STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v **No. 159516**

TRESHAUN TERRANCE,
Defendant-Appellee.

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF

Filed under AO 2019-6

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STATEMENT OF JURISDICTION

On June 20, 2017, defendant-appellee was bound over on one count of torture. Defendant moved to dismiss the case in circuit court and lost. The Court of Appeals then granted defendant's application for leave to appeal, reversed the trial 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).

STATEMENT OF QUESTION PRESENTED

I.

If any rational juror could have conceivably grounded their acquittal on an issue besides the one that the defendant seeks to foreclose, double jeopardy does not bar retrial. Here, the prior acquittal could rationally have been based on something other than defendant's identity as the perpetrator, such as lack of malice aforethought or a finding that defendant tortured Dalona but did not kill her. Does double jeopardy bar the pending torture charge?

The trial court answered, "No."
The Court of Appeals answered, "Yes."
The People answer, "No."
Defendant answers, "Yes."

STATEMENT OF FACTS

Defendant killed Dalona Tillman, his live-in girlfriend, by smothering her, a fact which he admitted under oath when he pleaded guilty to second-degree murder in the predecessor to this case.[1] 590a-591a. Nevertheless, as the People later conceded, the double jeopardy clause precluded his prosecution for that crime because, before he pleaded guilty, an earlier trial ended with a hung jury as to felony murder but an acquittal on premeditated murder and, critically, the lesser-included of second-degree murder. 571a, 575a, 578a. *Yeager v US,* 557 US 110 (2009) requires this result.

And not only did defendant admit that he killed Ms. Tillman, the evidence at trial conclusively established that fact. Specifically, defendant is the one who called 911, and he admitted to the responders that she had died in his presence. 219a-220a, 225a. Dalona had bruises all over her body; defendant claimed that she had been beaten by two other women and then succumbed to her injuries once returning home. 208a, 212a-13a; 413a. But the medical examiner discovered that although the victim had been savagely beaten, with head-to-toe contusions and more than 70 abrasions over her body, she died of asphyxiation. 253a-254a, 256a-257a,

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[1]The following is the colloquy from defendant's guilty plea on September 12, 2016:

> [Prosecutor]: And on that day, did she die, I in that location?
> [Defendant]: Yes.
> [Prosecutor]: And did you cause her death?
> [Defendant]: Yes.
> [Prosecutor]: Did she die as a result of being smothered?
> [Defendant]: Yes.
> [Prosecutor]: And at that time, did you intend to kill her, or intend to cause her great bodily harm?
> [Defendant]: Yes.

261a-265a,272a, 288a. By force of logic, defendant was the only person who could have smothered her to death. 474a-475a, 481a.

As a result, he was charged in January 2016 with both premeditated murder and felony murder, with the underlying felony being torture. At trial, after being instructed on these crimes as well as second-degree murder as a lesser-included of both counts, defendant's jury was only able to reach a partial verdict, finding him not guilty of count one while being deadlocked on felony murder. 570a-575a. The court thus entered the acquittal on count one and declared a mistrial as to count two. As indicated above, before the retrial on the felony murder count, defendant pleaded guilty to a reduced charge of second-degree murder.

He then filed a motion to vacate his conviction, arguing that he could not be convicted of second-degree murder under count two after the jury found him not guilty of that crime under count one. The People—while objecting to the result—had to concede that, based on *Yeager,* relief was required. The People further acknowledged that defendant's voluntary plea did not waive the issue, per *Menna v New York,* 423 US 61, 62 (1975) ("Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty."). The People then sought and were denied both leave to appeal in this court and certiorari in the United States Supreme Court.

Consequently, the People charged defendant in this new case with one count of torture, based on the injuries to Tillman identified at her autopsy. After being bound over for trial, defendant again moved in the circuit court to dismiss, claiming that the torture prosecution was

vindictive, and that it was barred on jeopardy grounds. The Court of Appeals granted defendant's interlocutory application for leave to appeal and ruled in his favor on the jeopardy issue in March 2019. Judge Gadola dissented. This court has ordered supplemental briefing on the People's application.

ARGUMENT

I.

If any rational juror could have conceivably grounded their acquittal on an issue besides the one that the defendant seeks to foreclose, double jeopardy does not bar retrial. Here, the prior acquittal could rationally have been based on something other than defendant's identity as the perpetrator, such as lack of malice aforethought or a finding that defendant tortured Dalona but did not kill her. Double jeopardy does not bar the pending torture charge.

