STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

-vs-

TRESHAUN LEE TERRANCE

Defendant-Appellee.
_____/

Supreme Court No. 159516

Court of Appeals No. 343154

Circuit No. 17-005253-01 FC

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant
_____

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DEFENDANT-APPELLEE'S SUPPLEMANTAL BRIEF

(ORAL ARGUMENT REQUESTED)

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Statement of Jurisdiction

Treshaun Lee Terrance does not contest that this Honorable Court has jurisdiction in this matter.

Counter-Statement of Question Presented

I. Did the Court of Appeals correctly hold that the torture charge against Mr. Terrance violates the issue-preclusion component of the Double Jeopardy Clause, based on well-settled U.S. Supreme Court precedent?

Court of Appeals answers, "Yes."

Treshaun Lee Terrance answers, "Yes."

Supplemental Counter- Statement of Facts and Material Proceedings

This Honorable Court ordered supplemental briefing on "whether the Court of Appeals erred when it concluded that the jury in [Treshaun Terrance's] first trial, when it acquitted him of first- and second-degree murder, necessarily decided an issue of ultimate fact such that the issue-preclusion aspect of the Double Jeopardy Clause bars prosecution for the crime of torture arising out of the same criminal incident." *People v Terrance,* ___ Mich ___; 932 NW2d 785 (2019). The Court of Appeals concluded "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." (3/5/19 Court of Appeals' Opinion, p. 1; 595a). Mr. Terrance relies on his Statement of Facts and Material Proceedings from his answer to the prosecutor's application for leave to appeal, pp 3-7, but adds the following to further demonstrate that the contested issue at trial was identity.

At trial, the prosecutor alleged that Mr. Terrance severely beat his girlfriend, Dalona Tillman, at their home, with the beating culminating in his suffocating her to death. (V, 44-56; 494a).[1] In closing argument, the prosecutor argued this was a "who-done-it" case, and that Mr. Terrance's claims that he did not inflict the injuries and that Ms. Tillman came home already beaten and dying were not credible. (V 49-56; 499a). The defense argued that the prosecution had not proven

[1] 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.

that Mr. Terrance had committed these acts, which he had denied committing when interrogated by the police. (*Id.* at 56-70; 506a).

In closing argument, the prosecutor emphasized to the jury that the only issue was the identity of Ms. Tillman's assailant:

> "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; 499a).
>
> ***
>
> "I submit to you that the only thing that you might debate, at this moment, in your mind, as to, well, are you sure the defendant did it? I'm gonna tell you why we're sure the defendant did it…." (V 50; 500a).
>
> ***
>
> "Now, Ms. Tillman (the decedent's mother) indicates that, at the hospital, you know, she confronted the defendant. She accused him of doing it. You're the one who did this. And he leaves, walks out of the hospital…" (V 52; 502a).
>
> ***
>
> But, if what the defendant says is true, you know, Sally Sue and whoever else, beat her up, this is information you would immediately want the Police to have, to get justice for your girlfriend, of two years, who you loved and cared about. (V 55; 505a).
>
> ***
>
> Now, he's got a bunch of things to say. Now, it was, Isis Terrell. Now it was, Jada Monique, who doesn't exist, who nobody could find, including the Officer in charge. Now, Tyler, first name, no last name, no address, no phone number….And then there's Germaine.

> But, as we heard from the defendant, nobody needs to worry about any of those people, because the defendant said, multiple times, nobody was in the house on the day of her death.
>
> In fact, nobody comes to our house. Nobody.
>
> He says it, multiple times. I can't even count how many times.
>
> So, none of those people are relevant. (V 55-56; 505a).

