

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant/Cross-Appellee

Supreme Court No. 159516

-vs-

Court of Appeals No. 343154

TRESHAUN LEE TERRANCE

Circuit Court No. 17-005253-01 FC

Defendant-Appellee/Cross-Appellant.

WAYNE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

STATE APPELLATE DEFENDER OFFICE

Attorney for Defendant-Appellant

DEFENDANT'S

ANSWER IN OPPOSITION
TO PROSECUTOR'S APPLICATION FOR LEAVE TO APPEAL

AND

APPLICATION FOR CROSS-APPEAL

STATE APPELLATE DEFENDER OFFICE

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**Statement of Jurisdiction/
Judgment Appealed from and Relief Sought**

Mr. Terrance does not contest that this Honorable Court has jurisdiction over the prosecutor's application for leave to appeal from the Court of Appeals' March 5, 2019 opinion (Appendix A). Likewise, this Court has jurisdiction over Mr. Terrance's application for cross-appeal as to Issue II, filed within 28 days of service of the prosecutor's application filed and served on April 30, 2019. MCR 7.307.

This Court should deny the prosecution's application for leave to appeal. The prosecutor has not established grounds for this Court to grant leave to appeal or take any other action but to deny leave. MCR 7.305(B). If this Court were to grant leave to appeal or oral argument on the prosecutor's application, Mr. Terrance asks this Court to also grant his application for cross-appeal or oral argument on whether the torture charge constitutes an impermissible exercise of prosecutorial vindictiveness. *Id.*

Statement of Questions Presented

- I. Should this Court deny the prosecutor's application for leave to appeal where *Yeager v United States*, 557 US 110 (2009), is settled U.S. Supreme Court precedent and the prosecutor has not shown that the Court of Appeals clearly erred in applying it? MCR 7.305(B). Does the torture charge against Mr. Terrance violate the issue preclusion component of the Double Jeopardy clause?

Court of Appeals answers, "Yes".

Defendant answers, "Yes".

- II. If this Court grants leave to appeal or oral argument on the prosecutor's application, then should it do the same for Mr. Terrance's application for cross-appeal? Is the torture charge levied in the instant case against Mr. Terrance after his success in his previous appeal an impermissible exercise of prosecutorial vindictiveness? Does the newly filed charge carries at least a presumption of prosecutorial vindictiveness, and should it have been dismissed with prejudice as a due process violation?

Court of Appeals answers, "No".

Defendant answers, "Yes".

Introduction and Summary of the Argument

The prosecution of Treshaun Terrance, seventeen years old at the time of the alleged offenses, is before this Honorable Court for a second time. In the prior appeal, Mr. Terrance successfully moved to vacate his second-degree murder plea conviction and dismiss the first-degree felony murder charge, because a jury had previously acquitted him of second-degree murder as a lesser included offense of first-degree premeditated murder.¹ The prosecution conceded error in the circuit court pursuant to *Yeager v United States*, 557 US 110 (2009), but appealed through the United States Supreme Court seeking to have that court revisit and reverse the rule of *Yeager*.²

In a new file number, the prosecution charged Mr. Terrance with torture, the underlying enumerated felony for the dismissed felony murder charge. Mr. Terrance moved to dismiss the torture charge on two grounds: as a Double Jeopardy violation pursuant to *Yeager* and as a vindictive prosecution. The circuit court denied the motion, but the Court of Appeals reversed that order on Double Jeopardy grounds though it did not find the prosecution was vindictive. (COA opinion, 3/5/19, Appendix A). The Court of Appeals determined that the torture charge again violated *Yeager*'s issue preclusion component of Double Jeopardy "after a jury necessarily decided in a prior trial that [Mr. Terrance] did not commit the assault against [decedent Dalona Tillman] culminating in her death." (Appendix A – 3/5/19 COA Opinion, p. 1).

¹ Felony murder is second-degree murder committed during the commission or attempted commission of an enumerated felony. *People v Aaron*, 409 Mich 672, 725 (1980).

² *People v Treshaun Terrance*, Wayne Circuit No. 16-1235; COA No. 338938; 501 Mich 911 (2017)(No. 156394); cert den ___ US ___; 138 S Ct 1334; 200 L Ed 2d 515 (2018).

This Court should deny the prosecution's application for leave to appeal. The Court of Appeals' opinion involves another application of *Yeager v United States*, 557 US 110 (2009) to the evidence introduced and arguments made at the trial in the prior file number.³ The Double Jeopardy issue here does not involve a legal principle of major significance to this state's jurisprudence as this Court has no authority to alter the test of *Yeager* and the United States Supreme Court has already turned down the prosecutor's request that it revisit and reverse the rule of *Yeager*. Further, the Court of Appeals properly applied the well-established federal Double Jeopardy jurisprudence to the facts of this case. The prosecutor's theory at trial is relevant to the Double Jeopardy inquiry. The prosecutor has not established grounds for this Court to grant leave to appeal or take any other action but to deny leave. MCR 7.305(B).

If this Court were to grant leave to appeal or oral argument on the prosecutor's application, Mr. Terrance asks this Court to also grant his application for cross-appeal or oral argument on whether the torture charge constitutes an impermissible exercise of prosecutorial vindictiveness. *Blackledge v Perry*, 417 US 21 (1974); *Bordenkircher v Hayes*, 434 US 357, 364 (1978). The record shows that the prosecutor would not have brought the torture charge except to punish Mr. Terrance for his successful prior appeal of his second-degree murder conviction, and that she was upset about that appeal. Because of various aspects of Michigan law, a torture

³ *People v Treshaun Terrance*, Wayne Circuit No. 16-1235; COA No. 338938; 501 Mich 911 (2017)(No. 156394); cert den ___ US ___; 138 S Ct 1334; 200 L Ed 2d 515 (2018).

conviction could expose Mr. Terrance to greater punishment than he faced before his successful prior appeal.

Statement of Facts and Material Proceedings

In May 2016, Treshaun Terrance stood trial before the Honorable Kevin J. Cox. He was charged with first-degree premeditated murder⁴ and first-degree felony murder⁵ predicated on the underlying offense of torture.⁶ The prosecution did not charge him with torture as a separate offense. (Appendix B – Amended Felony Information, 16-1235). The prosecution alleged that Mr. Terrance, then seventeen years old, beat and suffocated his girlfriend, Dalona Tillman, causing her death. (T V, 44-56).⁷ The defense argued that the prosecution had not proven that Mr. Terrance had committed these acts, which he had denied committing when interrogated by the police. *Id.* at 56-70.

At the close of Mr. Terrance’s trial, the jury was instructed on premeditated and felony murder, as well as the lesser-included offense of second-degree murder.⁸ After deliberating for approximately two days, the jury acquitted Mr. Terrance of

⁴ MCL 750.316.

⁵ MCL 750.316.

⁶ MCL 750.85.

⁷ The trial transcripts in file no. 16-1235 were filed in the instant appeal with Mr. Terrance’s interlocutory application for leave to appeal in the Court of Appeals. The May 2016 trial will be cited by volume number, then page number.

⁸ MCL 750.317.

first-degree premeditated murder and also the lesser-included second-degree murder charge, as evidenced by the Verdict Form. VII 12, Appendix C – Verdict Form, 16-1235. The jury indicated that it could not reach a verdict on first-degree felony murder. V 8.

On September 12, 2016, the prosecution filed a second amended information, this time charging Mr. Terrance only with first-degree felony murder. (Appendix D – Second Amended Information, 16-1235). That same day Mr. Terrance pled guilty to a reduced count of second-degree murder. P 4, 8.⁹ In exchange, Mr. Terrance received a sentence agreement of 28-45 years in prison. P 3-4.

Mr. Terrance moved to vacate the second-degree murder conviction and dismiss the first-degree felony murder charge as being in violation of the state and federal prohibitions on Double Jeopardy and, alternatively, for ineffective assistance of counsel where his counsel failed to move for dismissal of the felony murder count and instead had him plead guilty to a crime of which he had been acquitted.¹⁰ (Defendant’s Motion to Vacate Convictions and Dismiss Charges, 16-1235).¹¹ The prosecution conceded that the circuit court must grant the motion under binding

⁹ Mr. Terrance’s September 12, 2016 plea will be cited by P, then page number.