Standard of Review:

A double jeopardy challenge presents a question of law that is reviewed de novo. *People v Herron,* 464 Mich 593, 599 (2001). The defendant bears the burden of proving that the issue-preclusion component of double jeopardy bars reprosecution. *Dowling v US,* 493 US 342, 351 (1990).

Discussion:

While our constitution plainly bars the government from engaging in multiple attempts to convict a citizen for the same crime, that protection is limited to "offenses," and this defendant is being prosecuted for torture—an offense unquestionably different from the murder he was acquitted of. Of course, the Fifth Amendment has also been held to prohibit repeated attempts to prove the same *conduct*, where a jury has already *conclusively determined* that the state failed to prove that conduct the first time around. But defendant's jury did not conclusively determine that he wasn't the *cause* of Ms. Tillman's death—only that he did not

commit murder. Nothing prevents a second jury from finding beyond a reasonable doubt that defendant, whether he killed her or not, tortured Dalona.

A. Broad application of issue preclusion in criminal cases denies the state a full and fair opportunity to convict those who have violated its laws.

Issue preclusion is a civil doctrine that was not originally a part of criminal constitutional jurisprudence. As Justice Scalia comprehensively explained in his dissents in *Yeager* and *Grady v Corbin,* 495 US 508 (1990), the double jeopardy clause codified the common law doctrines of *auterfoits acquit* and *auterfoits convict.* These doctrines precluded the government from re-prosecuting a citizen for an offense of which he had already been acquitted or convicted. But the common law clearly allowed subsequent prosecutions for any other offense, *even if it involved the same act.* Thus a man could be acquitted of stealing a horse, and then prosecuted for theft of its saddle. *Yeager* at 128 (Scalia, J., dissenting, citing Sir Matthew Hale, 2 Pleas of the Crown 246 (1736)). As long as the *offenses* were distinct, an acquittal or conviction on one never barred prosecution on the other.

Extending double jeopardy protection to include issue preclusion was the invention of *US v Oppenheimer,* 242 US 85 (1916). In *Oppenheimer,* the defendant had used the Bankruptcy Act's one-year statute of limitations to quash his indictment. But a subsequent case held the statute of limitations inapplicable in such prosecutions, and so the government re-indicted. The Supreme Court ruled that the second indictment was barred by res judicata, despite the fact that the defendant had never been placed in jeopardy. The Court's entire analysis in this regard was summed up in one sentence:

> It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.

Id. at 87.

Using *Oppenheimer* as a jumping off point, the Court then held in *Ashe v Swenson,* 397 US 436 (1970), 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." *Id.* at 443. Thus, Bob Fred Ashe could not be tried a second time for robbing a poker game when "[t]he *single rationally conceivable issue in dispute* before the jury was whether the petitioner had been one of the robbers," and it had acquitted him. *Id.* at 445 (emphasis added). That is, after examining the pleadings, evidence, charge, and other relevant matter, the Court found the record "utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery." *Id.* Correspondingly, the bar to multiple prosecutions prohibited the state from trying Ashe as the person who robbed any of the *other* poker-playing victims. *Id.*

But as the Court went to great lengths to explain in *Standefer v US,* 447 US 10 (1980), there are many reasons issue preclusion should not apply in criminal cases. Unlike parties to civil litigation, for instance, the public prosecutor does not enjoy extensive rights of discovery; but it is this full and fair opportunity to litigate which establishes the "prerequisite of estoppel." *Id.* More critically, unlike a civil party, the prosecution can *never* obtain a directed verdict in its favor nor a judgment notwithstanding the verdict when the proofs clearly demand it. Correspondingly, the prosecution may never appeal a loss at trial as being against the

great weight of the evidence, as any civil party can. Nor may the prosecutor appeal an erroneous legal ruling at trial that leads to an unfavorable verdict. As *Standefer* noted, the estoppel doctrine "is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct. In the absence of appellate review, or of similar procedures, such confidence is often unwarranted." *Id.* at 23 n18. Finally, as Chief Justice Burger recognized in *Ashe,* if issue preclusion were an appropriate criminal doctrine, it would have to apply both ways. 397 US at 465 (Burger, CJ, dissenting). In other words, had Ashe been *convicted* the first time around, evenhanded application of the issue-preclusion doctrine would require *as a matter of law* that he was guilty in the other five cases.

