id.* quoting, *Sealfon,* 332 US at 579. Defendant has failed to show that the jury's inconsistent verdicts resolved of an issue in favor of defendant "clearly, definitely, and unequivocally." *Gates, supra* at 158.

G. Barring prosecution would allow defendant an unwarranted windfall which would thwart the prosecution's interest in convicting those who violate the law.

The remedy requested by defendant of a full bar from prosecution for the count for which the defendant was already convicted, was not one that was intended by the jury and would inappropriately allow the defendant to transform his partial victory in the jury room into a complete victory that the jury refused to give him. Given this uncertainty of what the verdict meant, it is hardly satisfactory to allow the defendant to receive a windfall. *Powell,* 469 US at 68.

The public interest in allowing retrial on convicted counts is particularly strong in the mixed verdict context because the prosecution has no ability to challenge acquittals. See: *Green,* 355 US at 188 ("[O]ne of the elemental principles of our criminal law" is "that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous."); *Powell,* 469 US at 63. In the civil context, collateral estoppel does not apply at all when the party that would be precluded had no legal right to obtain review of the judgment. Restatement of Judgments §28(1). Although the prosecution's inability to appeal from an acquittal does not prevent the application of collateral estoppel in the criminal context, it counsels strongly against allowing a jury's acquittal to bar retrial on a count upon which the jury had previously convicted.

"Collateral estoppel must be applied so as to strike a balance between the need to eliminate repetitious and needless litigation and the interest in affording litigants a ***full and fair*** adjudication of the issues involved in their claims." (internal citations omitted)(emphasis original) *Trakhtenberg, supra* at 50. The Double Jeopardy Clause affords the government one complete opportunity to convict those who have violated the law and applying collateral estoppel

across counts in mixed verdict cases to bar retrial on convicted counts undermines "the public's interest in fair trials designed to end in just judgments." *Kennedy,* 456 US at 672 (quoting *Wade v Hunter,* 336 US 684, 689; 69 S Ct 834; 93 L Ed 974 (1949)).

H. Conclusion

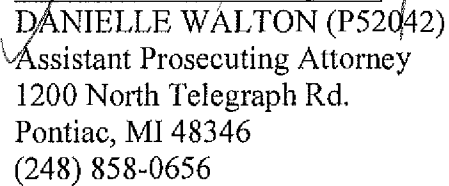
When a jury renders inconsistent verdicts, a fundamental requirement for application of collateral estoppel principles is lacking. A defendant cannot show that the jury actually decided an issue in his favor. In this case after the defendant's first trial the jurors convicted the defendant of felony-murder, commission of a murder in the course of an attempted or completed first-degree home invasion, and acquitted the defendant of first-degree home invasion. These verdicts were inherently inconsistent and therefore, collateral estoppel principles cannot apply to preclude re-trial of the felony-murder charge. For collateral estoppel to apply the defendant must show "clearly, definitely, and unequivocally" that the jury "necessarily decided" that the defendant was not guilty of the felony-murder. *Gates, supra.* This issue was not necessary decided in defendant's favor because the previous jury convicted the defendant of felony-murder. The trial court erred by dismissing the felony-murder charge.

RELIEF

WHEREFORE, the Prosecuting Attorneys Association respectfully requests that this Honorable Court affirm the Court of Appeals' decision.

Respectfully submitted,

JESSICA R. COOPER
PROSECUTING ATTORNEY
OAKLAND COUNTY

BY: 

DANIELLE WALTON (P52042)
Assistant Prosecuting Attorney
1200 North Telegraph Rd.
Pontiac, MI 48346
(248) 858-0656

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