¹⁰ Mr. Terrance was represented by the State Appellate Defender Office (SADO) on this motion and the People’s appeal from the circuit court order granting it.

¹¹ This was the subject of the People’s prior appeal. *People v Terrance*, unpublished order of the Court of Appeals, entered August 24, 2017 (Docket No. 338938), granting Defendant’s motion for affirmance; 501 Mich 911 (2017), leave to appeal denied; cert den ___ US ___; 138 S Ct 1334; 200 L Ed 2d 515 (2018).

precedent from the U.S. Supreme Court. MH 5/19/17, 4.¹² The prosecution indicated his intent to appeal all the way to the U.S. Supreme Court to ask that court to overturn its existing precedent. MH 5/19/17, 4. Judge Cox granted the motion. (Appendix E – 5/19/17 Trial Court Order Granting Motion to Vacate/Dismiss, 16-1235).

While conceding that Michigan’s appellate courts were bound by that same U.S. Supreme Court precedent, the prosecution appealed the circuit court’s order. The Court of Appeals granted Mr. Terrance’s motion to affirm the circuit court’s order (Appendix F – 8/24/17 Court of Appeals Order, 338938). This Court denied leave to appeal, and later the U.S. Supreme Court denied certiorari. *People v Terrance*, 501 Mich 911 (2017), cert den ___ US ___; 138 S Ct 1334; 200 L Ed 2d 515 (2018).

Meanwhile, in the instant case number, 17-5253, the prosecution filed a charge of torture against Mr. Terrance, stemming from the same incident that was the subject of the previous case. On October 12, 2017, Mr. Terrance filed a motion to dismiss the charge against him, on the bases of (1) prosecutorial vindictiveness and (2) double jeopardy. On March 12, 2018, Judge Cox denied the motion. MH 3/12/18, 11; Appendix G – 3/12/18 TC order denying motion to dismiss.¹³ The court did not issue a written opinion. The court found that Mr. Terrance had not shown “by a preponderance of the evidence” that the prosecution charging him with torture “satisfie[d] the burden of showing prosecutorial vindictiveness.” MH 3/12/18, 8. With

¹² This post-conviction motion hearing from the prior case number will be cited by MH 5/19/17, then page number.

¹³ The hearing on the motion to dismiss in the instant case number will be cited by MH 3/12/18, then page number.

respect to double jeopardy, the court held that Mr. Terrance “did not meet [his] burden” and prove that “no rational jury could have grounded its verdict upon an issue other than that which [he sought] to foreclose from consideration” because at trial, “the jury made no findings about any of the elements to the . . . torture charge.” MH, 3/12/18, 11.

On March 14, 2018, the trial court denied a stay of the proceedings. However, the court adjourned trial until May 21, 2018, and re-appointed SADO for purposes of an interlocutory appeal.

The Court of Appeals granted Mr. Terrance’s interlocutory application for leave to appeal and stayed further proceedings in the trial court. Following briefing and oral argument, on March 5, 2019, in a 2-1 decision, the Court of Appeals issued an opinion reversing the trial court’s order denying the motion to dismiss. (Appendix A - 3/5/19 COA Opinion).

In sum, the record establishes that the prosecution asked the jury to find that defendant was the perpetrator of the assaultive acts against Tillman on the day of her death. The record at trial provides no basis to conclude that a rational juror could have decided that defendant did not suffocate the victim but did commit the beating immediately preceding that act. As the prosecution argued, the ultimate issue of fact in the first trial was whether defendant was the one who perpetrated the entire assault, i.e., whether defendant “did it.” The jury’s decision to acquit defendant of murder in light of the record evidence cannot support a conclusion that defendant committed the assault culminating in that murder. Accordingly, the prosecution is barred by issue preclusion from relitigating that issue in a second trial. (Appendix A - 3/5/19 COA Opinion, 5).

On the second issue raised in the Mr. Terrance's appeal, prosecutorial vindictiveness, the Court of Appeals held that the trial court had correctly denied relief on that claim. (Appendix A – 3/5/19 COA opinion, p 6). The court explained:

We decline to hold that a presumption of vindictiveness arises when the prosecution charges the defendant with an equivalent or lower offense after exercising a legal right. When the prosecution brings a more severe charge, this indicates a high likelihood that the new charge was intended to punish the defendant for asserting his rights and to discourage assertion of those rights. However, when the new charge carries the same or lesser punishment as the original charge, it is difficult to see how this punishes a criminal defendant for exercising a legal right or deters future defendants from asserting that right. Absent some additional proof of vindictiveness, we see no basis for concluding that a new charge that does not carry the possibility of greater punishment is a vindictive prosecution. (Appendix A – COA opinion, p 6).

The prosecutor now asks this Honorable Court to grant leave to appeal or to peremptorily reverse the Court of Appeals' decision on the Double Jeopardy claim. But the prosecutor has not established grounds for this Court to grant leave to appeal or take any other action but to deny leave. MCR 7.305(B). If this Court were to grant leave to appeal or oral argument on the prosecutor's application, Mr. Terrance asks this Court to also grant his application for cross-appeal or oral argument on whether the torture charge constitutes an impermissible exercise of prosecutorial vindictiveness.

- I. **This Court should deny the prosecutor’s application for leave to appeal where *Yeager v United States*, 557 US 110 (2009), is settled U.S. Supreme Court precedent and the prosecutor has not shown that the Court of Appeals clearly erred in applying it. MCR 7.305(B). The torture charge against Mr. Terrance violates the issue preclusion component of the Double Jeopardy clause.**

Standard of Review

The prosecutor correctly states that issues of constitutional law, including claims of Double Jeopardy, are reviewed de novo on appeal. *People v Miller*, 498 Mich 13, 17-18 (2015).

Argument

The Court of Appeals correctly held that the torture charge against Mr. Terrance should be dismissed with prejudice, because it violates the issue preclusion component of the Double Jeopardy Clause. US Amend V, XIV.¹⁴ The principles underlying issue preclusion are well-settled by U.S. Supreme Court jurisprudence. *Yeager v United States*, 557 US 110 (2009); *Ashe v Swenson*, 397 US 436 (1970). Therefore, this Court should deny leave to appeal.

In criminal prosecutions, the issue preclusion component of Double Jeopardy means 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.” *Yeager, supra* at 119; see also *People v Wilson*, 496 Mich 91, 99 (2014), abrogated on other grounds *Bravo-Fernandez v United States*, __ US __; 137 S Ct 352; 196 L Ed 2d 242 (2016). This Court has no authority to alter the test of *Yeager* and

¹⁴ See also 1963, art 1 § 15.

the United States Supreme Court has already turned down this prosecutor's request in its prior appeal that it revisit and reverse the rule of *Yeager*, so now the prosecutor argues that the Court of Appeals has misapplied the *Yeager* test to the newly filed charge of torture. *People v Treshaun Terrance*, 501 Mich 911 (2017)(No. 156394); cert den ___ US ___; 138 S Ct 1334; 200 L Ed 2d 515 (2018). But the Court of Appeals' majority faithfully applied *Yeager* and *Ashe*.

In determining whether an issue of ultimate fact has been necessarily decided, a reviewing court may not consider or draw any inferences from the fact that a jury was unable to reach a verdict on any count during the first trial. *Id.* at 122-123.

To determine what a jury necessarily determined in the first trial, a court must "examine the record of a prior proceeding *taking into account the pleadings, evidence, charge, and other relevant matter*, 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. *Ashe, supra* at 443 (citations omitted)(emphasis added). "A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence *and arguments presented to it.*" *Yeager, supra* at 122 (Emphasis added.)

In *Yeager*, the jury acquitted the defendant of the fraud offenses, yet failed to reach a verdict on the insider-trading charges. The U.S. Supreme Court held that retrial on the insider-trading charges was barred by the Double Jeopardy Clause, because the acquittal on the fraud charges represented a jury determination that the defendant did not have any insider information. When a jury acquits on one count

while failing to reach a verdict on another count concerning the same issue of ultimate fact, the preclusive effect of the acquittal prevents the government from re-trying the defendant on the hung count. *Yeager, supra*.

