STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

Judges William B. Murphy, Peter D. O'Connell, and William C. Whitbeck

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

DWAYNE WILSON,

Defendant-Appellant.
_____/

Supreme Court No. 146480

Court of Appeals No. 311253

Lower Court No. 09-2637FC,

MACOMB COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

PETER JON VAN HOEK (P26615)
Attorney for Defendant-Appellant

BRIEF ON APPEAL – DEFENDANT-APPELLANT (ORAL ARGUMENT REQUESTED)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provsions, Statutes

STATEMENT OF JURISDICTION

This Court granted leave to appeal on May 24, 2013. This Court has jurisdiction pursuant to MCL 770.3(6); MCR 7.301 (A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. **DID THE TRIAL JUDGE CORRECTLY DISMISS THE FELONY-MURDER COUNT AGAINST MR. WILSON AS THE SPECIFIC FACTUAL QUESTION OF WHETHER HE COMMITTED A HOME INVASION WAS DECIDED IN MR. WILSON'S FAVOR BY THE INITIAL TRIAL JURY, AND THUS THE PROSECUTION ON RETRIAL IS BARRED FROM RELITIGATING THAT CHARGE, WHICH IS AN ESSENTIAL ELEMENT OF THE FELONY-MURDER COUNT, UNDER THE FEDERAL AND STATE DOUBLE JEOPARDY PRINCIPLE OF COLLATERAL ESTOPPEL?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

At a trial before Macomb County Circuit Court Judge Matthew S. Switalski in December, 2009, a jury convicted Dwayne Edmund Wilson of First-Degree Felony Murder (MCL 750.316), Second-Degree Murder (MCL 750.317)[1], Assault with Intent to Commit Great Bodily Harm (MCL 750.84), Felony Firearm (MCL 750.227b), and two counts of Unlawful Imprisonment (MCL 750.34g), arising out of the shooting death of Kenyetta Williams in Warren, Michigan on May 26, 2009. The jury acquitted Mr. Wilson of First-Degree Premeditated Murder (MCL 750.316) and First-Degree Home Invasion (MCL 750.110a(2)).

Judge Switalski subsequently sentenced Mr. Wilson to a term of life imprisonment without the possibility of parole on his Felony Murder conviction, a term of 36 years to 60 years imprisonment on the Second-Degree Murder conviction, 5 years to 10 years imprisonment on the Assault with Intent to Commit Great Bodily Harm conviction, 5 years to 15 years imprisonment on the Unlawful Imprisonment conviction, and 2 years imprisonment on the Felony Firearm conviction.

Mr. Wilson appealed as of right. On May 10, 2011, the Court of Appeals reversed the convictions on the basis that the trial court committed structural error in denying Mr. Wilson's request for self-representation. *People v Wilson,* No. 296693. (16a-18a). The Court remanded the case to the trial court for further proceedings. The prosecution filed an application for leave to appeal this opinion with this Court. On September 6, 2011, this Court denied the prosecution's application for leave to appeal. *People v Wilson,* No. 143290.

[1] The second-degree murder conviction was for a necessarily lesser included offense under a first-degree, premeditated murder charge.

On April 6, 2012, the prosecution filed an amended information setting forth the charges on retrial: First-Degree Felony Murder in the course of a Home Invasion, Second-Degree Murder, Assault with Intent to Commit Great Bodily Harm, Felony Firearm, Carrying a Weapon with Unlawful Intent (MCL § 750.226), and two counts of Unlawful Imprisonment. (19a-20a). Subsequently, Mr. Wilson moved to dismiss the count of Felony Murder, arguing the state and Federal double jeopardy guarantees barred his retrial on the charge of Felony Murder because the initial jury acquitted him on the designated predicate felony of First-Degree Home Invasion.

On July 6, 2012, Judge Switalski granted the defense motion to dismiss the Felony-Murder count. In his order, the judge stated, in part:

> The issue here is whether the Prosecution may proceed in a retrial with a charge of Felony Murder containing a predicate of Home Invasion, when the defendant has been acquitted of the predicate charge in the original trial. We have not been able to find any Michigan law squarely on this issue. For the Court it seems dispositive of the issue that CJI2d 16.4 mandates that each of the elements of the predicate felony must be proven beyond a reasonable doubt. But the defendant has already been acquitted by a jury of that crime. A jury can give a logically inconsistent verdict, so long as it does so in one trial. But the same logic and law that dictates that Defendant is forever acquitted of the Home Invasion count after the first trial, compels the Court to hold that he cannot be tried on Felony Murder when the only predicate available is that for which he has already been acquitted. If this next jury found Defendant guilty of Felony Murder, they would necessarily be finding that the elements of Home Invasion were proven. But their hands have been tied by the finding of the original jury. Accordingly, the Felony Murder count is dismissed.