This present case provides a perfect example of the shortcomings of issue preclusion in the criminal context. That is, there can be no doubt here that defendant killed Dalona Tillman: by his own admission he was the only one who possibly could have smothered her. And yet *Yeager* issue-preclusion prevents the People from going forward on the felony murder count for which defendant was *neither acquitted nor convicted.* But no matter how wrong defendant's jury was in acquitting him of second-degree murder, the People can never correct that verdict on appeal. And, to add insult to injury, issue-preclusion doctrine prohibits a retrial on even the count that the jury did *not* resolve against the People.

Unquestionably, the state is entitled to one full and fair opportunity to convict those who have violated its laws. *Ohio v Johnson,* 467 US 493, 502 (1984) (citation omitted). Issue preclusion impinges on this right and so must be narrowly and cautiously applied. At the very least, where *any*

rationally conceivable view of the evidence could reconcile the jury's acquittal with the subsequent charges, reprosecution must not be prohibited. Such is the case here.

B. The evidence and verdict at the 2016 trial are not inconsistent with a finding that defendant caused Tillman's death.

According to *Ashe v Swenson,* 397 US 436, 446 (1970), double jeopardy bars a criminal reprosecution 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." In other words, if there is any rational explanation for the not-guilty verdict consistent with guilt in the second case, the prosecution may proceed. Here, a rational juror could have concluded that defendant killed Ms. Tillman, but without the malice aforethought necessary for murder.

Specifically, by rejecting second-degree murder, defendant's jury did not *necessarily* find that he did not kill Dalona: involuntary manslaughter was not one of the jury's options. 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 cutting off Dalona's air supply may have risen only to the level of gross negligence. "Unlike murder, involuntary manslaughter contemplates an unintended result and thus requires something less than an intent to do great bodily harm, an intent to kill, or the wanton and wilful disregard of its natural consequences." See *People v Datema,* 448 Mich 585, 606 (1995).

That is, the evidence is at least consistent with the theory that defendant wanted only to torture Dalona, but not to (a) kill her, (b) do

great bodily harm to her, or (c) 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 the identity of the perpetrator.

Thus, by acquitting defendant of murder, the most that can be said of the jury's decision here was *either* that the evidence did not prove he caused Dalona's death *or*, in causing her death, he did not have one of the requisite states of mind. The latter is more likely than the former, and at the very least it is not "inconceivable" that the jury went that way. That is, the evidence at trial strongly suggested—and at a minimum it gave rise to the reasonable inference—that defendant intended to smother Dalona but not kill her. As defense counsel noted multiple times, defendant did not run away after Tillman stopped breathing, but frantically called his mother and 911, applied CPR to revive her, and then rode in the ambulance to the hospital. 508a-509a, 516a-517a. The 911 call was admitted into evidence and displays defendant's panic and emotional upset. Moreover, Dalona had so many injuries to her body that they could not be counted, 618a-622a, but none were fatal. It could reasonably appear to a jury from this that defendant was abusing Dalona, exercising his domination over her in a way that was unlikely to be detected. Terrorizing his victim by cutting off her air supply fits this pattern, and so does his panicked reaction after she stopped breathing: death may well not have been his intent.

Defendant's answer will no doubt be that both the prosecution and the defense took an all-or-nothing approach to the case: he was either guilty as charged or guilty of nothing. Thus, according to him, no rational

juror could have veered from the course set by the parties and decided the case on any issue other than the identity of the perpetrator. But that argument ignores the explicit instructions that were given to the jury, especially the fact that jurors don't have to cater to the parties' theories of the case. As all juries are instructed in Michigan, and as Judge Cox instructed defendant's jury here, *they* were the judges of the facts, *they* were to decide the case based only on the evidence, and the attorneys' arguments were *not evidence*:

> As jurors, you must decide what the facts of this case are. This is your job, and nobody else's. … What you decide about any fact in this case is final. …
>
> When you decide the case, and decide on your verdict, you may only consider the evidence that has been properly admitted in this case. … *The lawyers' statements, and arguments, and any commentary, are not evidence.* They are only meant to help you to understand the evidence, *and each side's theories.* You should only accept things the lawyers say that are supported by the evidence, or by your own common sense, and general knowledge. …
>
> You are the only judges of the facts, and you should decide this case from the evidence. … To repeat once more, you must decide this case based only on the evidence admitted during this trial. As I said before, it is your job to decide what the facts of this case are. You must decide which witnesses you believe, and how important you think their testimony is. You do not have to accept or reject everything a witness said. You are free to believe all, none, or part of any person's testimony. In deciding which testimony you believe, you should rely on your own common sense, and every day experience.