Mr. Terrance's trial was a question of identification.¹⁵ The prosecution alleged that it was Mr. Terrance who beat and suffocated Ms. Tillman, causing her death. (T V (5/18/16), 44-56). The defense argued that the prosecution had not proven that Mr. Terrance had committed these acts, which he had denied committing when interrogated by the police. *Id.* at 56-70. As the Court of Appeals' majority noted: "The question, therefore, as presented by both sides, was whether [Mr. Terrance] was [Ms. Tillman]'s assailant on December 15, 2015; neither side suggested that [Mr. Terrance] committed only the murder or only the beating." (Appendix A - 3/5/19 Court of Appeals' Opinion, p. 4). The prosecutor told the jury as much during its closing argument stating: "**I submit to you that the only issue you may have, in your mind, at the, at this moment, the only element you will have to deliberate when you go back into that room, is whether or not you think the defendant did it**" V 49 (emphasis added). The jury's acquittal of Mr. Terrance, given the evidence at trial and the arguments of the parties, means that they necessarily decided that Mr. Terrance was not the perpetrator of the violent acts against Ms. Tillman.

¹⁵ An essential element of every criminal offense is identity, i.e. that the defendant is the one who committed the charged offenses. *People v Oliphant*, 399 Mich 472, 489 (1976); *People v Yost*, 278 Mich App 341, 356 (2008).

The prosecution has raised a new theory of the case for the first time on appeal: that Mr. Terrance could be not guilty of killing Ms. Tillman, but still guilty of torturing her, by unintentionally killing her “in the process” of torturing her. Therefore, the prosecutor argues that Mr. Terrance’s acquittals on first and second-degree murder do not preclude the possibility that a jury could convict Mr. Terrance of torture. This is a misapplication of issue preclusion jurisprudence. The Court of Appeals correctly held, pursuant to *Yeager*, supra, that:

following his acquittals, [Mr. Terrance] may only be charged with torture *in a second trial* if there was evidence or argument at the first trial from which the jury could have concluded, even by inference, that [Mr. Terrance] was guilty of torture despite the fact that he did not commit the murder. In this case, there was none.
(Appendix A, p. 4 (emphasis included)).

The Court of Appeals was correct to conclude that both parties at trial treated the beating and asphyxiation of Ms. Tillman as a “single attack” - that her death was the final act of an assault – and that the entire trial hinged on identifying the perpetrator of these acts. Therefore, “[t]he record at trial provides no basis to conclude that a rational juror could have decided that [Mr. Terrance] did not suffocate [Ms. Tillman] but did commit the beating immediately preceding that act.” (Appendix A, p. 5).

It does not matter whether the prosecution now wants to or could argue, based on the evidence, that Mr. Terrance could not be guilty of killing Ms. Tillman, but could still be guilty of torture. Nor does it matter that involuntary manslaughter was not part of the jury’s deliberation, and that the jury was not asked to decide whether Mr. Terrance’s alleged actions constituted “gross negligence.” The Court of Appeals

correctly stated that “[t]his view ignores the fact that we must determine the question of issue preclusion based on the record of the first trial, not what might be done differently at a second trial.” (Appendix A, p. 6).

Based on the way the trial was conducted, the jury’s acquittal necessarily represents a factual finding that Mr. Terrance is not the individual who committed the acts that the prosecution alleged constituted murder and torture. Neither the prosecution nor defense proposed a theory which separated the act of torture from the act of murder, or alleged that the acts constituting torture only rose to the level of involuntary manslaughter.

To allow the prosecution to retry Mr. Terrance based on a new argument, which it strategically chose to forego in the first trial resulting in an acquittal, would disregard the “vitally important interest[]” in preserving “the finality of judgments.” *Yeager*, 557 US at 117-118. Moreover, it would allow the prosecution to use their decision not to charge Mr. Terrance at the outset with torture as an “appellate parachute.” See *People v Carter*, 462 Mich 206, 214 (2000) (“Counsel may not harbor error as an appellate parachute.”).

To ignore the parties’ theories of the case and arguments at the first trial that resulted in acquittal as the prosecutor asks would be to ignore the test as articulated by the U.S. Supreme Court. *Ashe, supra* at 443 (“examine the record of a prior proceeding *taking into account the pleadings, evidence, charge, and other relevant matter*)(emphasis added); *Yeager, supra* at 122 (“A jury’s verdict of acquittal represents the community’s collective judgment regarding all the evidence *and*

arguments presented to it.”(Emphasis added.)

This Court should deny leave to appeal.

- II. If this Court grants leave to appeal or oral argument on the prosecutor's application, then it should do the same for Mr. Terrance's application for cross-appeal. The torture charge levied in the instant case against Mr. Terrance after his success in his previous appeal is an impermissible exercise of prosecutorial vindictiveness. The newly filed charge carries at least a presumption of prosecutorial vindictiveness, and it should have been dismissed with prejudice as a due process violation.**

Issue Preservation/Standard of Review

The claim of prosecutorial vindictiveness is preserved where Mr. Terrance raised it in his motion to dismiss and brief in support, which the circuit court denied. Issues of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579 (2002).

Argument

The prosecutor could have charged Mr. Terrance with torture when she charged him with first-degree premeditated murder and first-degree felony murder (predicated on torture) in file no. 16-1235-01. But the prosecutor chose not to do so. By charging Mr. Terrance with torture following the jury's not guilty verdict on the first-degree premeditated murder count and its lesser included charge of second-degree murder and following his successful motion to vacate the second-degree murder plea and dismiss the felony murder charge with prejudice, the prosecutor has engaged in conduct that establishes at least a presumption of prosecutorial vindictiveness. This Court should reverse the circuit court's and the Court of Appeals' decisions in regard to this claim.

A prosecutor has “broad discretion” in deciding whom to prosecute and which charges to bring. *Bragan v Poindexter*, 249 F3d 476, 481 (CA 6, 2001). This discretion, however, “is not unfettered.” *Id.* At a minimum, prosecutorial discretion is restrained by Due Process requirements, which prohibits the prosecution from punishing a defendant for exercising a protected statutory or constitutional right. *United States v Poole*, 407 F3d 767, 774 (CA 6, 2005) (citing *United States v Goodwin*, 457 US 368, 372 (1982)).

The essence of a claim of prosecutorial vindictiveness is that the government may not punish a person for exercising a statutory or constitutional right. As stated in *Bordenkircher v Hayes*, 434 US 357, 364 (1978):

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort [citation omitted], and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently "unconstitutional." 98 S Ct at 668.

Accord, *United States v Goodwin*, 457 US 368 (1982); *Blackledge v Perry*, 417 US 21 (1974); *People v Ryan*, 451 Mich 30, 35-36 (1996).

Here, the Court of Appeals held that the trial court had correctly denied relief on Mr. Terrance’s claim of prosecutorial vindictiveness. (Appendix A – 3/5/19 COA opinion, p 6). The Court of Appeals explained:

We decline to hold that a presumption of vindictiveness arises when the prosecution charges the defendant with an equivalent or lower offense after exercising a legal right. When the prosecution brings a more severe charge, this indicates a high likelihood that the new charge was intended to punish the defendant for asserting his rights and to discourage assertion of those rights. However, when the new

charge carries the same or lesser punishment as the original charge, it is difficult to see how this punishes a criminal defendant for exercising a legal right or deters future defendants from asserting that right. Absent some additional proof of vindictiveness, we see no basis for concluding that a new charge that does not carry the possibility of greater punishment is a vindictive prosecution. (Appendix A – COA opinion, p 6).

The Court of Appeals’ reasoning impermissibly strays from the U.S. Supreme Court’s precedent for prosecutorial vindictiveness.