(21a).

The prosecution sought interlocutory leave to appeal Judge Switalski's ruling to the Court of Appeals. On July 16, 2012, that Court granted the prosecution's motion for immediate consideration, motion for stay of proceedings, and application for interlocutory leave to appeal. *People v Wilson,* No. 311253.

On November 15, 2012, the Court of Appeals issued an unpublished, per curiam opinion overruling Judge Switalski's order granting the motion to dismiss the Felony-Murder count, and remanding the matter for retrial. (22a-24a).

Mr. Wilson timely sought leave to appeal to this Court from the decision of the Court of Appeals. On May 24, 3013, this Court granted leave to appeal.

I. THE TRIAL JUDGE CORRECTLY DISMISSED THE FELONY-MURDER COUNT AGAINST MR. WILSON AS THE SPECIFIC FACTUAL QUESTION OF WHETHER HE COMMITTED A HOME INVASION WAS DECIDED IN MR. WILSON'S FAVOR BY THE INITIAL TRIAL JURY, AND THUS THE PROSECUTION ON RETRIAL IS BARRED FROM RELITIGATING THAT CHARGE, WHICH IS AN ESSENTIAL ELEMENT OF THE FELONY-MURDER COUNT, UNDER THE FEDERAL AND STATE DOUBLE JEOPARDY PRINCIPLE OF COLLATERAL ESTOPPEL.

Standard of Review:

This constitutional question is reviewed by this Court under the *de novo* standard. *People v Nutt*, 469 Mich 565 (2004).

Argument:

In their initial Brief on Appeal, Plaintiff, in arguing that Judge Switalski erred in granting Mr. Wilson's motion to dismiss the felony-murder count prior to retrial in this matter, based their argument solely by reference to the decisions in *People v Nutt, supra*, and *People v Ream,* 481 Mich 223 (2008). In *Ream*, this Court, citing to the legal analysis in *Nutt*, held the offenses of felony-murder and the predicate underlying felony are not the "same offense" for the purposes of Double Jeopardy review because each contain essential elements that the other does not. Accordingly, Plaintiff asserted the jury's acquittal of Mr. Wilson at his initial trial on the separately charged offense of Home Invasion, which was the listed predicate felony for the Felony-Murder charge, was not an acquittal on the "same offense" as Felony-Murder, and thus does not bar retrial on the Felony-Murder count.

While Mr. Wilson does not disagree with Plaintiff's descriptions of the holdings in *Nutt* and *Ream*, Plaintiff's conclusion that Judge Switalski erred in dismissing the Felony-Murder count is wrong for two reasons. First, Judge Switalski never held that Felony-Murder and First

Degree Home Invasion are legally the "same offense" for the purposes of Double Jeopardy analysis, nor did he premise his decision on such a finding. Second, and more importantly, the trial judge correctly dismissed the Felony-Murder count under the distinct Double Jeopardy principle of collateral estoppel, which focuses not on the legal elements of the two offenses but rather on review of the necessary and specific factual decisions made by an initial jury. (21a). Under collateral estoppel review, the trial judge's decision in this case was constitutionally correct. US Const, Amend V; Const 1963, art 1, sec 15.

The landmark collateral estoppel decision of the United States Supreme Court is *Ashe v Swenson,* 397 US 436; 90 S Ct 1189; 25 L Ed 2d 469 (1981). In *Ashe*, six men who were playing cards at one of the men's house were robbed by several masked gunmen. The state initially charged Mr. Ashe with a single count of robbery of one of the six victims. At trial, the jury acquitted Mr. Ashe on that charge. The state then charged Mr. Ashe with a second count of armed robbery, with the named complainant now being one of the other five men who were robbed. Mr. Ashe moved to dismiss the second charge on the grounds of Double Jeopardy, but the trial court denied the motion and Mr. Ashe was subsequently convicted by different jurors than those at the initial trial. On habeas corpus review, the Supreme Court reversed the conviction and ordered the charge dismissed with prejudice.