529a-533a.

Thus, defendant's jury could rationally have determined that he *was* the perpetrator, but still acquitted him of murder because the prosecution

failed to prove malice aforethought: the intent to kill, the intent to do great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. See *People v Goecke,* 457 Mich 442, 464 (1998). As such, defendant cannot prove conclusively that the acquittal represented the factual determination that he did not smother and kill Ms. Tillman.

Even the Court of Appeals majority below recognized this truth—although simultaneously failing to come to grips with the evidence supporting it—by stating that "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." 598a (emphasis added). Defendant's reaction to Dalona's unconsciousness gave rise to the inference that he abused her but did not intend to kill her. This case may properly proceed on that basis.

C. Even if defendant can prove that there is no conceivable basis for the acquittal other than lack of proof of his identity as the killer, that is not a finding that he did not *earlier* torture Ms. Tillman.

Dalona had injuries from head to toe, and the not-guilty verdict does not preclude the People from proving that defendant tortured her before she was killed. In this case 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. 272a-274a. Thus, defendant could have beaten her, without being the one who suffocated her, which, of course, would be consistent with a conviction for

torture but not murder. Two, some of Dalona's injuries were more than a day old. 265a, 267a. Thus, even if someone else beat *and* suffocated her on the day in question, there was still evidence that defendant perpetrated additional, earlier abuse, again consistent with a theory that he tortured Ms. Tillman but did not kill her.

The Court of Appeals majority rejected this argument, essentially determining that if *it* had been defendant's jury, it would not have been persuaded by this argument. In that vein, the majority stated that 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," while in almost the next breath acknowledging that, according to the medical examiner, the majority of the injuries she found on Tillman's body "could have occurred anytime within a 24-hour period before her death …." 599a. There were no eyewitnesses to the beating (or beatings); the timing was entirely a matter of inference. Given that, it would not have been unreasonable to infer that defendant—who lived with Dalona and had the best opportunity and the greatest motive to inflict her non-fatal wounds, and who got caught lying about how she died—actually did inflict them.

Additionally, as even the Court of Appeals acknowledged, a torture charge in this case could properly arise from the injuries that were more than 24 hours old. Id. At the very least, this matter should proceed on that ground, with the additional provision that the People should be able to introduce evidence, under the more-likely-than-not standard that applies in every other instance regarding 404(b) evidence, that defendant also perpetrated the "fresh" beatings and the suffocation. Remarkably, the majority provided no legal citation for its conclusion that, if the prosecution proceeded on that basis, the People would be precluded from

introducing "evidence concerning any assaultive behavior at issue in the first trial … as direct evidence of guilt or as other bad acts evidence." Id. That ruling cannot stand.

D. The hung jury on the felony murder count is further proof that the jury did not unequivocally determine that defendant was not the cause of Ms. Tillman's injuries and death.

Yeager's entire analysis rests on the proposition that nothing can be concluded from a hung jury, but that is demonstrably false. Jurors are instructed that they must render a unanimous verdict: not guilty, guilty as charged, or guilty of a lesser offense. And they are presumed to follow their instructions. See *US v Powell,* 469 US 57, 66 (1984) ("Jurors, of course, take an oath to follow the law as charged, and they are expected to follow it."). While it is within the realm of possibility that jurors could find that defendant did not commit second-degree murder and so acquit on count one, but then conclude that they are too exhausted to check the box on count two acquitting of second-degree murder based on the same facts and law, see *Yeager* at 121 ("a host of reasons [including] exhaustion after a long trial" may account for a hung jury), it is also within the realm of the possible for a group of monkeys with typewriters to recreate Hamlet. See *In re Chargit Inc,* 81 BR 243, 247 n5 (1987).

But the *possibility* of something other than logical inconsistency is not sufficient: the law requires that the defendant *prove* that *no* explanation exists other than that the jury meant to acquit him. See *Dowling v US,* 493 US 342, 351 (1990). Not only that, but according to *Ashe* itself, the analysis is to be practical, realistic, and rational, not hypertechnical and archaic. 397 US at 444. And the review is to take account of "*all* the circumstances of the proceedings" (*id., emphasis*

added), which would seem to include the circumstance that the trial ended with a hung jury on one count.