There are two types of prosecutorial vindictiveness: presumed and actual. *Goodwin, supra* at 380; *Ryan, supra* at 36. Actual vindictiveness will be found when there is objective evidence, such as expressed hostility or threat, that a prosecutor has acted to deliberately penalize a defendant for his exercise of a procedural, statutory or constitutional right. *Goodwin, supra* at 380. In other cases, vindictiveness is presumed in those circumstances where “action detrimental to the defendant has been taken after the exercise of a legal right[.]” *Goodwin, supra* at 373. Presumed vindictiveness requires a “reasonable likelihood” that the prosecution acted vindictively. *Id.*; *Blackledge, supra* at 27. The presumption arises when a defendant who prevails on appeal is then charged with an additional crime based on the same nucleus of operative facts.¹⁶ *Id.*

The Supreme Court in *Goodwin* significantly emphasized *Blackledge’s* protection of defendant’s right to engage in the appellate process, declaring:

¹⁶ In the current matter, the charge of torture carries the same statutory possible penalty as the second-degree murder conviction that Mr. Terrance successfully challenged in his prior appeal, life or any term of years, but Mr. Terrance pled pursuant to a sentence agreement.

There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. **In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.** *United States v Goodwin*, 457 US 368, 381 (1982)(emphasis added)

In the instant case, there is at least a presumption of vindictiveness. The prosecution filed the additional torture charge as a direct result of Mr. Terrance's successful pursuit of his appellate remedies following an unconstitutional plea conviction for second-degree murder entered after a not guilty verdict to the same charge. The prosecution has done so based on the evidence known to it back at the time of trial. The torture charge could easily have been pursued at the trial, which included a felony murder charge predicated on torture; the torture charge arose out of the same nucleus of operative facts and is subsumed within the legal elements of the felony murder count.¹⁷

¹⁷ Since 2008 convictions and sentences for both felony murder and the predicate felony have been allowed to stand together. In *People v Ream*, 481 Mich 223 (2008), this Court held that convictions for both felony murder and the predicate felony did not constitute a Double Jeopardy violation under the multiple punishments strand, overruling its prior precedent of *People v Wilder*, 411 Mich 328 (1981).

An analogous case is *United States v Jenkins*, 504 F 3d 694, 700 (CA 9, 2007). *Jenkins* sequentially begins with the defendant being stopped at the U.S. – Mexico border on October 19th, 2004. An officer found two non-citizens in her trunk and, upon questioning, Jenkins admitted she had been offered \$400 to drive the undocumented immigrants into the country. She was again stopped with two undocumented immigrants on the following day, October 20th. The government did not press charges against Jenkins for either incident.

Three months later, on January 9th Jenkins was again stopped, and this time officers found marijuana in the interior panels of her car. She was given her *Miranda* warnings, and then stated she had been paid \$500 to bring what she thought was an undocumented alien across the border. She referenced the October stops, and stated that she had been paid to smuggle aliens twice before but was apprehended. Officers interviewing Jenkins had information with regard to the October 19th and 20th stops. *Jenkins, supra* at 698.

At her trial, Jenkins took the stand and her testimony commented on the October 19th and 20th stops as she attempted to assert her ignorance defense on the drug importation charge. While the jury was deliberating in the marijuana case, the government filed charges against the defendant for alien smuggling. Jenkins moved to dismiss the smuggling charges on the ground of vindictive prosecution. At the hearing on the defendant's motion, the government's attorney conceded the government could have charged the defendant with alien smuggling prior to her marijuana trial but asserted that it decided to file those charges after the defendant's

testified, because her testimony strengthened its case. The trial court granted the defendant's motion to dismiss, and the court of appeals affirmed. *Id.*

On appeal, the *Jenkins* Court noted that: "To establish a presumption of vindictiveness, [Jenkins] must demonstrate a reasonable likelihood that the government would not have brought the alien smuggling charges had she not elected to testify at her marijuana smuggling trial and presented her theory of the case" (*Jenkins* 504 F.3d 694, 700). In evaluating this test, the Ninth Circuit looked closely at the evidence related to alien smuggling available to the government before Jenkins exercised her right to testify. The government admitted that it had more than enough information to bring the alien smuggling charges against Jenkins prior to her testimony at trial and that they "could have brought charges earlier on". These circumstances led the Court to determine that "at the very least, [there was] a "reasonable or realistic likelihood" that the government's decision to add the new charge was motivated by a retaliatory purpose related to her credible defense on her marijuana importation charges.

It is beyond a reasonable likelihood the torture charge brought against Mr. Terrance was in direct response to his successful appeal. Had Mr. Terrance not pursued his appellate remedies from the second-degree murder plea conviction, the People would not have brought the torture charge that they could have brought at his trial that preceded the plea.

Additionally, this case goes far beyond *Jenkins* regarding evidence available to the prosecution prior to Mr. Terrance exercising his constitutional rights. The elements of torture were actually litigated during the first trial as the predicate felony for the prosecution's felony murder charge. Despite this, a torture charge was never brought individually before or during the jury trial, or in the prosecution's subsequent complaint following the trial. There is no other reasonable explanation as to why the torture charge is being brought now other than as a retaliatory response to Mr. Terrance successfully obtaining appellate relief overturning the guilty plea conviction and dismissing the felony murder charge in vindication of his constitutional rights to be free from double jeopardy.¹⁸

There is some evidence in the record of actual vindictiveness. After the torture charge was brought, the assistant prosecuting attorney who had represented the People during the murder trial, complained intensely about Mr. Terrance's successful appeal stating at a bond hearing in July 2017:

Prosecutor Rubio: ... Then through some very strange, and I say strange because the entire appellate department had never heard of this -- through some strange circumstance, the Court of Appeals basically found sort of a double jeopardy saying that if, in fact, he was acquitted on one of the theories, then he can't plead guilty to the other theory. So for that reason Judge Cox had no choice but to vacate it. Our office is appealing it all the way up to the U.S. Supreme Court. (7/10/17 Bond Motion Hearing, p 7).

¹⁸ Mr. Terrance also raised an alternative claim of ineffective assistance of counsel because his trial counsel failed to move for dismissal of the felony murder count after the jury trial and instead had him plead guilty to a crime of which he had been acquitted. (Defendant's Motion to Vacate Convictions and Dismiss Charges, 16-1235). This alternative claim was not reached as relief was granted on the Double Jeopardy claim.

Moreover, the Court of Appeals' inability to find how the newly brought torture charge in this case punishes Mr. Terrance for exercising a legal right or deters future defendants from asserting that right when the torture charge carries the same or lesser statutory punishment as the original charge is short sighted. (See Appendix A, COA opinion, p 6, quoted above). Because the possible punishment for Michigan's Class A offenses, like torture, is so broad – life or any term of years¹⁹ – the punishment for a conviction of torture could exceed the 28-year to 45-year sentence which Mr. Terrance received under the sentence agreement for his second-degree murder plea conviction. The statutory sentencing guidelines are no longer mandatory, i.e. there is no longer a requirement for a substantial and compelling reason to depart. *People v Lockridge*, 498 Mich 358 (2015). Further, under this Court's current sentencing jurisprudence, the jury's acquittal on the murder charge would not protect Mr. Terrance from having the judge at a sentencing proceeding on a torture conviction make an independent finding of guilty of murder under the lesser preponderance standard used at sentencing and use that against him to increase the punishment. See *People v Dixon-Bey*, 501 Mich 1066 (2018) and *People v Beck*, 501 Mich 1065 (2018). Finally, given that Mr. Terrance was a juvenile at the time of the alleged murder, a sentencing proceeding for a torture conviction would have less restrictions on the judge's sentencing discretion than it would if Mr. Terrance had actually been convicted of first-degree murder. This is because the judge would not

¹⁹ MCL 750.85(1).

be required to consider the *Miller* factors²⁰ when sentencing on a torture conviction and would not be under the sentencing constraints of MCL 769.25(9)²¹.

The prosecutor's pursuit of the torture charge now is a violation of Mr. Terrance's rights to due process. US Const, Am XIV; Const 1963, art 1, § 17. This Court should reverse the circuit court's and the Court of Appeals' decisions in regard to this claim.