In finding a double jeopardy violation on these facts, the Court focused on the constitutional theory of collateral estoppel, finding it an essential component of the Fifth Amendment guarantee that no person may twice be placed in jeopardy, applicable to state prosecutions under the Fourteenth Amendment. The Court wrote:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been

> determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

397 US at 443. Where the initial judgment is a general verdict, collateral estoppel review requires a court to closely review the actual evidence and theories in the case to determine the precise factual findings made by the initial finder of fact.

Applying that standard of review to the record of the initial trial in *Ashe*, the Supreme Court concluded the second charge of armed robbery was barred by double jeopardy. The Court held the acquittal of Mr. Ashe at the first trial had to have been based on a jury finding of reasonable doubt as to his identity as one of the masked robbers. At the trial, the defense never challenged the evidence that a robbery occurred, or that property was taken from the named complainant. Instead, both the prosecution and defense cases dealt primarily with the question of whether the prosecution could prove Mr. Ashe was one of the robbers. Based on this review of the record, the *Ashe* Court found the **factual** issue of whether Mr. Ashe was one of the robbers would have to be relitigated at the second trial in order to convict him of robbing a different victim. Applying their definition of collateral estoppel, the Court held double jeopardy barred relitigation of that ultimate fact at a subsequent trial between the same parties:

> The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again.
>
> After the first jury had acquitted the petitioner of robbing Knight, Missouri could certainly not have brought him to trial again upon that charge. Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that the petitioner was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery of Knight in the hope that a different jury might find that

> evidence more convincing. The situation is constitutionally no different here, even though the second trial related to another victim of the same robbery. For the name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers.
>
> In this case the State in its brief has frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution: 'No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do-he refined his presentation in light of the turn of events at the first trial.' But this is precisely what the constitutional guarantee forbids.

397 US at 446-447. See also *Turner v Arkansas,* 407 US 366; 92 S Ct 2096; 32 L Ed 2d 798 (1972) (collateral estoppel bars state from charging underlying felony at new trial where jury at first trial rendered a general verdict of not guilty on felony-murder count).

In *People v Garcia,* 448 Mich 442 (1995), this Court faced a collateral estoppel question similar to that posed in the case at bar. In *Garcia,* the defendant was charged with felony-murder in the course of an armed robbery. The jury convicted him of second degree murder as a necessarily included offense of the felony-murder count[2]. On appeal, the Court of Appeals reversed the conviction and remanded for a new trial. Prior to the retrial, the prosecution charged Mr. Garcia with second degree murder and armed robbery. While the trial court granted a defense motion to quash the armed robbery count, the Court of Appeals reversed that decision in an interlocutory appeal. At the retrial, the second jury acquitted Mr. Garcia of the second degree murder count, but convicted him of armed robbery.

On appeal, the Michigan Court of Appeals reversed and dismissed the armed robbery conviction. On review, this Court, in a 3-3 decision, upheld the decision of the Court of Appeals,

[2] Mr. Garcia was not separately charged, as was Mr. Wilson in the case at bar, under an alternative theory of premeditated or open murder. The second degree murder conviction must have been as an included offense under the felony-murder count. 448 Mich at 470-471.

with three justices finding the armed robbery charge was barred by double jeopardy under collateral estoppel analysis.

In his opinion to affirm, Justice Cavanagh found a review of the evidence and arguments at the first trial, under the *Ashe* precedent, led to the conclusion that the first jury found a reasonable doubt over whether the defendant committed an armed robbery. That jury clearly found sufficient proof that Mr. Garcia committed a murder, as shown by the second degree murder conviction, and Justice Cavanagh thus concluded the only reasonable explanation for the implied acquittal on the felony-murder charge was the jurors finding insufficient evidence of the essential element of commission of an armed robbery:

> *Ashe* instructs us to find that the first jury's judgment, as it pertained to the armed robbery element, was a valid and final judgment. *Id.* 397 U.S. at 443, 90 S.Ct. at 1194. I believe that verdict was final, especially in view of the fact that neither party objected to the verdict before the jury was dismissed.
>
> * * *
>
> *Ashe* further directs us to determine whether a rational jury could have grounded its verdict on an issue other than the failure to prove beyond a reasonable doubt that the instant defendant was guilty of armed robbery. See *id.* 397 U.S. at 444, 90 S.Ct. at 1194. Under *Aaron [People v Aaron,* 409 Mich 672 (1981)], if the jury had found the defendant guilty of murder, i.e., second-degree murder, *and* guilty of the underlying felony, armed robbery, then the first-degree murder *statute* would have elevated the *murder* to first-degree felony murder. *Id.* at 730, 299 N.W.2d 304. The first jury determined that all the elements of *murder* had been proven beyond a reasonable doubt when it convicted the defendant of second-degree murder. If the jury had also determined that the prosecutor had proven beyond a reasonable doubt that the defendant was guilty of armed robbery, it was *obligated* by the jury instructions to return a verdict of guilty of first-degree felony murder. Therefore, the reasonable conclusion is that the jury found that at least one of the elements of armed robbery was not proven beyond a reasonable doubt. As directed by *Turner,* I would conclude that the issue whether the defendant was guilty of armed robbery was resolved by the first jury.
>
> * * *

