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,	Supreme Court No. 146480
-vs-	Court of Appeals No. 311253
DWAYNE WILSON, Defendant-Appellant _____/	Lower Court No. 09-2637-FC

BRIEF ON APPEAL-APPELLEE
ORAL ARGUMENT REQUESTED

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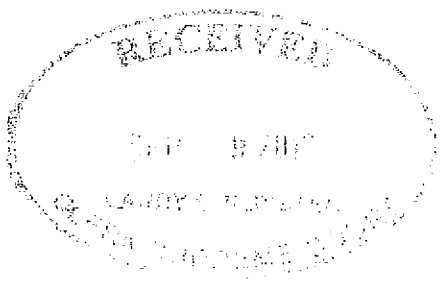

ERIC J. SMITH
MACOMB COUNTY PROSECUTING ATTORNEY

September 6, 2013

Mr. Corbin Davis, Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48909

State of Michigan V Dwayne Wilson
Supreme Court No: 146480
Court of Appeals No: 311253
Lower Court No. 09-2637-FC

Dear Mr. Davis:

In reference to the above matter, please find an original and twenty-three (23) copies of **Plaintiff-Appellee's Brief on Appeal**. A **Proof of Service** is also enclosed.

Sincerely,

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By:

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ISSUE PRESENTED

DO STATE AND FEDERAL DOUBLE JEOPARDY GUARANTEES BAR RETRIAL OF THE DEFENDANT ON THE CHARGE OF FIRST-DEGREE FELONY MURDER?

Plaintiff-Appellee's Answer: "No".
Defendant-Appellant's Answer: "Yes".

COUNTERSTATEMENT OF FACTS

After a jury trial before Macomb County Circuit Court Judge Matthew S. Switalski ("Judge Switalski") in December of 2009, a jury convicted the defendant, Dwayne Edmund Wilson, of First-Degree Felony Murder (MCL § 750.316), Second-Degree Murder (MCL § 750.317), Assault with Intent to Commit Great Bodily Harm (MCL § 750.84), Felony Firearm- Second Offense Notice (MCL § 750.227b), and two counts of Unlawful Imprisonment (MCL § 750.349b) arising out of the shooting death of Kenyetta Williams in Warren on May 26, 2009. (7a). In that regard, the jury acquitted the defendant of First-Degree Premeditated Murder (MCL § 750.316) and First-Degree Home Invasion (MCL § 750.110a(2)). (7a). Judge Switalski sentenced the defendant to a term of life imprisonment without the possibility of parole on his First-Degree 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 two years imprisonment on the Felony Firearm conviction. (6a).

The defendant appealed as of right. On May 10, 2011, the Michigan Court of Appeals ("Court of Appeals") reversed the defendant's convictions on the basis that the trial court committed structural error in denying the defendant's motion for self-representation. (16a-18a). This

Court remanded the case to the trial court for further proceedings. (16a-18a). The prosecution filed an application for leave to appeal this ruling with this Court. (5a). On September 6, 2011, this Court denied the prosecution's application for leave to appeal. See Order- SC No. 143290. (5a).

On April 6, 2012, the prosecution filed an amended information setting forth the charges on retrial: First-Degree Felony Murder, Second-Degree Murder, Assault with Intent to Commit Great Bodily Harm, Felony Firearm- Second Offense Notice, Carrying a Weapon with Unlawful Intent (MCL § 750.226), and two counts of Unlawful Imprisonment. (19a-20a). Subsequently, the defendant moved to dismiss the count of First-Degree Felony Murder, arguing that state and federal double jeopardy guarantees barred his retrial on the charge of First-Degree Felony Murder because the jury had acquitted him of the predicate felony of First-Degree Home Invasion. (2a).

On July 6, 2012, Judge Switalski signed an order stating, 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).

With a jury trial is scheduled for Tuesday, July 17, 2012, on the charges of Second-Degree Murder, Assault with Intent to Commit Great Bodily Harm, Felony Firearm- Second Offense Notice, Carrying a Weapon with Unlawful Intent, and two counts of Unlawful Imprisonment, the prosecution sought interlocutory leave to appeal Judge Switalski's ruling to the Court of Appeals. (10a-13a). On July 16, 2012, the Court of Appeals granted the prosecution's motion for immediate consideration, motion for stay of proceedings, and application for interlocutory leave to appeal. See Order- COA No. 311253. (Tr. 10a-13a).