²⁰ *Miller v Alabama*, 567 US 460 (2012)(the sentencing court is required to consider the attributes of youth in mitigation as described in the opinion).

²¹ If after consideration of the *Miller* factors, the sentencing judge decides to impose a term of years sentence rather than life then the minimum must be set at between 25 years and 40 years. MCL 769.25(9).

Summary and Request for Relief

WHEREFORE, for the foregoing reasons, **Treshaun Terrance** asks this Honorable Court to deny the prosecution’s application for leave to appeal in regard to the Double Jeopardy claim. If this Court were to grant leave to appeal or oral argument on the prosecutor’s application, Mr. Terrance asks this Court to also grant his application for cross-appeal or oral argument on whether the torture charge constitutes an impermissible exercise of prosecutorial vindictiveness.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Angeles R. Meneses

BY: _____

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Dated: May 28, 2019

APPENDIX A

COA Opinion, 3-5-2019

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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRESHAUN LEE TERRANCE,

Defendant-Appellant.

UNPUBLISHED
March 5, 2019

No. 343154
Wayne Circuit Court
LC No. 17-005253-01-FC

Before: SHAPIRO, P.J., and SERVITTO and GADOLA, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying his motion to dismiss a charge of torture, MCL 750.85. Defendant argues that the charge violates the issue-preclusion component of the Double Jeopardy Clause and constitutes an impermissible exercise of prosecutorial vindictiveness. We agree with the trial court's ruling regarding prosecutorial vindictiveness, but hold that defendant may not be tried for torture after a jury necessarily decided in a prior trial that defendant did not commit the assault against the victim culminating in her death. Accordingly, we reverse and remand.¹

I. BACKGROUND

The charges in this case arise out of the killing of defendant's girlfriend, Dalona Tillman, by suffocation, preceded by a severe beating, at their home on December 15, 2015. Defendant denied the charges and told police that when Tillman returned to their home after what was to be a trip to the grocery store, she was badly beaten on her body and face and said she was dying. Defendant called 911, and first responders found Tillman unresponsive; she was later pronounced dead. The cause of death was asphyxiation. It was determined based on injuries to and discoloration around Tillman's mouth that she had been "smothered." The autopsy revealed

¹ We review de novo questions of constitutional law. *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

extensive injuries on Tillman's body, including 71 abrasions, 7 incision wounds, and bruising over much of her body. According to the medical examiner, the great majority of Tillman's injuries were "fresh."

Defendant was tried before a jury on charges of first-degree premeditated murder and first-degree felony murder. The predicate felony for the felony-murder charge was torture, though it was not charged as a separate individual crime. The jury was instructed on second-degree murder as a lesser included offense for both charges. After two days of deliberation, the jury acquitted defendant of first-degree murder and the lesser offense of second-degree murder. The jury was unable, however, to reach a verdict on the felony-murder charge.

The prosecution then charged defendant a second time with felony murder, and defendant pleaded guilty to second-degree murder. However, after appointment of appellate counsel, defendant filed a motion to withdraw his plea, vacate his conviction, and dismiss the charge against him. Defendant contended that, because he was acquitted of second-degree murder in his first trial, he could not have been recharged with felony murder or second-degree murder and so his conviction of the latter constituted a double jeopardy violation. The prosecutor conceded that defendant was entitled to this relief under United States Supreme Court precedent, and the trial court granted the motion.²

The prosecutor then charged defendant with torture, and defendant again moved to dismiss, arguing that the charge constituted (1) a violation of double jeopardy and (2) a vindictive prosecution. With respect to double jeopardy, defendant argued that the jury necessarily decided that he was not the perpetrator of the assault against Tillman and therefore he could not be tried on that issue again. In response, the prosecution contended that the torture charge did not implicate double jeopardy concerns because defendant had only been acquitted of murder, leaving open the possibility that defendant tortured Tillman but did not kill her. The trial court denied defendant's motion, concluding that the jury's acquittal of murder did not necessarily imply a finding that defendant was not guilty of torture. The court also found that defendant failed to meet his burden of demonstrating prosecutorial vindictiveness.

II. ANALYSIS

A. DOUBLE JEOPARDY

Defendant argues that the current torture charge against him violates the issue-preclusion component of the Double Jeopardy Clause. He asserts that the jury in the first trial necessarily

² The prosecution nevertheless appealed arguing that *Yeager v United States*, 557 US 110; 129 S Ct 2360; 174 L Ed 2d 78 (2009), was wrongly decided and we affirmed. *People v Terrance*, unpublished order of the Court of Appeals, entered August 24, 2017 (Docket No. 338938). The prosecution then filed for and was denied leave to appeal to the Michigan Supreme Court before also being denied certiorari by the United States Supreme Court. *People v Terrance*, 501 Mich 911 (2017), cert den ___ US ___; 138 S Ct 1334; 200 L Ed 2d 515 (2018).

decided that he was not the perpetrator of the assault on December 15, 2015, that involved the victim's beating and suffocation. We agree.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." US Const Amend V. See also Const 1963, art 1 § 15. The Double Jeopardy Clause serves "two vitally important interests." The first interest is to protect against multiple prosecutions, and the second interest is to preserve "the finality of judgments." *Yeager v United States*, 557 US 110, 117-118; 129 S Ct 2360; 174 L Ed 2d 78 (2009) (quotation marks and citation omitted). The Double Jeopardy Clause includes the concept of issue preclusion, also known as collateral estoppel. *People v Garcia*, 448 Mich 442, 497; 531 NW2d 683 (1995). Thus, in criminal proceedings, "when an issue of ultimate fact has once been determined by a valid and final judgment of acquittal, it cannot again be litigated in a second trial for a separate offense." *Yeager*, 557 US at 119. To determine what a jury necessarily determined in the first trial, a court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, 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." *Ashe v Swenson*, 397 US 436, 444; 90 S Ct 1189; 25 L Ed 2d 469 (1970) (quotation marks and citations omitted).

For example, in *Ashe* a jury acquitted the defendant of robbing a participant in a poker game, and the prosecution then charged the defendant with robbing a different participant at the same game and obtained a conviction. *Id.* at 437-440. The United States Supreme Court held that the second conviction was barred by the issue-preclusion aspect of the Double Jeopardy Clause because, under the facts of that case, the first jury necessarily determined that there was a reasonable doubt that the defendant was one of the robbers. *Id.* at 443-446. In *Bravo-Fernandez v United States*, ___ US ___; 137 S Ct 352; 196 L Ed 2d 242 (2016), the Supreme Court reaffirmed the principle of issue preclusion in criminal cases but held that it did not apply in that case.

The record provided to us establishes that the jury was asked to find that defendant murdered Tillman in his home on December 15, 2015, as the final act of an assault in which he also inflicted a severe beating and that the extensive beating and suffocation constituted the crime of torture.³ The prosecution emphasized that point during closing argument, referring to the beating and killing as a single attack: "I submit to you that the only issue you may have, in your mind, at the, at this moment, the only element that you will have to deliberate when you go back into that room, is whether or not you think the defendant did *it*." (Emphasis added). Throughout the trial, the prosecution's evidence and argument were directed toward a finding that defendant was the victim's sole assailant, that the assault was a continuous or near-

³ The elements of torture are as follows: (1) the defendant had custody or physical control over the victim, (2) the defendant exercised custody or physical control over the victim without consent or lawful authority, (3) the defendant intentionally caused great bodily injury and/or severe mental pain or suffering to the victim. MCL 750.85(1); M Crim JI 17.36.

continuous event, beginning with a beating and culminating in defendant suffocating the victim. The defense asserted that defendant was not the party responsible for either the beating or the murder. The question, therefore, as presented by both sides, was whether defendant was the victim's assailant on December 15, 2015; neither side suggested that defendant committed only the murder or only the beating. Accordingly, we conclude that the prosecution's claim that defendant tortured the victim on that day is barred under the doctrine of issue preclusion by the jury's verdict acquitting defendant of murder.