> I believe that the factual basis of the armed robbery charge at the second trial was identical to the factual basis of the armed robbery element of felony murder that was produced at the first trial. Because the first jury resolved the issue of guilt regarding the armed robbery theory in the defendant's favor, the collateral estoppel doctrine barred relitigation of those issues at the second trial.

448 Mich at 483, 485-486, 487.

In her separate opinion in *Garcia*, for reversal of the Court of Appeals, Justice Riley would have found no double jeopardy bar, under collateral estoppel principles, on the facts of the case. Her opinion, however, was based on the fact the prosecution did not separately charge Mr. Garcia with armed robbery, and thus that charge was not explicitly presented to the jury for a verdict limited to the elements of armed robbery. Accordingly, Justice Riley would not have concluded the acquittal on the felony-murder count at the initial trial could only be interpreted as the jury finding reasonable doubt as to one or more of the essential elements of armed robbery as the predicate felony to the felony-murder charge:

> On the basis of these decisions, Justice Cavanagh maintains that a final verdict was rendered with regard to armed robbery, and retrial of that offense is thus barred by collateral estoppel. We do not agree. As Justice Cavanagh concedes, in the present case the jury *only* spoke with regard to second-degree murder-guilty. The jury, therefore, impliedly rendered a decision with regard to first-degree felony murder-not guilty. Even if the collateral estoppel doctrine applies to a judgment of implied acquittal pursuant to *Green* [*Green v United States,* 355 US 184; 78 S Ct 221; 2 L ED 2d 199 (1957)], as Justice Cavanagh maintains, at 701, neither doctrine may be expanded to apply to the lesser-included offense of that offense which defendant was impliedly acquitted, i.e., armed robbery. To do so would be to extend the principles of *Ashe, Turner,* and *Green* far beyond recognizable boundaries. **On the basis of the instructions given in the present case, the jury did not render a verdict with regard to armed robbery.** *Ashe* and *Turner* involve situations in which an appellate court was able to review the instructions and unequivocally determine that the jury had rendered a decision that precluded a subsequent trial.

448 Mich at 458-459. (Emphasis added) (Footnotes omitted).

The manifest difference between the facts in *Garcia, supra*, and the facts in the case at bar is that the prosecution voluntarily chose to charge Mr. Wilson with a separate count on the cognate included offense of first degree home invasion, and thus that offense was directly and unequivocally presented to the initial jury, which rendered a not guilty verdict on that cognate offense. There is no need in this case to review and interpret what the jury decided as to the factual evidence in support of the allegation that Mr. Wilson committed a home invasion – they explicitly acquitted him on the elements of that offense. That **factual** determination by this fully instructed jury is the equivalent, in collateral estoppel review, of the initial jury's determination in *Ashe* there was insufficient evidence of Mr. Ashe's identity as the robber. Just as in *Ashe* collateral estoppel barred the same parties from relitigating the issue of ultimate fact (who committed the robbery) at a second proceeding, in the instant case it bars the same parties from relitigating the factual issue of whether Mr. Wilson committed a home invasion.

Neither *Ashe* nor *Turner* dealt with the double jeopardy definition of "same offense." It is clear the second charge of armed robbery in *Ashe* was not legally the "same offense" as the first charge, as the unit of prosecution was different – a different victim. The *Ashe* Court expressly stated that Missouri could have separately charged, convicted, and sentenced Mr. Ashe of multiple counts of armed robbery at the initial trial. Having instead elected to proceed only on one charge at the initial trial, the prosecution in *Ashe* was bound by that jury's factual determination that Mr. Ashe was not one of the robbers. The Supreme Court correctly held the prosecution does not get a second bite of the apple, or a "dry run" to test out its case prior to bringing further charges.