Defense counsel argued that Mr. Terrance's claims of innocence were credible. Defense counsel stated: "You heard Mr. Terrance say that he did not kill Dalona, didn't smother her, didn't beat her. That's evidence. That's what you should listen to. And quite frankly, that's reasonable doubt. That's your reasonable doubt." (V 57; 507a). "At every turn, every question, everything that they ask him, he said, no, I did not do that." (V 64; 514a). Defense counsel argued that the police had failed to adequately investigate the names that Mr. Terrance gave them because their theory that he was the perpetrator led to tunnel vision. (V 64-65; 514a). "We not gonna do that [investigate the others], because that then destroys our theory of the case, and it supports his. And we don't want to do that. We just wanna leave these fourteen people to believe he's the one that did it." (V 65-66; -515a). Defense counsel ended his closing argument with: "And if you believe, which I ask that you do believe, that Mr. Terrance did not commit the crimes that he's charged. Don't let this -- you send a message to the Prosecutor, you send a message to the Police, do a thorough investigation of a case, and we're not gonna allow you to impact this man's life negatively. Period." (V 70; 520a).

In rebuttal, the Prosecutor focused on attacking Mr. Terrance's statements denying that he was the perpetrator. "So, okay, the defendant said, I didn't do it. Oh, well, case closed. Let's all go home. Well, he said it, so, hmm, that's gotta be true." (V 71-72). The Prosecutor listed all the reasons that she believed his denials were not credible, including dissecting his statements during the police interrogation. (V 72-78). The Prosecutor did not separate out the acts that she alleged constituted the torture (the beating) from the death culminating from the alleged torture. E.g. "So, I just would submit to you that this woman was in the fight of her life." (V 77). The Prosecutor concluded with: "I submit, when you go back, and you deliberate, it will be painfully obvious to you that the defendant committed these crimes, and I ask you to come back with a guilty verdict." (V 78; 528a).

On this record, the Court of Appeals held that the torture charge based on the same events was precluded by the Double Jeopardy Clause:

> 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. (3/5/19 COA Opinion, 5, 599a).

Standard of Review

The prosecution 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, 869 NW2d 204, 208 (2015); *People v Wilson*, 496 Mich 91, 98 (2014), abrogated on other grounds by *Bravo-Fernandez, v United States*, __ US __; 137 S Ct 352; 196 L Ed 2d 242 (2016).

Supplemental Counter-Arguments

I. The Court of Appeals correctly held that the torture charge against Mr. Terrance violates the issue-preclusion component of the Double Jeopardy Clause, based on well-settled U.S. Supreme Court precedent.

The prosecution asks this Court to reverse the Court of Appeals. That request is based on its misstatement and misapplication of the rule from the applicable U.S. Supreme Court precedent on the issue-preclusion aspect of Double Jeopardy. But the Court of Appeals' majority conducted the proper analysis under the correct test. This was an identity case with no separation between the alleged acts of torture and murder, i.e. no separation between the beating and the death. The jury determined that Mr. Terrance was not the person who assaulted Ms. Tillman.

The prosecution allocates much of its briefing to criticism of U.S. Supreme Court precedent, which it has already unsuccessfully sought to overturn. *See* Prosecutor's Petition for Writ of Certiorari in *Michigan v Terrance*, ___ US ___, 138 S Ct 1334 (2018), *cert denied*. This Honorable Court cannot overturn U.S. Supreme Court precedent on a federal constitutional question, and the reasoning behind

those decisions is sound. This Court should deny leave to appeal or affirm the Court of Appeals' decision granting Mr. Terrance relief.

The prosecutor maintains that the issue-preclusion component of the Double Jeopardy Clause does not protect a criminal defendant from re-trial if a rational juror could have "conceivably" grounded their acquittal on an issue other than the one the defendant seeks to foreclose. *See* Prosecutor's Supplemental Brief, p 11, 15, 16, 18. The prosecutor proffers that despite the trial's focus on the element of identity[2] of the person who beat Ms. Tillman culminating in her death, it is theoretically possible that the jury acquitted Mr. Terrance based on some other element that was not at issue.

The prosecutor's "conceivability" formulation of the rule for issue-preclusion is not the rule of *Ashe v Swenson*, 397 US 436 (1970) or *Yeager v United States*, 557 US 110 (2009). If the prosecutor's formulation were the rule, then no criminal defendant in Michigan would ever receive protection under the issue-preclusion component of Double Jeopardy, because Michigan is a general verdict state. There will always be another hypothetical element about which a prosecutor can speculate about after an acquittal. The prosecutor seeks a legal universe in which the government may always hold a charge in reserve and then advance a *post hoc* hypothesis following an acquittal, and subsequently re-try any acquitted defendant.

