

STATE OF MICHIGAN  
IN THE SUPREME COURT

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,

v

No.

TRESHAUN TERRANCE,  
Defendant-Appellee.

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Court of Appeals No. 343154

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PLAINTIFF-APPELLANT'S  
APPLICATION FOR LEAVE TO APPEAL

KYM WORTHY  
Prosecuting Attorney  
County of Wayne

JASON W. WILLIAMS  
Chief of Research, Training,  
and Appeals

**DAVID A. McCREEDY (P56540)**  
Principal Attorney, Appeals  
1441 St. Antoine, 11<sup>th</sup> Floor  
Detroit, Michigan 48226  
(313) 224-3836

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### STATEMENT OF JURISDICTION

On June 20, 2017, defendant-appellee was bound over on one count of torture. On September 29, 2017, the circuit court denied defendant's motion to quash. On March 14, 2018, the trial court denied defendant's motion to dismiss. The Court of Appeals granted defendant's interlocutory application for leave to appeal, and on March 5, 2019, the Court of Appeals reversed the circuit court and remanded for dismissal of the charge. This court has jurisdiction to grant the People's application for leave to appeal by virtue of MCR 7.303(B)(1). This application is timely because it is being filed within 56 days after the Court of Appeals' opinion. MCR 7.305(C)(2)(b).

**STATEMENT OF QUESTION PRESENTED**

**I.**

**Double jeopardy only bars retrial on charges that were *necessarily* decided in the defendant's favor by an earlier jury. The prior acquittal of murder could rationally have been based on a finding that defendant intended to cut off Dalona's air supply but not to kill her; that is, to torture her but not murder her. Because the torture charge was not necessarily rejected by defendant's first jury, is a retrial barred on that count?**

The trial court answered, "No."

The Court of Appeals majority answered, "Yes."

The People answer, "No."

Defendant answers, "Yes."

## STATEMENT OF FACTS

Defendant smothered his live-in girlfriend to death, a fact which he admitted under oath in pleading guilty to second-degree murder in the predecessor to this case. 9.12.2016 at 7-8. But that conviction had to be vacated because, in an earlier mistrial, while the jury could not reach a verdict on felony murder, it acquitted him of both premeditated murder and second-degree murder. 5.20.2016 at 8, 12, 15. The US Supreme Court decision in *Yeager v US*, 557 US 110 (2009), barred defendant's conviction for second-degree murder as a lesser of felony murder because the jury acquitted on premeditated murder and its lesser included, second-degree murder. Because of *Yeager*, defendant will never be held criminally accountable for the murder that he admitted, under oath, that he committed.

Because of that, the People proceeded on the underlying felony of torture, without the murder counts, although the evidence was the same: defendant admitted that his girlfriend, Delona Tillman, died in his presence, claiming that she had been fatally beaten by some other women. 5.12.16 at 208, 212-13; 5.17.16 at 25. But the medical examiner discovered that although Ms. Tillman had been savagely beaten, with head-to-toe contusions and more than 70 abrasions over her body, she died of asphyxiation. 5.16.16 at 13-14, 16-17, 21-25, 32, 48. By his own admission, defendant was the only person who could have smothered her to death. 5.18.16 at 24-25, 31.

Defendant again moved in the trial court to dismiss, claiming that the torture prosecution was vindictive, and that it was also barred on jeopardy grounds. The Court of Appeals granted defendant's interlocutory application for leave to appeal on May 17, 2018, and ruled in his favor on the jeopardy issue on March 5, 2019. Judge Gadola dissented. This application for leave to appeal ensues.

## ARGUMENT

### I.

**Double jeopardy only bars retrial on charges that were *necessarily* decided in the defendant's favor by an earlier jury. The prior acquittal of murder could rationally have been based on a finding that defendant intended to cut off Dalona's air supply but not to kill her; that is, to torture her but not murder her. Because the torture charge was not necessarily rejected by defendant's first jury, a retrial is not barred on that count.**

#### **Standard of Review:**

Constitutional rulings are reviewed de novo. *People v Hickman*, 470 Mich 602, 605 (2004).