In this case, the prosecution likewise made a decision to separately charge Mr. Wilson with a count of home invasion, and thus to present that distinct charge to the jury. (14a-15a).

While the *Nutt* and *Ream* decisions allow the prosecution to seek such separate convictions through charging, an express acquittal on the separate charge of the predicate felony cannot be ignored under collateral estoppel review.

In his ruling, Judge Switalski based the dismissal of the felony-murder count on the principles of collateral estoppel. While he never used that exact phrase, neither did he expressly hold that felony-murder and the predicate felony are the "same offense," as the prosecution interpreted his ruling. His words show that he recognized a second jury cannot disagree with the factual findings of an initial jury – the precise rationale of the *Ashe* decision:

> The issue here is whether the Prosecution may proceed in a retrial with a charge of Felony Murder containing a predicate of Home Invasion, when the Defendant has been acquitted of the predicate charge in the original trial. * * * If this next jury found Defendant guilty of Felony Murder, they would necessarily be finding that the elements of Home Invasion were proven. **But their hands have been tied by the finding of the original jury.**

(21a). (Emphasis added).

This language can only be interpreted as an application of the principles of collateral estoppel double jeopardy. Juries do not make legal rulings on the elements of offenses, nor determine whether two offenses are legally the "same offense" for double jeopardy review. Juries make factual findings, under proper instructions, on whether the prosecution has proved beyond a reasonable doubt all of the essential elements of a charged crime. Judge Switalski was correct in finding the jury's hands at Mr. Wilson's retrial are constitutionally tied by the express decision of the initial jury that the prosecution failed to prove beyond a reasonable doubt that Mr. Wilson committed a home invasion, just as the second jury in the *Ashe* case would have been bound by the initial jury's determination there was a reasonable doubt as to Mr. Ashe's identity as one of the robbers. The prosecution freely and voluntarily elected to present the home

invasion charge as a separate count to the initial jury. They now must live with the consequences of the acquittal on that charge, just as the prosecution in *Ashe* had to live with the consequences of not charging Mr. Ashe with multiple counts of armed robbery at the initial trial.

It is acknowledged that the jury verdicts in the initial trial in this matter can be seen as inconsistent or contrary. While the jury convicted Mr. Wilson of felony-murder, they expressly acquitted him on the separate charge of home invasion – the predicate felony for the murder charge. They must have found that a murder occurred, and that Mr. Wilson was responsible for that murder, given the guilty verdict on second degree murder as an included offense under the separate open murder charge. While it is hard to reconcile the jury's verdicts on the felony-murder and home invasion counts, Michigan law permits a jury to render inconsistent or internally contradictory verdicts. See *People v Vaughn,* 409 Mich 463 (1980); *People v Lewis,* 415 Mich 443 (1982). Where, as here, the jury renders an explicit verdict of not guilty on the elements of home invasion, there is no need to explore the record to determine how they implicitly resolved the elements of felony-murder. As Judge Switalski correctly recognized, for the jury at the retrial to find factual proof beyond a reasonable doubt on the elements of home invasion, as the predicate felony to the felony-murder charge, they would have to directly disagree with the express verdict of the first jury on those elements.[3] Having been resolved by the initial jury, those factual questions cannot be relitigated by the same parties. *Ashe, supra.*

This case thus presents an important constitutional question concerning the double jeopardy implications of a prosecutor's voluntary decision to separately charge a defendant with

[3] The prosecution has implicitly agreed that double jeopardy bars a new charge of home invasion against Mr. Wilson, as they have not recharged him with that offense. (19a-20a). The basis for a double jeopardy bar on recharging home invasion can only be the verdict of the initial jury on that specific and separate charge. If that verdict acts to bar retrial on that charge, it must also have an impact on the ability of the prosecution to recharge and retry Mr. Wilson on the felony-murder count that depends on proofs as to home invasion.

both a felony which encompasses the necessity for the prosecution to prove a predicate felony – such as felony-murder – and the predicate felony itself, where that predicate felony is a cognate included lesser offense. This issue must be considered in light of the seeming trend in Michigan jurisdictions for the prosecution to circumvent the decision of this Court in *People v Cornell*, 466 Mich 335 (2002), which bars a trial judge from instructing a jury, pursuant to a request from either the defense and/or the prosecution, on a cognate included offense as an alternative conviction under a charged offense.