[2] Identity is an essential element of every criminal offense, i.e. that the defendant is the one who committed the charged offenses. *People v Oliphant*, 399 Mich 472, 489, 250 NW2d 443, 449 (1976); *People v Yost*, 278 Mich App 341, 356, 749 NW2d 753, 767 (2008).

Issue preclusion or collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be relitigated between the same parties in any future lawsuit." *Ashe, supra* at 443. 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 matters,* 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 applying this test, 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.

Applying the test, the *Ashe* Court analyzed the trial record and held that collateral estoppel precluded subsequent prosecution of the defendant for robbery of a different card-player victim because the jury had already found that the defendant was not one of the robbers. *Id.* at 446-447. The Supreme Court emphasized that an examination of the way in which the case was tried is particularly important when deciding whether an issue of fact has been "determined" by the jury in cases where a general verdict has been entered:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.

> **Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to '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.'** The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' *Sealfon v. United States*, 332 U.S. 575, 579, 68 S.Ct. 237, 240. **Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal**. *Id.* at 444 (footnote citations omitted) (emphasis added).

If all the government is required to do to avoid a determination of issue preclusion on a contested element from the first trial, in a state that has general verdicts, was to hypothesize that the jury could conceivably have based its acquittal on another element for which there was substantial evidence, on a point that the defendant did not contest, there could never be a finding of issue preclusion. *Ashe, supra* at 444 n 9. "In fact, such a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel, since it is impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction." *Ashe, supra* at 444 n 9, quoting Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Har L Rev 1, at 38 (1960).

The prosecutor has mistakenly conflated the *Ashe* Court's application of the test with the *Ashe* Court's formulation of the test. The *Ashe* Court held that "straightforward application" of the rule in the case of the robbery of the six poker

players was an easy call because the defense had not contested that an armed robbery occurred or that the complainant was indeed a victim of that armed robbery, and thus the only "rationally conceivable issue" in dispute was whether the defendant was one of the robbers. *Ashe, supra* at 445. Contrary to the prosecution's assertion here, the *Ashe* Court did *not* hold that an acquitted defendant is subject to a second trial if a rational juror might "conceivably" have grounded the acquittal on any issue other than the one the defendant seeks to foreclose. The prosecutor asks this Court to disregard how the parties tried the case, and thus to disregard the U.S. Supreme Court's rule in *Ashe*.

The prosecutor first hypothesizes that the jury may have acquitted Mr. Terrance of first- and second-degree murder by finding that he was the one who killed Ms. Tillman, but that he did so without malice or intent while in the process of torturing her. This argument is unavailing. As noted above, the primary if not sole focus of both parties at trial was on the element of identity.[3] Notably, neither party asked for an instruction on manslaughter. The prosecutor's hypothesis was not a theory that the prosecutor or the defense advanced at trial. Rather, the prosecutor asserted this theory for the first time on appeal. The Court of Appeals' majority here 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." (3/5/19 Court of Appeals' Opinion, p. 6; 595a).

[3] Please see the extensive quotes from closing arguments in the Counter-Statement of Facts and Material Proceedings, above.

The prosecutor next speculates that the jury may have acquitted Mr. Terrance of murder by finding that he was not the one who killed Ms. Tillman, but still believed that he tortured her. This contorted logic fails to acknowledge that neither the evidence presented nor the parties' argument separated the beating from the death. Both sides treated it as a continuous transaction, i.e. a beating that culminated in death. Again, this is a theory that was not argued at trial, but that the Prosecutor put forth for the first time on appeal. The Court of Appeals correctly held that where the parties did not advance an argument separating the acts and where the evidence does not at all suggest that these were separate transactions, the prosecutor's contention is not supported by the trial record. (3/5/19 Court of Appeals' Opinion, p 5; 595a).