#### **Discussion:**

There is a rational explanation for how defendant could be not guilty of killing Dalona Tillman, but still guilty of torturing her: in the process of punishing her or terrorizing her by cutting off her air supply, he unintentionally killed her. Because defendant's jury could have—consistent with the evidence at trial—acquitted defendant of murder on that basis, the jury did not *necessarily* find that he was not the perpetrator of the assaults on Delona. As such, the double jeopardy clause does not bar defendant's prosecution on the torture charge. Additionally, the former verdict does not preclude the People from proving that defendant tortured Dalona, not by smothering her, but by inflicting dozens of nonfatal wounds on her—more than could be counted. Thus it is not true, as defendant and the Court of Appeals majority claim, that the jury necessarily decided that Mr. Terrance was not the perpetrator of the violent acts against Ms. Tillman. Because of that, the torture charge is proper and must be reinstated.

*Ashe v Swenson*, 397 US 436 (1970), makes clear that collateral estoppel only bars charges that were “necessarily” decided in an earlier trial. That is, double jeopardy bars a criminal prosecution after a not-guilty verdict in a first trial *only* if no rational jury “could have grounded its

verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” *Id.* at 446. The Supreme Court has subsequently elaborated that a “determination ranks as necessary or essential only when the final outcome hinges on it.” *Bobby v Bies*, 556 US 825, 835, 129 S Ct 2145 (2009). Correspondingly, if there is *any* rational explanation for the not-guilty verdict consistent with guilt in the second case, the prosecution may proceed.

Here, by rejecting second-degree murder, defendant’s jury did not *necessarily* find that he did not kill Dalona: involuntary manslaughter was not part of the jury’s deliberation. In other words, while the jurors agreed that the prosecution had not proved one of the three intents required for murder, they were not asked to decide whether defendant’s actions—beating and suffocating Dalona—may have risen only to the level of gross negligence. See *People v Maghzal*, 170 Mich App 340 (1988) (defendant’s grossly negligent actions causing death met requirements for common-law involuntary manslaughter). That is, the evidence is consistent with the view that defendant tortured Dalona, but without malice aforethought (the intent to kill, do great bodily harm, or act in wanton and wilful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm). See *People v Lewis*, 168 Mich App 255 (1988) (three different theories of malice). Thus the not-guilty verdict on second-degree murder could rationally have been based on a lack of proof of intent, rather than a lack of proof of the identity of the perpetrator. As such, defendant can be prosecuted in the present case, and Judge Cox did not err in so holding.<sup>1</sup>

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<sup>1</sup>The Court of Appeals majority actually held as a matter of law that, because suffocating someone takes 90 seconds to three minutes, it would be impossible to mistakenly kill someone in this manner. The flaws in this analysis should be self-evident: a perpetrator may not be a medical expert and know how long is too long; he may want the victim to lose consciousness but not die; in a struggle he may lose track of time, et cetera.

More specifically, the evidence showed that Dalona had innumerable bruises, literally from head to toe, but none of the injuries were fatal. And, according to the medical examiner, some of the wounds were older than others: Dalona had not been injured in a fight, but rather abused over time. From this, it is reasonable to infer that defendant repeatedly injured his victim to demonstrate his control over her, but with no intent to kill her. It is not difficult to see how someone with this mentality might also use his hand to cover his victim's mouth and cut off her breath; perhaps to silence her, perhaps to remind her that he held the power of life or death over her, perhaps both. In this regard, the evidence in this case is perfectly compatible with a finding that defendant used this torture tactic on December 15, 2015, except he did it for too long. As trial counsel noted in his closing, defendant then frantically called 911, did chest compressions to try to revive Dalona, and rode with EMS to the hospital. 5.18.16 at 58-59. Given all this, his jury could rationally have rejected the prosecution's claim that he intended for Dalona to die, and decided instead that he acted only with gross negligence rather than a depraved heart or an intent to do great bodily harm. To quote the Court of Appeals majority: "If there was evidence or argument at the first trial from which the jury could have concluded, even by inference, that defendant was guilty of torture despite the fact the he did not commit the murder," then the torture prosecution could proceed. Defendant's jury *could have* reasonably decided that he was guilty of torture but did not commit the murder. The majority's own words belie its analysis.

Granted, as the Court of Appeals majority also pointed out, this theory of the case is not consistent with either party's arguments at trial; but that is irrelevant. The test, again, is whether any rational view of the evidence could support the finding that defendant intended to torture but not kill Dalona on the day she died, not whether either of the parties at trial advanced that view. Michigan law is clear that a jury may render a verdict that is *consistent with the evidence* while at the same

time being *at odds with the parties' theories* of the case. Of course, since criminal juries can render totally inconsistent verdicts (see *People v Vaughn*, 409 Mich 463, 466 (1980)), appellate courts normally attempt to reconcile facially inconsistent verdicts only in civil cases. But the principle is the same either way: a jury is “free to accept or to reject the plaintiff’s or the defendant’s interpretation of the evidence.” *Granger v Fruehauf Corp*, 429 Mich 1, 9 (1987). Here, there is nothing necessarily inconsistent with the finding that defendant intended to commit torture but not murder. That alone is enough to reverse the Court of Appeals and send this case back for trial.