As in the case at bar, if the prosecution wants to have the jury able to consider convicting a defendant on a cognate lesser offense, such as the home invasion charge in this matter, they can get that cognate charge in front of the jury, creating the possibility of a conviction on either or both the cognate and the greater charge, by separately charging the cognate offense. By this discretionary and voluntary charging decision, the prosecution will negate the *Cornell* ban on requesting instruction on a cognate offense as a lesser included offense alternative. However, if the prosecution does not want, in a particular case,[4] for the jury to have the option to convict the defendant only on the cognate offense, they can decide not to separately charge that cognate offense, and thus rely on the *Cornell* rule to bar the defense from receiving any instruction on the cognate. Accordingly, due to its exclusive power to bring charges, the prosecution can decide, for strategic reasons, whether or not the *Cornell* rule will be applicable in the particular case. The defense, of course, has no such opportunity to circumvent the rule, and is always bound by *Cornell's* ban on cognate offense instructions.

[4] For example, where the defense would want to argue that the accused is guilty only of the cognate lesser offense, but not of the more serious charged offense. In such a case, the prosecution may wish, for strategic reasons, to require the jury to render an "all-or-nothing" verdict on the charged offense, in hopes that the jurors will not acquit a defendant who admits to engaging in some criminal conduct.

In the case at bar, the *Nutt* and *Ream* decisions permitted the prosecution to charge, and possibly convict, Mr. Wilson for both first-degree home invasion and first-degree felony-murder in the course of that same home invasion. The issue presented here is not the continuing viability of the *Nutt* and *Ream* decisions, but instead the double jeopardy implications of a factual decision by the jury where the prosecution elects to charge the cognate lesser offense as a separate and distinct count.

The bench and bar need a definitive ruling as to when the collateral estoppel principles bar recharging, at a retrial, in a culture of more limited definitions of "same offense" for general double jeopardy review, and the concurrent trend of charging multiple felonies arising out a single set of facts. Mr. Wilson is not asking this Court to overrule *Cornell*, but only to consider the double jeopardy implications of charging decisions made in light of that rule – decisions that belong solely to the prosecution. Having elected to separately charge a cognate predicate offense, the prosecution should bear the consequences of that decision as they impact on an appellate reversal and retrial.

In finding no collateral estoppel double jeopardy bar to recharging Mr. Wilson with felony-murder in the course of a home invasion in the instant case, the Court of Appeals below relied primarily on the decision of the United States Supreme Court in *United States v Powell*, 469 US 57; 105 S Ct 471; 83 L Ed 2d 461 (1984). (22a-24a). While the *Powell* decision does deal with seemingly inconsistent jury verdicts, as in the case at bar, it is both factually and legally distinguishable from the situation in the instant case.

In *Powell*, the defendant was charged with a conspiracy to possess cocaine with intent to deliver, with counts alleging "overt acts" in furtherance of that charged conspiracy, and with the substantive offense of possession of cocaine with the intent to deliver. At the trial on all these

charges, the jury acquitted on the conspiracy and possession charges, and on one of the four counts alleging an illegal overt act, but convicted on the other three counts. The defendant argued that those convictions could not stand, as a requisite element of the overt act offenses was that the accused conspired to possess or actually did possess the cocaine, charges upon which she was acquitted.

The Supreme Court disagreed, and upheld the convictions. Relying the prior opinion in *Dunn v United States*, 284 US 390; 52 S Ct 189; 76 L Ed 356 (1932), which held that inconsistent verdicts at a single jury trial are permissible,[5] the Court held the fact one charge was a predicate felony of a different charge did not create an exception to the rule from *Dunn*. While the Supreme Court in *Powell, supra*, did find that the principles of collateral estoppel or res judicata did not apply to this situation of factually inconsistent verdicts, the case is distinguishable from both *Ashe v Swenson, supra*, and the case at bar in that *Powell* did not involve any subsequent proceedings between the two same parties – the inconsistencies there occurred solely within the context of a single trial. There was no consideration given, as none was necessary under the facts of *Powell*, to whether the same ruling would result if a second jury was asked to reconsider or relitigate a factual question already decided in the initial trial.[6]

As compared to *Powell*, the much more relevant opinion from the United States Supreme Court on the issue presented here is *Yeager v United States*, 557 US 110; 129 S Ct 2360; 174 L Ed 2d 78 (2009). In *Yeager*, the defendant was charged with multiple counts of conspiracy to commit wire fraud and securities fraud, wire fraud, securities fraud, insider trading, and money

[5] This Court in *Vaughn* and *Lewis, supra*, similarly relied on the *Dunn* opinion to reach its rulings. See 409 Mich at 465; 415 Mich at 451, fn. 10.