Reviewing courts engaging in issue-preclusion analysis must reject parties' claims on appeal regarding alternate theories that were not advanced at trial. In *United States v Coughlin*, 610 F3d 89, 93 (DC Cir, 2010), a jury acquitted Mr. Coughlin of three counts of mail fraud but hung on the remaining two counts of mail fraud, one count of making a false and fraudulent claim, and one count of theft or public money. The D.C. Circuit Court held that issue preclusion barred retrial on the remaining mail fraud counts, but not on the false claim and theft counts. *Id.* In so concluding, the Court entered into a detailed analysis of the parties' theories at trial. It addressed Mr. Coughlin's argument that retrial was barred on the false claim and theft counts because he presented the defense of "good faith" to all charges against him. *Id.* at 104. The Court was unpersuaded by Mr. Coughlin's

argument because he "never made such an argument to the jury." *Id.* During closing argument, Mr. Coughlin's attorney addressed each count individually and failed to "argue that everything rose and fell together[.]" *Id.* The government did the same: "it told the jury that 'you don't have to believe that the entire claim was false'" and that it could convict even if it found Mr. Coughlin acted in good faith as to some of his acts. *Id.*

Indeed, under the prosecution's logic in this case, it seems the prosecution would argue that, after his acquittal of robbery, the prosecutor in *Ashe* really should have been able to try the defendant again on a charge of home invasion of the same victim as in the first trial, as well as on charges of armed robbery of the other poker players, because of a theoretical argument untethered to the actual trial record that the jury acquitted based on an element other than identity. The U.S. Supreme Court disagrees. At both the trial in *Ashe* and Mr. Terrance's trial, identity was the contested element and the lynchpin of the case. Because that issue was already litigated at trial and decided in the defendants' behavior, retrial on new charges based on the same facts is barred here as it was in *Ashe*.

The prosecutor criticizes the U.S. Supreme Court's issue-preclusion jurisprudence, i.e. *Ashe* and *Yeager*. This Court, of course, cannot alter the test articulated in *Yeager* and *Ashe*, as it is bound by the U.S. Supreme Court's authoritative holding on questions of federal constitutional law. *People v Lewis*, 501 Mich 1, 7; 903 NW2d 816 (2017); *People v Stevens*, 460 Mich 626, 642 n 6; 597 NW2d 53, 62 n 6 (1999). Further, the United States Supreme Court has already

declined the prosecution's request in its prior appeal that it revisit and reverse the rule of *Yeager* and *Ashe*. *People v Treshaun Terrance,* 501 Mich 911 (2017) (No. 156394); *cert. denied*, ___ US ___; 138 S Ct 1334 ; 200 L Ed 2d 515 (2018).

Even if this Court could entertain it, the prosecution's argument that issue preclusion should not apply in criminal cases because it deprives the government of a "full and fair opportunity to litigate" and does not "apply both ways" is unconvincing. As explained above, the prosecution had a full and fair opportunity to try Mr. Terrance. It just regrets its strategic choices. The Double Jeopardy Clause prevents an unwarranted second bite at the apple in order to protect two important interests:

> (1) the deeply ingrained principle that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty; and
>
> (2) the preservation of the finality of judgments. *Currier v Virginia*, 138 S Ct 2144, 2158 (2018) (internal citations omitted).

To allow the prosecution to re-try Mr. Terrance based on a new argument, which it strategically chose to forego in the first trial resulting in an acquittal, where identity was the key issue, would set dangerous precedent that would cause the very harms that issue preclusion is meant to protect against. Re-trying Mr. Terrance 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 with torture at the outset as an

"appellate parachute." See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144, 149 (2000) ("Counsel may not harbor error as an appellate parachute.").

Prosecutors could always choose to hold some charge(s) in reserve so that if their first trial strategy does not work, they can try that individual again on the related charge not used at the first trial. If the prosecutor here prevails, why would any prosecutor hesitate to hold the predicate felony to a felony murder charge in reserve, in case they do not obtain the felony murder conviction at the first trial?[4] Criminal trials are not meant to be rehearsals, or moot court exercises to be used as tools by prosecutors to test different theories and strategies until one works.

Adopting the prosecutor's position here would also increase the risk of "forced" or "false" guilty pleas, as defendants' wills and mental resolve are worn down by long periods of pre-trial incarceration and by the stress of facing serious charges that carry long prison sentences. Additionally, multiple prosecutions for the same offense(s) will cause defendants to use up any money and other resources they may had to defend themselves, leaving them at an even more unfair disadvantage to the government than usual. Eventually, stamina and/or assets run out.