The prosecution argues that the acquittal on the first- and second-degree murder charges does not exclude the possibility that the jury might have convicted defendant of torture had it been separately charged. To a large degree, this argument rests on the fact that the jury did not reach a verdict on felony murder. The prosecution argues from this fact that the question of whether defendant committed torture was not answered. Were this a question of the more typical double jeopardy concept controlled by *Blockburger*,⁴ we would agree because the charges on which defendant was acquitted did not contain torture as an element. However, the issue preclusion-aspect of double jeopardy is governed by different rules which are intended to protect the finality of judgments. When applying issue preclusion, we may not consider the meaning or effect of the jury's failure to reach a verdict on a charge.⁵ *Yeager*, 557 US at 122. The question turns not on the elements of the charged crimes, but rather on the actual evidence and factual arguments made at trial. *Id.* at 120. In other words, following his acquittals, defendant may only be charged with torture in a second trial 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 that he did not commit the murder. In this case, there was none.

The prosecution also argues that by acquitting defendant of murder, the jury did not necessarily find that defendant did not kill Tillman because the jury was not asked to consider whether defendant committed involuntary manslaughter. This argument fails for several reasons. First, the prosecution may not rely on speculation about the basis for the acquittals. Rather it must show evidence to support its theory. Second, a rational view of the evidence does not support a theory of accidental killing or involuntary manslaughter. Involuntary manslaughter is

⁴ Under *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), two offenses are not the same for double jeopardy purposes if they pass the "same elements" test, i.e., each requires proof of a fact that the other does not. *People v Nutt*, 469 Mich 565, 576; 677 NW2d 1 (2004).

⁵ Thus, the fact that the jury was hung on felony murder is wholly irrelevant to our analysis. Instead, we must focus on the jury's verdict of acquittal, "which represents the community's collective judgment regarding all the evidence and arguments presented to it." *Yeager*, 557 US at 122. Our dissenting colleague notes this principle, but nonetheless relies on the fact that the jury was instructed to consider the crimes of murder and felony murder separately and concludes that "the jury did not necessarily determine that defendant did not torture the victim." Thus, it is clear to us that the dissent is relying on the jury's inability to reach a verdict on felony murder.

“the unintentional killing of another, committed with a lesser mens rea of gross negligence or an intent to injure” *People v McMullan*, 284 Mich App 149, 152; 771 NW2d 810 (2009) (quotation marks and citations omitted). In this case, the medical examiner testified that “it can take anywhere from ninety seconds, up to two and a half to three minutes” to smother an adult. Thus, the evidence in this case is inconsistent with an unintentional killing. Moreover, the prosecution elected not to seek an instruction on the lesser-included offense of involuntary manslaughter. It may not forfeit its right to such an instruction in the first trial and then rely on the absence of that charge to speculate about what the jury might have done had it received such an instruction.

In sum, the record establishes that the prosecution asked the jury to find that defendant was the perpetrator of the assaultive acts against Tillman on the day of her death. The record at trial provides no basis to conclude that a rational juror could have decided that defendant did not suffocate the victim but did commit the beating immediately preceding that act. As the prosecution argued, the ultimate issue of fact in the first trial was whether defendant was the one who perpetrated the entire assault, i.e., whether defendant “did it.” The jury’s decision to acquit defendant of murder in light of the record evidence cannot support a conclusion that defendant committed the assault culminating in that murder. Accordingly, the prosecution is barred by issue preclusion from relitigating that issue in a second trial.⁶

Our dissenting colleague suggests that we are improperly prohibiting the prosecution from adjusting its trial strategy upon retrial after a hung jury. This argument puts the cart before the horse. Certainly, when there is a retrial following a hung jury, the prosecution may alter its strategy and introduce different evidence on retrial. See *Yeager*, 557 US at 118. However, that does not mean that a retrial is necessarily permissible; it is a rule that comes into play only if a retrial is not barred by some other rule of law such as issue preclusion. See *id.* at 118-119. The dissent speculates that on retrial the prosecution may have evidence from which a torture conviction could be obtained. This view ignores the fact that we must determine the question of

⁶ We note that this does not preclude new charges based upon assaults that were not part of the beatings that culminated in the victim’s death. At trial, the medical examiner testified that while the majority of the injuries she found on Tillman’s body were “fresh,” meaning that they could have occurred anytime within a 24-hour period before her death, several injuries were more than a day old. The prosecution clearly relied on the victim’s most recent injuries in trying to prove to the jury that defendant tortured the victim. For the reasons discussed, the jury’s verdict shows that it found at least a reasonable doubt as to whether defendant caused those injuries. However, at least at this point, we cannot dismiss the possibility that the prosecution may be able to prove that some of the victim’s injuries occurred before the acts for which defendant has already been tried. To the degree the new charge of torture is based upon alleged acts that occurred prior to the day on which the victim was killed, it is not barred by issue preclusion. To be clear, however, no evidence concerning any assaultive behavior at issue in the first trial may be admitted as direct evidence of guilt or as other bad acts evidence.

issue preclusion based on the record of the first trial, not by what might be done differently at a second trial. Thus, the dissent miscomprehends the purpose of the issue-preclusion component of double jeopardy, which is to ensure the finality of the jury's verdict. See *id.*

B. PROSECUTORIAL VINDICTIVENESS

Defendant also argues that the torture charge constitutes prosecutorial vindictiveness. We disagree.

Prosecutorial vindictiveness occurs when a person is punished for exercising a statutory or constitutional right. *People v Ryan*, 451 Mich 30, 35-36; 545 NW2d 612, 616 (1996). Such punishment constitutes a violation of due process. *Id.* “[T]here are two types of prosecutorial vindictiveness, presumed vindictiveness and actual vindictiveness.” *Id.* Actual vindictiveness exists only when there is “objective evidence of an expressed hostility or threat suggests that the defendant was deliberately penalized for his exercise of a procedural, statutory, or constitutional right.” *Id.* (quotation marks, citation, and footnote omitted). Presumptive vindictiveness, on the other hand, has been found “in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right” *United States v Goodwin*, 457 US 368, 373; 102 S Ct 2485; 73 L Ed 2d 74 (1982). In order to prove presumptive vindictiveness, a defendant must show a reasonable likelihood of vindictiveness. *Id.* “[T]he appearance of vindictiveness results only where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights.” *United States v Gallegos-Curiel*, 681 F2d 1164, 1169 (CA 9, 1982).

Defendant argues that the prosecution's decision to charge him with torture after he was acquitted of first- and second-degree murder, and only after he successfully challenged his plea, establishes a presumption of prosecutorial vindictiveness. We decline to hold that a presumption of vindictiveness arises when the prosecution charges the defendant with an equivalent or lower offense after exercising a legal right. When the prosecution brings a more severe charge, this indicates a high likelihood that the new charge was intended to punish the defendant for asserting his rights and to discourage assertion of those rights. However, when the new charge carries the same or lesser punishment as the original charge, it is difficult to see how this punishes a criminal defendant for exercising a legal right or deters future defendants from asserting that right. Absent some additional proof of vindictiveness, we see no basis for concluding that a new charge that does not carry the possibility of greater punishment is a vindictive prosecution.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto

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STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRESHAUN LEE TERRANCE,

Defendant-Appellant.

UNPUBLISHED

March 5, 2019

No. 343154

Wayne Circuit Court

LC No. 17-005253-01-FC

Before: SHAPIRO, P.J., and SERVITTO and GADOLA, JJ.

GADOLA, J. (*dissenting*)

As summarized by the majority, based on allegations that defendant brutally beat and then suffocated the victim, defendant was charged with first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.315(1)(b), premised on the underlying felony of torture, MCL 750.85. At trial, the jury was additionally instructed regarding the lesser included offense of second-degree murder, MCL 750.317. The jury acquitted defendant of the first- and second-degree murder charges but was unable to reach a verdict with respect to the felony-murder charge. The prosecution now seeks to charge defendant with torture. The majority reverses and remands the trial court's order denying defendant's motion to dismiss the torture charge on the ground that double jeopardy protections prevent retrial on an issue necessarily decided by the jury in a previous trial. Specifically, the majority holds that, by acquitting defendant of first- and second-degree murder, the jury necessarily determined that he did not commit any of the charged acts of violence against the victim, including torture. I respectfully dissent and would affirm the trial court's order.