[6] Mr. Wilson is not arguing that his felony-murder conviction at the first trial could not stand, had there not been an appellate reversal on an unrelated issue, due to the acquittal on the home invasion count. Had that been the case, the *Powell* and *Dunn* decisions would have directly applied, as inconsistent verdicts within the context of a single trial are constitutionally permissible.

laundering, arising from the Enron scandal. At a jury trial, he was acquitted on the various fraud and conspiracy counts but the jury could not reach any unanimous verdicts on the insider trading charges. The trial judge accepted the acquittal verdicts, and declared a hung jury mistrial as to the other counts.

The government subsequently obtained a new indictment charging the defendant with some but not all of the insider trading counts on which the initial jury had hung. The defense moved to dismiss the new indictment, arguing the acquittals on the substantive frauds counts must have been premised on the jury finding reasonable doubt that he possessed material and non-public information about the business, a necessary element of the insider trading offenses. The United States District Court denied the motion to dismiss, concluding the not guilty verdicts did not necessarily mean the jury found that he did not possess any insider information.

On review, the Fifth Circuit Court of Appeals affirmed the decision of the District Court, but on a different basis.[7] The Fifth Circuit held the acquittals on the fraud counts could only be interpreted as a jury finding that he did not possess insider information, and that such a finding would normally preclude a conviction for insider trading, but held that if the initial jury had been "truly rational" it would have acquitted the defendant on the insider trading counts as well as on the fraud counts. 557 US at 116. Based on that conclusion, the Fifth Circuit ruled it impossible to determine the basis for the acquittals, and that the inconsistency between the acquittals and the hung counts "barred the application of issue preclusion in this case." *Id.* at 116.

The United States Supreme Court, noting a split in the Federal circuit courts on this issue, granted certiorari and thereafter reversed the decisions of the District Court and the Fifth Circuit as contrary to the Double Jeopardy clause of the Fifth Amendment. The Court first wrote, in Justice Stevens' majority opinion:

[7] *United States v Yeager*, 521 F 3d 367 (CA 5, 2008).

> In *Dunn v. United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932), the Court, speaking through Justice Holmes, held that a logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict. The question presented in this case is whether an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts affects the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment. We hold that it does not.

557 US at 112.

In reviewing the history of double jeopardy jurisprudence, the Court identified two interests at the core of that constitutional protection – that the state should not be permitted to use its resources and powers to repeatedly attempt to convict an individual for the same offense, and the preservation of the finality of judgments.[8] Turning to the case before them, the Court wrote:

> While the case before us involves a mistrial on the insider trading counts, the question presented cannot be resolved by asking whether the Government should be given one complete opportunity to convict petitioner on those charges. Rather, the case turns on the second interest at the core of the Clause. We must determine whether the interest in preserving the finality of the jury's judgment on the fraud counts, including the jury's finding that petitioner did not possess insider information, bars a retrial on the insider trading counts. This requires us to look beyond the Clause's prohibition on being put in jeopardy "twice"; the jury's acquittals unquestionably terminated petitioner's jeopardy with respect to the issues finally decided in those counts. The proper question, under the Clause's text, is whether it is appropriate to treat the insider trading charges as the "same offence" as the fraud charges. Our opinion in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), provides the basis for our answer.

Id. at 118-119.

In applying its decision in *Ashe* to the facts in issue in *Yeager*, the Court gave equal collateral estoppel effect to the acquittals on the fraud counts against Mr. Yeager as they did to the initial trial acquittal on the single robbery count against Mr. Ashe:

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[8] See *Crist v Bretz*, 437 US 28, 33; 98 S Ct 2156; 57 L Ed 2d 24 (1978).

> Unlike *Ashe*, the case before us today entails a trial that included multiple counts rather than a trial for a single offense. And, while *Ashe* involved an acquittal for that single offense, this case involves an acquittal on some counts and a mistrial declared on others. The reasoning in *Ashe* is nevertheless controlling because, for double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe's acquittal.

Id. at 120.

The Court went on to reject the Fifth Circuit's reasoning that the seeming inconsistency between the jury's acquittals on the fraud counts and inability to reach a verdict on the insider trading counts removed any collateral estoppel impact of the acquittals. The Court held that no meaning could be attributed to the hung counts, as it would be pure conjecture to determine why the jury was unable to reach any unanimous verdict on those charges, and such conjecture "should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return." *Id.* at 122.