After receiving briefs and hearing oral argument, the Court of Appeals reversed the trial court's decision, reinstated the First-Degree Felony Murder charge against the defendant, and remanded the case for trial. (Tr. 22a-24a).

The defendant sought leave to appeal to this Court and, on May 24, 2013, this Court granted his application. (10a-13a).

ISSUE

STATE AND FEDERAL DOUBLE JEOPARDY GUARANTEES DO NOT BAR RETRIAL OF THE DEFENDANT ON THE CHARGE OF FIRST-DEGREE FELONY MURDER.

STANDARD OF REVIEW

A double jeopardy challenge presents a question of constitutional law that an appellate court reviews de novo. *People v. Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

ARGUMENT

The defendant persuaded the trial court that state and federal prohibition against double jeopardy barred his retrial on First-Degree Felony Murder because the jury in the first trial acquitted him of the predicate felony of First-Degree Home Invasion. The prosecution contends that Judge Switalski's ruling amounts to reversible error.

The Michigan Constitution, in article 1, § 15, states, "No person shall be subject for the same offense to be twice put in jeopardy." The analogous provision in the United States Constitution, contained in the Fifth Amendment, provides, "No person shall . . . be subject for the same offense to be twice put in jeopardy." These provisions afford individuals "three-related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. *Nutt*, 469 Mich at

574; 677 NW2d 1. The first two protections comprise the "successive prosecutions" strand of double jeopardy, while the third protection is commonly understood as the "multiple punishments" strand. *People v. Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). The case at bar does not implicate any of these three double jeopardy protections.

The defendant's argument originally focused on the first "successive prosecution" protection, which guards against a second prosecution for the same offense after acquittal. Here, it is undisputed that the jury in the first trial convicted the defendant of First-Degree Felony Murder and acquitted the defendant of the predicate felony of First-Degree Home Invasion. Notably, however, the prosecution seeks to retry the defendant only on First-Degree Felony Murder. The crimes of First-Degree Felony Murder and the predicate felony of First-Degree Home Invasion are not the "same offense" for purposes of state and federal double jeopardy law. For this reason, the trial court erred in concluding that double jeopardy guarantees prohibit the prosecution from retrying the defendant for First-Degree Murder.

In *Nutt*, 469 Mich 565, 576; 677 NW2d 1 (2004), this Court held that an offense does not constitute the "same offense" for purposes of the "successive prosecutions" strand of double jeopardy if each offense requires proof of a fact that the other does not. Four years later, in *People v. Ream*, 481 Mich 223, 240; 750 NW2d 536 (2008), this Court, although in the context of a "multiple punishments" case, held First-

Degree Felony Murder and the predicate felony were not the "same offense" under state and federal double jeopardy protections.

In *Ream*, 481 Mich at 241-242; 750 NW2d 536, Justice Markman wrote:

> In the instant case, defendant was convicted of both first-degree felony murder and first-degree criminal sexual conduct, where the latter constituted the predicate felony for the felony-murder conviction. The killing of a human being is one of the elements of first-degree felony murder. MCL 750.316(1)(b); *People v. Carines*, 460 Mich. 750, 758-759, 597 N.W.2d 130 (1999) (citation omitted). Sexual penetration is one of the elements of first-degree criminal sexual conduct. MCL 750.520b(1). First-degree felony murder contains an element not included in first-degree criminal sexual conduct, namely, the killing of a human being. Similarly, first-degree criminal sexual conduct contains an element not necessarily included in first-degree felony murder, namely, a sexual penetration . . . Because first-degree felony murder and first-degree criminal sexual conduct each contains an element that the other does not, we conclude that these offenses are not the "same offense" under with the Fifth Amendment or Const. 1963, art. 1, § 15, and, therefore, defendant may be punished separately for each offense.