The Court of Appeals majority also rejected the People’s argument on appeal because the prosecutor did not ask for involuntary manslaughter as a lesser included charge, and so supposedly the People are now are barred from going forward on that theory, and because it is “speculation” to try to reconcile the not-guilty murder verdict with defendant’s intent to torture. Notably, the majority below cited not a single authority for either proposition. As for the failure to request involuntary manslaughter, the People are not prosecuting defendant for that crime. Similarly, as to the attempt to reconcile the verdict, the law allows a retrial in every case except where the former verdict necessarily forecloses the subsequent prosecution. In other words, the majority below can call it whatever they want, but double jeopardy jurisprudence requires that the defendant demonstrate zero possibility that the former verdict and the present charge can be reconciled. Because the People have articulated such a possibility, consistent with the evidence, there is no bar to the present proceeding.

A recent Sixth Circuit US Court of Appeals case illustrates the point. In *Wade v Timmerman-Cooper*, 785 F3d 1059 (2015), Wade’s jury convicted him of rape and kidnaping, but acquitted him of using a gun during the crimes. The convictions were overturned on appeal, and of course the acquittal on the gun charges prohibited retrial on those counts. Nevertheless, the Sixth Circuit agreed that jeopardy did not bar the prosecution from advancing a theory at the retrial that the defendant

had used a gun to perpetrate the rape and kidnaping, because the initial acquittal on the firearms charges was not *necessarily* inconsistent with the prosecutor's theory at the retrial. In other words, "a rational jury *could have* grounded its verdict upon an issue other than that which the defendant [sought] to foreclose from consideration" because the fact of defendant's gun use was not "necessarily determined in the first trial." *Id.* at 1069 (emphasis added, citations omitted).

Such was not the case in *Ashe*, where no rational view of the evidence left open the possibility that the defendant could have robbed the second of six poker players, when a jury had already determined that reasonable doubt existed whether he was one of the robbers in the first place. In other words, defendant either robbed all six players, or he robbed none. 397 US at 437-40. Here, nothing the jury decided has foreclosed the possibility that defendant smothered Delona without intending to kill her.

Because the not-guilty verdict in the first trial left open the possibility that defendant negligently caused Dalona's death, double jeopardy does not prevent the prosecution from going forward here under the theory that defendant did, in fact, both torture and kill Ms. Tillman. Additionally, the initial not-guilty verdict also leaves open a torture prosecution based on the theory that defendant beat Dalona but did not smother her. The medical examiner testified to two important facts. One, Dalona Tillman was beaten over her entire body, from head to toe, but she died from someone holding something over her mouth and nose and suffocating her, not from any internal injuries. 5.16.16 at 32-34. Thus, defendant could have tortured her by beating her, even if he wasn't the one who suffocated her. Two, some of Dalona's injuries were more than a day old. *Id.* at 25, 27. Thus, even if someone else beat and suffocated her on December 15, there was still evidence that defendant perpetrated earlier abuse, again consistent with a theory that he tortured Ms. Tillman but did not kill her. The Court of Appeals left open this last theory, but then prohibited the prosecution

from mentioning the fact that she died from being suffocated shortly thereafter. The People should be entitled to try defendant on the torture count, on the theory that the abuse was ongoing and led to her eventual death.

In any event, there is no constitutional bar to this prosecution, and the court should allow the case to proceed to trial.

**RELIEF**

THEREFORE, the People request this Honorable Court either grant leave to appeal or peremptorily reverse the Court of Appeals and remand for trial.

Respectfully submitted,

KYM WORTHY  
Prosecuting Attorney  
County of Wayne

JASON W. WILLIAMS  
Chief of Research, Training,  
and Appeals

*/s/ David A. McCreedy*

**DAVID A. McCREEDY (P56540)**  
Principal Attorney, Appeals  
1441 St. Antoine, 11<sup>th</sup> Floor  
Detroit, Michigan 48226  
(313) 224-3836

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