In language highly relevant to the case at bar, the *Yeager* majority found the interest of finality of judgments requires that the unanimous not guilty verdicts of the jury as to a charge that constituted a requisite element of the remaining charges must be given double jeopardy significance:

> Accordingly, we hold that the consideration of hung counts has no place in the issue-preclusion analysis. Indeed, if it were relevant, the fact that petitioner has already survived one trial should be a factor cutting in favor of, rather than against, applying a double jeopardy bar. To identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide. **A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it.** Even if the verdict is "based upon an egregiously erroneous foundation," *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962) (per curiam), **its finality is unassailable**. See, e.g., *Washington [Arizona v Washington*, 434 US 497; 98 S Ct 824; 54 L Ed 2d 717 (1978)], 434 U.S. at 503, 98 S.Ct. 824; *Sanabria v. United States,* 437 U.S. 54, 64, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978).

> **Thus, if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element.**

Id. at 122-123. (Emphasis added).

Finally, the *Yeager* Court rejected the Government's reliance on the opinion in *Powell, supra*:

> At bottom, the Government misreads our cases that have rejected attempts to question the validity of a jury's verdict. In *Powell* and, before that, in *Dunn*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356, we were faced with jury verdicts that, on their face, were logically inconsistent and yet we refused to impugn the legitimacy of either verdict. In this case, there is merely a suggestion that the jury may have acted irrationally. And instead of resting that suggestion on a verdict, the Government relies on a hung count, the thinnest reed of all. If the Court in *Powell* and *Dunn* declined to use a clearly inconsistent verdict to second-guess the soundness of another verdict, then, a fortiori, a potentially inconsistent hung count could not command a different result.

Id. at 125.

The situation in the case at bar, while different from *Yeager* in that here the jury convicted on the felony-murder count rather than being unable to reach a verdict on that charge, the collateral estoppel implication of the acquittal on the requisite underlying felony of home invasion similarly means Mr. Wilson received "a jury verdict that necessarily decided that issue in his favor [that] protects him from prosecution for any charge for which that is an essential element." There is no question that for a jury to convict Mr. Wilson at the retrial of felony-murder in the commission of a home invasion, they would have to find the essential elements of home invasion were proven beyond a reasonable doubt – a verdict directly at odds with the specific acquittal on that offense by the initial jury. As in *Yeager*, that not guilty verdict

"represents the community's collective judgment regarding all the evidence and arguments presented to it," and its finality is "unassailable" regardless of any question as to its foundation.

In the case at bar the prosecution, exploiting the opportunity to circumvent the *Cornell* rule on cognate offenses discussed above, did directly present the distinct predicate felony charge of home invasion to the initial jury, and that jury expressly acquitted Mr. Wilson of that charge. To now find, as the Court of Appeals below did, that that acquittal carries no collateral estoppel or double jeopardy implications at a retrial, other than to bar the prosecution from again charging home invasion as a distinct count (which the prosecution, seemingly aware that the acquittal clearly bars such a charge, did not attempt to do), would permit the prosecution to avoid the *Cornell* rule with impunity, whenever it suits their wishes.

In *Turner v Arkansas*, *supra*, the United States Supreme Court held that collateral estoppel bars a state from charging the underlying predicate felony at a subsequent trial where the initial jury acquitted on a felony-murder charge which included the necessity to show the commission of that predicate felony. That rule should apply equally to the reverse situation, regardless of the seeming inconsistency of the initial jury's verdicts, as the initial jury expressly found reasonable doubt as to whether Mr. Wilson committed the alleged home invasion. Where the Court in both *Ashe* and *Turner* had to presume the factual basis for the jury's acquittal by review of the record, no such presumption is necessary here, as the first jury specifically ruled on the elements of the predicate felony, and found Mr. Wilson not guilty. No second jury should be constitutionally permitted to disagree with that factual result. *Ashe, supra; Yeager, supra.*

The trial judge correctly held, under clear constitutional principles of collateral estoppel and double jeopardy, the prosecution is barred from proceeding with the felony-murder count at

the retrial. This Court should affirm the decision of the trial court, and remand the matter to that court for trial on the remaining charges.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court reverse the decision of the Michigan Court of Appeals, and reinstate the order of the trial court dismissing the felony-murder count.

Respectfully submitted,

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