Justice Markman's analysis is equally relevant in the instant case. First-Degree Felony Murder contains an element not included in First-Degree Home Invasion—the killing of a human being. Moreover, First-Degree Home Invasion contains an element not necessarily included in first-degree felony murder, namely, a breaking and entering or entry without permission of a dwelling. See MCL § 750.110a(2). Given the foregoing, these offenses are not the "same offense" within the meaning of the state and federal constitutional double jeopardy protections and the

prosecution should be free to retry the defendant for First-Degree Felony Murder.[1]

In his pleadings, the defendant claims that principles of collateral estoppel bar the prosecution from retrying him on the charge of First-Degree Felony Murder. In that regard, the defendant initially maintains that Judge Switalski did not base his decision to dismiss the First-Degree Felony Murder on traditional double jeopardy guarantees, but instead on the ancillary principle of collateral estoppel. A review of Judge Switalski's written ruling belies this contention. The written opinion and order is entitled, "Dismissal of Count 1 Felony Murder on Double Jeopardy Grounds." The ruling itself does not contain the phrase "collateral estoppel" nor set forth any case law whatsoever regarding that legal principle. Instead, the language employed in the opinion reflects a decision grounded upon the double jeopardy protections against a second prosecution for the same offense after acquittal. See *Nutt*, *supra* at 574. Given the foregoing, it is disingenuous to suggest that Judge Switalski's ruling was based upon collateral estoppel principles.

Even so, the doctrine of collateral estoppel does not prevent the prosecution from retrying the defendant for First-Degree Felony Murder.

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[1] In a footnote, the defendant asserts that if the not guilty verdict on First-Degree Home Invasion "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." The prosecution submits that it does not. Traditional double jeopardy protections ("successive prosecutions") bar the defendant's retrial on First-Degree Home Invasion. At the same time, as noted below, principles of collateral estoppel do not prevent the prosecution from retrying the defendant for First-Degree Felony Murder.

Collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe v. Swenson*, 397 US 436, 445; 90 SCt 1189; 25 LEd2d 469 (1970). In *Ashe, supra* at 437, the United States Supreme Court's seminal case regarding collateral estoppel, three or four masked men, armed with shotguns and pistols, broke into a basement and robbed several individuals who were engaged in a poker game. The following morning, state troopers arrested four men. *Id.* The state prosecutors charged Ashe and the other three men with armed robbery of the six poker players and possession of a stolen car. *Id.* at 438.

The prosecution tried Ashe for robbing one of the poker players. *Id.* at 438. With weak evidence that Ashe was one of the armed robbers, the jury acquitted Ashe. *Id.* at 438-439. Six weeks later, the prosecution sought to try Ashe again, this time for the robbery of another poker player. *Id.* at 439. Ashe moved the trial court for dismissal "based on his previous acquittal." *Id.* The trial court denied this motion. *Id.* At this trial, the prosecution elicited stronger testimony from the eyewitnesses regarding Ashe's identification and the jury convicted Ashe. *Id.* at 440.

In its opinion, the United States Supreme Court defined collateral estoppel as follows:

> '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 full judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

. . .

> The ultimate question to be determined, then . . . is whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else that constitutional guarantee may embrace, . . . it surely protects a man who has been acquitted from having to 'run the gantlet' a second time. *Ashe, supra* at 443, 445-446

Ashe requires that, after a thorough search of the record, a reviewing court must determine what issues a jury must have decided in reaching its verdict. *Id.* at 444. If the jury might not have decided a specific issue, that issue will not be foreclosed. *Id.* The reviewing court must decide whether a jury could have based its decision on an issue other than that which the defendant seeks to preclude from consideration. *Id.* at 444. "The inquiry 'must be set in practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* (quoting *Sealfon v. United States*, 332 US 575, 579; 68 SCt 237).

In *Ashe, supra* at 446, the United States Supreme Court observed that the question was "not whether the prosecution could validly charge the petitioner with separate offenses for the robbery of the six poker players" or "whether he could have received a total of six punishments had he been convicted in a single trial of robbing the six victims." Instead, the question was "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."