Under the Double Jeopardy Clauses of the United States and Michigan Constitutions, a criminal defendant may not twice be placed in jeopardy for a single offense. US Const, Am V; Const 1963, art 1 § 15; see also *People v Ford*, 262 Mich App 443, 447; 687 NW2d 119 (2004). The prohibition against double jeopardy protects against multiple punishments for the same offense and against successive prosecutions for the same offense after acquittal or conviction. *Ford*, 262 Mich App at 447. However, when prosecution of an offense results in a mistrial due to the jury's inability to reach a verdict, double jeopardy protections do not preclude reprosecution and retrial of that offense. *Yeager v United States*, 557 US 110, 118; 129 S Ct

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2360; 174 L Ed 2d 78 (2009). Rather, a jury's inability to reach a verdict is treated as a "nonevent" that does not bar retrial. *Id.*

Although a criminal defendant generally may be retried for an offense on which the jury was unable to reach a verdict, this principle may be undercut by the doctrine of collateral estoppel. Double jeopardy protections encompass the doctrine of collateral estoppel and thus preclude relitigation of any ultimate issue of fact that was "necessarily decided" by a jury's acquittal in a previous trial. *Id.* at 119, citing *Ashe v Swenson*, 397 US 436, 443; 90 S Ct 1189; 25 L Ed 2d 469 (1970); see also *People v Wilson*, 496 Mich 91, 99; 852 NW2d 134 (2014), abrogated on other grounds by *Bravo-Fernandez v United States*, __ US __; 137 S Ct 352; 196 L Ed 2d 242 (2016). Accordingly, "when an issue of ultimate fact has once been determined by a valid and final judgment of acquittal, it cannot again be litigated in a second trial for a separate offense." *Id.* (quotation marks and citation omitted). In evaluating whether an issue has been necessarily decided, courts may not consider or draw any inferences from the fact that a jury was unable to reach a verdict on any count during the first trial. *Id.* at 122-123. Rather, courts must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, 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." *Ashe*, 397 US at 444.

Before the jury in the present case began its deliberations, the trial court delivered instructions regarding the elements necessary to prove the first- and second-degree murder charges, as well as felony murder premised on an underlying felony of torture. Of relevance to the present discussion, the elements necessary to prove second-degree murder are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). "Malice" is defined as "the intent to kill, to cause great bodily harm, or to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Woods*, 416 Mich 581, 627; 331 NW2d 707 (1982). First-degree murder incorporates the same elements as second-degree murder but requires the heightened mens rea of a premeditated and deliberate intent to kill. See *People v Dykhouse*, 418 Mich 488, 502; 345 NW2d 150 (1984); see also *People v Oros*, 502 Mich 229, 240; 917 NW2d 559 (2018) (elements of first-degree murder are "(1) the intentional killing of a human (2) with premeditation and deliberation.").

In light of the jury's acquittal on the first- and second-degree murder charges, the prosecution now alleges that defendant tortured the victim by severely beating her but does not allege that defendant suffocated her. The elements necessary to prove torture are as follows: (1) the defendant had custody or physical control over the victim through force or use of force, (2) the defendant exercised custody or physical control over the victim without consent or without lawful authority to do so, and (3) the defendant intentionally caused great bodily injury or severe mental pain or suffering to the victim. MCL 750.85(1); M Crim JI 17.36.

By acquitting defendant of first- and second-degree murder, the jury did not necessarily determine that defendant did not commit *any* acts of violence against the victim. Rather, the jury could have grounded its acquittal on a finding that defendant was not the ultimate cause of the victim's death or that defendant lacked the requisite intent to commit murder. Such findings

would be consistent with the prosecution's theory at trial, and with the evidence demonstrating that the victim's death was caused by suffocation, as opposed to the injuries sustained from the beating. And although convictions for both second-degree murder and torture may be premised on a defendant's intent to cause great bodily harm, the jury's acquittal of defendant was not necessarily predicated on the absence of this element. Nor is a finding of the intent to do great bodily harm necessary to a conviction for torture, which may also be based on the intent to cause severe mental pain and suffering. The torture charge is therefore not premised on any common issue of fact necessarily decided in the first trial and does not constitute the "same offense" as either of the murder charges. See *Yeager*, 557 US at 119 ("The proper question, under the [Double Jeopardy] Clause's text, is whether it is appropriate to treat the insider trading charges as the 'same offence' as the fraud charges.").

This conclusion is consistent with *Yeager*'s directive that, in determining whether double jeopardy protections preclude retrial on a charge on which a jury was hung, courts may not consider or draw any inferences from the fact that a jury was unable to reach a verdict on that charge. See *id.* at 122-123. My analysis of this case does not draw any inferences from the fact that the jury could not reach a verdict on the felony murder charge premised on the underlying felony of torture. Rather, the above analysis is limited to an examination of whether, in acquitting defendant, the jury necessarily decided any issues of fact that the prosecution must establish in order to convict defendant of torture. I conclude that it did not.

The present case is unlike *Ashe*, which involved the armed robbery of six men engaged in a poker game. *Ashe*, 397 US at 437. In *Ashe*, the defendant was initially charged and acquitted of the armed robbery of one of the players but was subsequently tried a second time and found guilty of the robbery of another player in the same game. *Id.* at 438. During the first trial, the jurors were instructed by the trial court that a conviction would be sustained if they determined that the defendant was one of the armed robbers, even if he had not personally robbed that particular participant in the poker game. *Id.* at 439. The United States Supreme Court determined that the second prosecution violated principles of double jeopardy, as "[t]he single rationally conceivable issue in dispute before the jury was whether the [defendant] had been one of the robbers. And the jury by its verdict found that he had not." *Id.* at 445. In the present case, by contrast, the jury's verdict could have been grounded upon an issue other than defendant's identity as the perpetrator.

The majority holds that the prosecution presented the alleged beating and subsequent suffocation of the victim as a single assault and submitted to the jury that the only factual question at issue was "whether or not you think the defendant did it." Likewise, the majority observes that the defendant denied the charges in their entirety. However, the parties' positions at trial are unremarkable. In virtually every criminal case that proceeds to trial, the prosecution will seek convictions on all charges, while the defendant will deny all charges. More significantly, and in stark contrast to *Ashe*, the trial court's jury instructions emphasized that the charges were to be treated as separate and independent:

These are separate crimes, and the Prosecutor is charging that the defendant committed both of them.

You must consider each crime separately, in light of all the evidence in the case.

You may find the defendant guilty of both, *or either of these crimes*, or not guilty. [(Emphasis added).]

Thus, the jury was not instructed to resolve the sole issue of defendant's identity as the perpetrator of a single assault consisting of a beating and suffocation. Rather, the jury was instructed to consider the murder charges (premised on the allegation that defendant suffocated the victim) independently from the felony murder charge based on an underlying felony of torture (premised on the allegation that defendant brutally beat the victim). Given that a jury is presumed to follow its instructions, *People v Armstrong*, 490 Mich 281, 294; 806 NW2d 676 (2011), it may be assumed that the jury separately considered the charges and the underlying factual allegations. As such, by acquitting defendant of the murder charges, the jury did not necessarily determine that defendant did not torture the victim.¹

The majority additionally suggests that the prosecution's theory and evidence advanced at trial – that defendant severely beat and then suffocated the victim – is inconsistent with the theory that defendant tortured the victim but did not murder her. Specifically, the majority notes that the evidence does not indicate that more than one person harmed the victim or that the victim's death could have been unintentional. However, the majority cites to no authority preventing the prosecution from adjusting its factual theory or evidence on re prosecution of one count in order to accommodate an acquittal on a separate count. Indeed, it is well-settled that the prosecution may re prosecute criminal charges on which a jury was unable to reach a verdict, given "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona v Washington*, 434 US 497, 509; 98 S Ct 824; 54 L Ed 2d 717 (1978). To preclude the prosecution from modifying its theory or evidence on retrial would significantly hamper its ability to re prosecute any charges on which a jury was unable to reach a verdict when the jury also acquitted the defendant on another charge. Applying such a rule would additionally burden courts with reviewing and comparing the evidence and arguments presented during subsequent trials for the slightest deviation.