Given that framework, it defies credulity to maintain, as the majority did in *Yeager,* that a jury's inability to reach a decision is never inconsistent with an acquittal on another count, merely because the nonverdict is not legally binding. While that may be literally true,[2] it is not unreasonable to view that position as a "hypertechnical" excuse for a preferred result.

As the Eighth, First, and DC Circuits all observed pre-*Yeager*, it is in fact the practical reality that—when a jury acquits on one count while failing to reach a verdict on another count that necessarily follows—the jury has acted inconsistently for issue-preclusion purposes. *US v Aguilar-Aranceta,* 957 F2d 18 (CA 1, 1992); see also *US v Howe,* 538 F3d 820 (CA 8, 2008); and *US v White,* 936 F2d 1326 (CA DC, 1991). Certainly, in the context of all the circumstances of the proceedings, as *Yeager* commands be considered, a defendant in such a case could not prove otherwise.

Thus when a jury cannot reach a verdict on a count that necessarily follows from an acquitted count, the trial court may not speculate that perhaps the jury had sharp disagreement about one count but not the other, was confused about one count but not the other, or was exhausted after a long trial and so just gave up. See *Yeager* at 121. Instead, the court must face the fact that the jury—in rendering an inconsistent

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[2]The Supreme Court in *Green v US,* 355 US 184 (1957), actually suggested that such is *not* true. In that case, the jury convicted the defendant of second-degree murder, but left the first-degree count blank. The *Green* Court stated that doing so constituted an *implied verdict* of acquittal. *Id.* at 190.

nonverdict—acted inconsistently, thereby making unavailable to the defendant a claim of issue preclusion as to that nonverdict.

This line of reasoning is entirely consistent with the Supreme Court's well-established rule that, when a jury cannot return a verdict and a mistrial is declared, the jeopardy does not end, but rather continues through the re-trial. *Richardson v US,* 468 US 317, 325 (1984). It was in this vein that the *Richardson* Court noted—as highlighted above—that the government is entitled to "one complete opportunity to convict those who have violated its laws." *Id.* at 324 (quoting *Arizona v Washington,* 434 US 497 (1978)). Thus, "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* at 325. A just judgment is, at the very least, one where the jury actually renders a verdict on all charged counts. The double jeopardy clause requires no less a result.

Granted, this analysis might be different if the People had proceeded seriatim against defendant, as did the prosecution in *Ashe*: choosing to try the same charges on successive prosecutions after an acquittal. But when, as here, the same issue underlies *more than one* charge and the prosecution brings the charges together, it cannot constitute a second jeopardy for one of the charges to continue through a retrial. Again, the prosecution is entitled to a full and fair trial, through the verdict, on all counts. See *Richardson* at 330 (Brennen, J., concurring in part and dissenting in part). Issue preclusion of the *Yeager* variety unfairly, and impermissibly, denies that opportunity.

Here, the jury's failure to reach a verdict on count two, while acquitting him on count one, likely signaled the jurors' conclusion that

there was insufficient proof of intent to kill as to count one, and their inability to agree whether defendant's intent rose to the level of depraved heart as to count two. As in the federal Court of Appeals cases cited above, if the jury here had really concluded that defendant did not cause Ms. Tillman's death, it would have found him not guilty on both counts. The prosecution should not be penalized for the jury's failure to reach unanimity or to properly consider all the verdict options.

Regardless, it is not necessary to determine *why* the jury acted inconsistently, only that it did. And since it did, issue preclusion should be precluded. To summarize, defendant cannot prove that his jury meant to find him not guilty of felony murder, or else it would have found him not guilty of felony murder. Such a straightforward line of thinking is not unfair, unreasonable, or (most importantly) inconsistent with fundamental double jeopardy principles. Although this court is powerless to consider the effect of the non-verdict, per *Yeager*, it should not be.

RELIEF

THEREFORE, the People request that this Honorable Court either (a) reverse the Court of Appeals and remand for trial or (b) grant leave to appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body-text font is 12 point Century Schoolbook set to 150% line spacing. This document contains 4439 countable words.

/s/ David A. McCreedy

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