Id. Ultimately, the *Ashe* Court found that "[o]nce 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 . . . in the hope that a different jury might find that evidence more convincing." *Id.*

In that regard, this Court has stated that "[c]ollateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined." *People v. Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990). *Gates* advises that in analyzing whether an issue was "actually litigated" in a prior proceeding, courts must consider "whether the party against whom collateral estoppel is asserted has a full and fair opportunity to litigate the issue." *Id.* at 156-157. Moreover, an issue is "necessarily determined" in a previous proceeding "only if it is 'essential' to the judgment." *Id.* at 158 (quoting 1 Restatement Judgments, 2d, § 27, p 250, comment h, p258). "The inability of a court to determine upon what basis an acquitting jury reached its verdict, is, by itself, enough to preclude the defense of collateral estoppel." *Id.*

Here, the defendant asserts that collateral estoppel precludes that prosecution from retrying the defendant for First-Degree Felony Murder because the jury in the first trial acquitted him of the predicate felony,

First-Degree Home Invasion. The defendant's argument is fatally flawed, however, because the jury in the first trial **convicted him of First-Degree Felony Murder**. This conviction necessarily negates any contention that the jury in the first trial unequivocally resolved this issue in the defendant's favor. The United States Supreme Court discussed the inapplicability of collateral estoppel principles in cases involving so-called inconsistent verdicts in *United States v. Powell*, 469 US 57, 68; 105 SCt 471; 83 LEd2d 461 (1984). In *Powell, supra*, at 59, federal law enforcement authorities indicted the defendant for 15 violations of federal law, including 10 violations of federal narcotics laws. Count I of the indictment charged the defendant with conspiring with her husband and 17-year-old son "to knowingly and intentionally possess with intent to distribute cocaine." *Id.* at 60. Count 9 charged the defendant with possession of a certain amount of cocaine with the intent to distribute it. *Id.* The jury acquitted Powell of these two charges. *Id.* Counts 3-6 charged the defendant with "the compound offenses of using the telephone in 'committing and in causing and facilitating' certain felonies—'conspiracy to possess with intent to distribute and possession with intent to distribute cocaine" in violation of federal statute. *Id.* The jury convicted Powell of three of these four charges. *Id.*

On appeal, the defendant argued that these jury verdicts were inconsistent and was entitled to reversal of the telephone facilitation convictions. *Powell, supra* at 60. Powell "urge[d] that principles of res

judicata or collateral estoppel should apply to verdicts rendered by a single jury, to preclude acceptance of a guilty verdict on a telephone facilitation count where the jury acquits the defendant of the predicate felony." *Id.* at 64. The *Powell* Court, however, rejected this argument:

> . . . respondent's argument that an acquittal on a predicate offense necessitates a finding of evidence on a compound felony simply misunderstands the nature of the inconsistent verdict problem. Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense could collaterally estop the Government on the compound offense, the argument necessarily assumes the acquittal on the predicate offense was proper—the one that the jury "really meant." This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily—and erroneously—argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient. The problem is that the same jury reached inconsistent results; once 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.* at 68.

Applying *Powell* and the statements in *Ashe*, *supra* at 444 (quoting *Sealfon*, supra at 579), directing a reviewing court to "'examine the record . . . 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,'" retrial on the First-Degree Felony Murder charge is not barred by collateral estoppel.

The Court of Appeals, relying on *Powell*, easily reached this conclusion in its opinion, noting that the jury's inconsistent verdicts

"negate[d] the applicability of the double jeopardy collateral estoppel principle." (23a). As the Court of Appeals wrote:

> . . . Here, the prior jury cannot be deemed to have found an ultimate fact regarding the first-degree home invasion. The trial court specifically instructed the jury that to convict defendant of felony-murder, the jury had to conclude, in part, "that when he did the act that caused the death of [the victim], the defendant was committing the crime of first-degree home invasion . . . " The jury found defendant guilty of felony-murder, apparently concluding that defendant committed the crime of first-degree home invasion. However, the jury acquitted defendant of first-degree home invasion. Although the jury had the prerogative of returning inconsistent verdicts, those inconsistencies preclude this Court from identifying which facts, if any, the jury necessarily found with regard to first-degree home invasion. (23a).

Thus, the Court of Appeals concluded that "the double jeopardy collateral estoppel principle does not apply" without "an indication in the record of a necessarily decided ultimate fact" and reinstated the First-Degree Felony Murder charge against the defendant. (23a).

For this reason, the cases cited by the defendant are easily distinguishable and inapposite in that none of these cases involved a jury's inconsistent verdicts. In *Ashe*, the jury acquitted the defendant of one count of armed robbery involving six different complainants. After the prosecution, using a different complainant, again charged the defendant, it was not difficult for the United States Supreme Court to determine that the jury has conclusively resolved the factual issue regarding the armed robber's identity in the defendant's favor and hold that collateral estoppel barred a second trial. As noted above, the jury in

the first trial in the case at bar, by reaching an inconsistent verdict, did not conclusively resolve the critical issue in the defendant's favor.