I would thus affirm the trial court's order denying defendant's motion to dismiss the torture charge.

/s/ Michael F. Gadola

¹ By considering the jury instructions, I draw no inferences from the fact that the jury was unable to reach a verdict on the felony-murder charge. Rather, these instructions simply rebut the majority's own position that the jury treated defendant's alleged torture and subsequent murder of the victim as a single offense such that, by acquitting defendant of the murder charges, the jury necessarily determined he also did not commit torture.

APPENDIX B

Amended Felony Information

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STATE OF MICHIGAN

2016701882

CASE NO: 1605564401-FY

36TH DISTRICT COURT
DETROIT
3RD JUDICIAL CIRCUIT

AMENDED INFORMATION
FELONY

The People of the State of Michigan

Offense Information

vs
TRESHAUN LEE TERRANCE 82-16701882-01

Police Agency / Report No.

DETROIT PD HOMICIDE 1512150287

Date of Offense

12/15/2015 cdg

Place of Offense

20170 MENDOTA, DETROIT

Complainant or Victim

DALONA T TILLMAN, HOWARD TILLMAN, NARVETTA CHARLES

Complaining Witness

INFO AND BELIEF

STATE OF MICHIGAN, COUNTY OF Wayne

In the name of the People of the State of Michigan: The Prosecuting Attorney for this county appears before the Court and informs the Court that on the date and at the location above described, the Defendant(s)

COUNT 1: HOMICIDE - MURDER FIRST DEGREE - PREMEDITATED

did deliberately, with the intent to kill, and with premeditation, kill and murder one DALONA T TILLMAN; contrary to MCL 750.316. [750.316-A]

FELONY: Life without parole; DNA to be taken upon arrest.

COUNT 2: HOMICIDE - FELONY MURDER

did while in the perpetration or attempted perpetration of torture, murder one DALONA T TILLMAN; contrary to MCL 750.316(1)(b). [750.316-B]

FELONY: Life without parole; DNA to be taken upon arrest.

Upon conviction of a felony or an attempted felony court shall order law enforcement to collect DNA identification profiling samples.

and against the peace and dignity of the State of Michigan.

Date

Kym Worthy
P38875
Prosecuting Attorney.

By: _____
Bar Number

APPENDIX C

Verdict Form

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

People of the State of Michigan,
Plaintiff

Case No: 16-001235-01-FC
Hon. Kevin J. Cox

-v-

Treshaun Terrance,
Defendant

JURY VERDICT FORM

COUNT 1: First Degree Premeditated Murder

You may return only ONE verdict on this count. Mark ONLY ONE of the following boxes:

NOT GUILTY

OR

GUILTY of COUNT 1, First-degree premeditated murder

OR

GUILTY of the lesser included offense of Second degree Murder

[Continued On the Next Page]

COUNT 2: Felony Murder

You may return only ONE verdict on this count. Mark ONLY ONE of the following boxes:

NOT GUILTY

OR

GUILTY of COUNT 2, Felony Murder

OR

GUILTY of the lesser included offense of Second degree Murder

5/20/2016
Date

Isaac Rust
Jury Foreperson

APPENDIX D

Second Amended Information

STATE OF MICHIGAN

CASE NO: 1605564401-FY

SECOND AMENDED
INFORMATION
FELONY

36TH DISTRICT COURT
DETROIT
3RD JUDICIAL CIRCUIT

The People of the State of Michigan

vs
TRESHAUN LEE TERRANCE 82-16701882-01

Offense Information
Police Agency / Report No.
DETROIT PD HOMICIDE 1512150287
Date of Offense
12/15/2015 cdg
Place of Offense
20170 MENDOTA, DETROIT
Complainant or Victim
DALONA T TILLMAN
Complaining Witness
INFO AND BELIEF

STATE OF MICHIGAN, COUNTY OF Wayne

In the name of the People of the State of Michigan: The Prosecuting Attorney for this county appears before the Court and informs the Court that on the date and at the location above described, the Defendant(s)

COUNT 1: HOMICIDE - FELONY MURDER

did while in the perpetration or attempted perpetration of torture, murder one DALONA T TILLMAN; contrary to MCL 750.316(1)(b). [750.316-B]

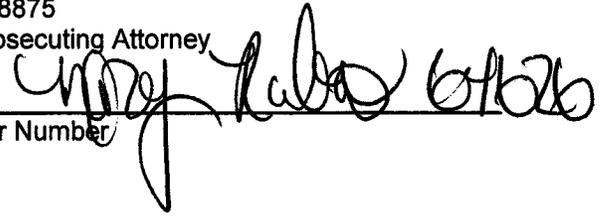
FELONY: Life without parole; DNA to be taken upon arrest.

Upon conviction of a felony or an attempted felony court shall order law enforcement to collect DNA identification profiling samples.

and against the peace and dignity of the State of Michigan.

9/12/16
Date

Kym Worthy
P38875
Prosecuting Attorney

By: 
Bar Number

APPENDIX E

Trial Court Order, 5-19-2017

STATE OF MICHIGAN THIRD JUDICIAL CIRCUIT WAYNE COUNTY	ORDER DENYING/GRANTING MOTION	CASE NO. 16-001235-01-FC
ORI MI- 821095J Court Address	1441 St. Antoine, Detroit MI 48226 Courtroom 604	Court Telephone No. 313-224-2441

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

Treshaun Lee Terrance
Defendant

At a Session of Said Court held in The Frank Murphy Hall of Justice
at Detroit in Wayne County on 5/19/17

PRESENT: Honorable Honorable Kevin J. Cox

A Motion for: Defendant's motion to vacate the 2nd Degree Murder conviction and dismiss the charges

_____ having been filed; and
the People having filed and answer in opposition; and the Court having reviewed the briefs and records in the
Cause and being fully advised in the premises;

IT IS ORDERED THAT the Motion for SAME
_____ be and

is hereby denied granted.



Honorable Honorable Kevin J. Cox

APPENDIX F

Court of Appeals Order, 8-24-2017

Court of Appeals, State of Michigan

ORDER

People of MI v Treshaun Lee Terrance

Docket No. 338938

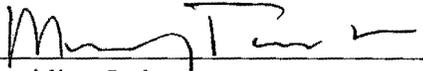
LC No. 16-001235-01-FC

Michael J. Talbot
Presiding Judge

Kirsten Frank Kelly

Thomas C. Cameron
Judges

The Court orders that the motion to affirm pursuant to MCR 7.211(C)(3) is GRANTED for the reason that the question to be reviewed is so unsubstantial as to need no argument or formal submission.



Presiding Judge

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AUG 28 2017

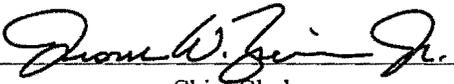
APPELLATE DEFENDER OFFICE



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 24 2017

Date



Chief Clerk

APPENDIX G

Trial Court Order, 3-12-2018

31141
ARM

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STATE OF MICHIGAN THIRD JUDICIAL CIRCUIT WAYNE COUNTY		ORDER DENYING/GRANTING MOTION		CASE NO. 17-005253-01-FC	
ORI MI-	821095J	Court Address	1441 St. Antoine, Detroit MI 48226	Courtroom	604
			Court Telephone No.	313-224-2441	

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

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MAR 29 2018

Treshaun Lee Terrance
Defendant

APPELLATE DEFENDER OFFICE

At a Session of Said Court held in The Frank Murphy Hall of Justice
at Detroit in Wayne County on MAR 12 2018

PRESENT: Honorable Kevin J. Cox

A Motion for: Defense motion to dismiss

_____ having been filed; and
the People having filed and answer in opposition; and the Court having reviewed the briefs and records in the
Cause and being fully advised in the premises;

IT IS ORDERED THAT the Motion for SAME
_____ be and

is hereby denied granted.

[Signature]
Honorable Kevin J. Cox