In its application and supplemental brief, the prosecution in this case repeatedly and inappropriately trumpets Mr. Terrance's now vacated unconstitutional plea to second-degree murder that occurred after his acquittal. The plea came from a scared, worn-down teenager, after a lengthy pre-trial detention; a teenager who both

[4] In 2008, this Court held in *People v Ream*, 481 Mich 223 (2008) that convictions and sentences for both felony murder and the predicate felony do not violate the multiple punishments strand of *Blockburger v United States*, 284 US 299 (1932), overruling its prior precedent of *People v Wilder*, 411 Mich 328 (1981).

the prosecutor and defense counsel allowed to mistakenly believe he was still under threat of a life without parole sentence (the felony murder charge). However, this Court may not consider Mr. Terrance's vacated plea as it is a nullity[5] and it is irrelevant to the Double Jeopardy question.

The dangers of forced or false pleas are particularly present for young defendants. Until their early- or mid-twenties, youth lack a "stable, solid capacity to make complex judgments, weigh closely competing alternatives in a balanced and careful way, control impulses and take the longer view."[6] "Children and teenagers are categorically more suggestible, compliant, and vulnerable to outside pressures than adults. They are less able to weigh risks and consequences; less likely to understand their legal rights; and less likely to understand what attorneys do or how attorneys can help them." [7] Accordingly, young people are more likely than adults to

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[5] When a guilty plea is vacated it is a nullity. *People v George*, 69 Mich App 403, 407 (1976), citing *People v Street*, 288 Mich 406, 408 (1939) and *Kercheval v United States*, 274 US 220, 224 (1927). That means that everything that transpired pursuant to the guilty plea is a nullity. *Id.* MRE 410 applies to exclude pleas that have been vacated. MRE 410; see *People v George,* 69 Mich App 403, 405 (1976) (evidence concerning a vacated guilty plea is inadmissible whether the vacated plea is introduced as substantive evidence of the defendant's guilt, or only as impeaching evidence when the defendant testifies). "The former plea should never have been commented on by the prosecutor." *People v Street,* 288 Mich 406, 408 (1939). *See also People v Moore*, 391 Mich. 426 (1974)(a constitutionally infirm conviction cannot be used by a court against a defendant).

[6] Daniel R. Weinberger et al., *The Adolescent Brain: A Work in Progress*, ii (2005), available at https://pdfs.semanticscholar.org/dfa0/64f8ae36b082f4b46c62cc87497359fc8b43.pdf

[7] Northwestern University Pritzker School of Law, Bluhm Legal Clinic, *Wrongful Convictions of Youth*, available at http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/understandproblem/

enter false guilty pleas.[8] A growing body of research demonstrates this.[9] For instance, a survey of 873 exoneration cases found that while 15% of exonerees in general had falsely confessed, that percentage jumped to 42% among juveniles—nearly a three-fold increase.[10] Another recent study indicates that juveniles are twice as likely as young adults to plead guilty when factually innocent.[11]

On the relevant question before this Court, the Court of Appeals correctly held that the torture charge against Mr. Terrance violates the issue preclusion component of the Double Jeopardy Clause. This Court should deny leave to appeal or affirm the Court of Appeals' majority opinion.

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[8] Brief for the American Psychological Association, American Psychiatric Association, National Association of Social Workers, and American Academy of Psychiatry and Law as Amici Curiae, p. 16-25, *Dassey v Dittman*, 138 S.Ct. 2677 (Mem) (2018), *cert. denied*. (stating, "[p]sychological research establishes conclusively that juveniles are far more likely than adults to falsely confess.")

[9] *Id*.

[10] Samuel R. Gross & Michael Shaffer, *Exoneration in the United States, 1989–2012: Report by the National Registry of Exonerations*, available at https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf; *see also* Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887, 904 (2010).

[11] Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 Law and Human Behavior 611 (2016).

Conclusion

For the reasons in his previously filed answer and in this supplemental brief, **TRESHAUN LEE TERRANCE** asks this Honorable Court to deny the Prosecutor's application for leave to appeal, or to affirm the Court of Appeals' decision.

Respectfully submitted,

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/s/ Angeles R. Meneses

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