The defendant also relies upon *People v. Garcia*, 448 Mich 442; 531 NW2d 683 (1995), which is, at least, more factually similar to the instant case. In *Garcia, supra*, at 444-445, the prosecution charged the defendant with First-Degree Felony Murder with Armed Robbery (MCL § 750.529) as the predicate felony, Open Murder, and Felony-Firearm arising out of a carjacking and fatal shooting. Before jury deliberations, the assistant prosecuting attorney dismissed the Open Murder count. *Id.* at 445. The jury deliberated on the remaining counts of First-Degree Felony Murder and Felony-Firearm. *Id.* On the First-Degree Felony Murder charge, the trial court instructed the jury on the lesser-included offenses of: (1) Second-Degree Murder; and (2) Armed Robbery. *Id.* The jury convicted the defendant of Second-Degree Murder and Felony-Firearm. *Id.* at 446.

The Court of Appeals, however, reversed these convictions because "the jury was not afforded the opportunity to return a general verdict of 'not guilty' on the entire first count on the verdict form. *Garcia, supra* at 446. On remand, the prosecution endeavored to retry the defendant on three counts—Second-Degree Murder, Armed Robbery, and Felony Firearm. *Id.* Ultimately, this Court, by a 3-3-1 decision held that "the collateral estoppel doctrine . . . barred the subsequent trial of the armed robbery count." *Id.* at 468.

Again, however, this case is easily distinguishable because the jury in the first trial in *Garcia* acquitted the defendant of First-Degree Felony Murder, convicting him of Second-Degree Murder and Felony Firearm. Apparently, the prosecution did not charge the defendant with the predicate felony of Armed Robbery as part of this trial. After the Court of Appeals reversed the defendant's Second-Degree Murder and Felony Firearm convictions, the prosecution retried the defendant for Second-Degree Murder and Armed Robbery. This Court, divided as it was, affirmed the Court of Appeals' holding that collateral estoppel barred prosecution of the defendant for Armed Robbery when the jury in the first trial has acquitted him of First-Degree Felony Murder using Armed Robbery as the predicate felony. Like *Ashe*, *Garcia* does not involve inconsistent verdicts; rather, its facts include a First-Degree Felony Murder acquittal in the first trial and a prosecution involving the predicate felony in the second trial. Under the circumstances, *Garcia* is not controlling.

Next, the defendant points to the United States Supreme Court's decision in *Yeager v. United States*, 557 US 110; 129 SCt 2360; 174 LEd2d 78 (2009). Again, the holding in *Yeager* is inapposite and easily distinguishable from the instant case. In *Yeager*, *supra* at 114, the federal government charged F. Scott Yeager with 6 "fraud counts" and hundreds of "insider trading counts." After a 13-week trial and 4 days of deliberations, the jury "acquitted [Yeager] on the fraud counts but failed

to reach a verdict on the insider trading counts. *Id.* at 115. The district court declared a mistrial on the hung counts. *Id.*

Subsequently, the federal government indicted Yeager, recharging him "with some, but not all, of the insider trading counts on which the jury had previously hung." *Yeager*, *supra* at 115. Yeager moved to dismiss the indictment "on the ground that the acquittals on the fraud counts precluded the Government from retrying him on the insider trading counts." *Id.* Yeager argued that "the jury acquittals had necessarily decided that he did not possess material, nonpublic information." *Id.* According to Yeager, "because reprosecution for insider trading would require the Government to prove that critical fact, the issue-preclusion component of the Double Jeopardy Clause barred a second trial of that issue and mandated dismissal of all of the insider trading counts. *Id.* In the end, the United States Supreme Court held that the jury's inability to reach a verdict on the insider-trading counts was a nonevent for purposes of determining whether the acquittal on the fraud counts were entitled to issue-preclusive effect under the Double Jeopardy Clause. *Id.* at 122-123.

As the defendant concedes in his brief on appeal, however, the case at bar is "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." Notably, the *Yeager* Count discussed this notable distinction throughout its opinion, observing at one point that "[t]o

identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide." *Yeager, supra* at 122. Later in the opinion, the Court discussed the *Yeager* case's relationship with its decision 25 years earlier in *Powell*:

> Arguing that a jury that acquits on some counts while inexplicably hanging on others is not rational, the Government contends that issue preclusion is as inappropriate in this case at it was in Powell. There are two serious flaws in this line of reasoning. First, it takes Powell's treatment of inconsistent *verdicts* and imports it into an entirely different context involving both *verdicts* and *hung counts*. But the situations are quite dissimilar. In Powell, respect for the jury's verdict counseled giving each verdict full effect, however inconsistent. As we explained, the jury's verdict 'brings to the criminal process, in addition to the collective judgment on the community, an element of needed finality. Id. at 67, 105 SCt 471. By comparison, hung counts have never been accorded respect as a matter of law or history, are not similar to jury verdicts in any relevant sense. By equating them, the Government's argument fails . . . *Id.* at 124-125.

In this way, the *Yeager* opinion's distinction between verdicts and hung counts wholly supports the Court of Appeals' ruling in the case at bar. As in *Powell*, we are faced with jury verdicts that, on their face, logically inconsistent and this Court should "refuse[] to impugn the legitimacy of either verdict" by invoking collateral estoppel to preclude the prosecution from retrying the defendant for First-Degree Felony Murder. *Yeager, supra* at 125.

Finally, the defendant cites *Turner v. Arkansas*, 407 US 366; 92 SCt 2096; 32 LEd2d 798 (1972), in support of his position. In *Turner*,

supra at 366, state prosecutors charged Dennis Turner with felony murder arising out of the robbery and murder of a man after he left a late-night poker game. A jury acquitted Turner on this charge. *Id.* at 367. Later that year, a grand jury indicted Turner for robbery arising out of the same incident. *Id.* The United States Supreme Court, reversing the Arkansas state courts, held that *Ashe* "squarely controlled" the case and that collateral estoppel "negate[d] the possibility of a constitutionally valid conviction for the robbery." *Id.* at 369-370. Like *Ashe*, however, *Turner* does not involve an "inconsistent verdict" case scenario like the case at bar. As Former Michigan Supreme Court Justice Riley noted in *Garcia, supra* at 459, "*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." Here, however, the jury found the defendant guilty of First-Degree Felony Murder with First-Degree Home Invasion as the predicate felony and not guilty of First-Degree Home Invasion. The jury's inconsistent verdicts nullify the applicability of the principles of collateral estoppel because no evidence exists to show that the jury conclusively determined this issue in his favor at this first trial.

Perhaps the most factually similar case was decided by the Court of Appeals is *People v. Curtis*, 1998 WL 1989824. In *Curtis, supra* at 1, a jury convicted the defendant of First-Degree Felony Murder and Armed Robbery, among other charges. The jury acquitted the defendant of

First-Degree Premeditated Murder and, on the verdict form, the lesser offense of Second-Degree Murder. *Id.* This Court reversed the defendant's convictions and remanded for retrial. *Id.* Before retrial, the defendant argued that "[t]he acquittal on charges of both premeditated and second-degree murder dictates the conclusion that the jury also found him not guilty of felony murder." *Id.* This Court rejected that argument, observing that there was numerous "plausible explanation[s]" for the verdict. *Id.* at 2. Distinguishing *Ashe*, the *Curtis* Court concluded that it could not "unequivocally determine that the jury acquitted defendant of second-degree murder" and that "the doctrine of collateral estoppel does not preclude a second trial." *Id.* The same reasoning applies to instant case—collateral estoppel principles do not bar the prosecution from retrying the defendant for First-Degree Felony Murder.

RELIEF REQUESTED

The prosecution respectfully requests that this Honorable Court **AFFIRM** the Court of Appeals' decision **REVERSING** the trial court's ruling that the state and federal prohibition against double jeopardy barred the defendant's retrial for First-Degree Felony Murder and **REMAND** this case back for trial on the charge of First-Degree Felony Murder.

Respectfully submitted,

Eric J. Smith P46186
Prosecuting Attorney
Macomb County, Michigan
By:

Joshua D. Abbott

Joshua D. Abbott P53528
Chief Appellate Attorney

DATED: September 9, 2013