

No. _____

In The
Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

WILLIAM R. LANDIS, JR.,

Respondent.

**On Petition For Writ Of Certiorari
To The Superior Court Of Pennsylvania**

PETITION FOR WRIT OF CERTIORARI

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Dated: December 3, 2019

QUESTIONS PRESENTED

Did the Superior Court of Pennsylvania err in finding that the reinstatement of Murder in the Third Degree upon the award of a new trial violated the Double Jeopardy Clause, where the verdict for this offense was not guilty in the first trial, but Respondent Landis was convicted of Murder in the First Degree and the proposed charge is a lesser included offense, contrary to relevant precedent established by this Honorable Court in *Blueford v. Arkansas*, 566 U.S. 599, 611-612 (2012) and *Poland v. Arizona*, 476 U.S. 147 (1986)?

Answered in the negative by the court below.

Suggested Answer: Yes.

Did the Superior Court of Pennsylvania err in finding that the intention of presenting a defense of diminished capacity by voluntary intoxication upon retrial, which under Pennsylvania law reduces the *mens rea* from Murder in the First Degree to Murder in the Third Degree, effectively waives any claim to double jeopardy protection for the reinstatement of the charge of Murder in the Third Degree?

Question posed but not answered by the court below.

Suggested Answer: Yes

PARTIES TO THE PROCEEDING

All parties to the proceeding are stated in the caption.

CORPORATE DISCLOSURE STATEMENT

This petition is not filed on behalf of a nongovernmental corporation.

DIRECTLY RELATED CASES

Commonwealth v. Landis, Berks County Court of Common Pleas, CP-06-CR-0005405-2009

Commonwealth's Pretrial Interlocutory Appeal

Commonwealth v. Landis, Superior Court of Pennsylvania, 826 and 1381 MDA 2010 (consolidated)

Landis's Direct Appeal After First Conviction

Commonwealth v. Landis, Superior Court of Pennsylvania, 1018 MDA 2013

Commonwealth's Post Conviction Collateral Appeal

Commonwealth v. Landis, Superior Court of Pennsylvania, 28 MDA 2016

Commonwealth v. Landis, Supreme Court of Pennsylvania, 151 MAL 2017

**Commonwealth's Pretrial Interlocutory Appeal
(instant appeal)**

Commonwealth v. Landis, Superior Court of Pennsylvania, 1785 MDA 2017

Commonwealth v. Landis, Supreme Court of Pennsylvania, 192 MAL 2019

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OPINIONS BELOW

The December 24, 2018 Opinion of the Superior Court of Pennsylvania, *Commonwealth v. Landis*, 201 A.3d 768 (Pa. Super. 2018) (1785 MDA 2017), is reproduced in the Appendix. (App. 1).

JURISDICTION

This Honorable Court has jurisdiction to consider the petition pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

STATEMENT OF THE CASE

This petition is filed to request the issuance of a writ of *certiorari* from the decision of the Supreme Court of Pennsylvania entered September 4, 2019, which denied discretionary review of a published decision of the Superior Court of Pennsylvania entered December 24, 2018 affirming the denial of the Commonwealth's motion to reinstate charges of Murder in

the Third Degree and Aggravated Assault. (App. 1, 24). William R. Landis, Jr., Respondent, was granted a new murder trial upon collateral review. (App. 4). The Commonwealth petitioned the trial court to reinstate charges for Murder in the Third Degree and Aggravated Assault, as Landis was previously convicted of Murder in the First Degree and the proposed charges were lesser included offenses. (App. 5). The trial court denied the Commonwealth's motion, reasoning that because Landis was acquitted of these lesser included offenses in the first trial, a second trial on these charges would constitute a double jeopardy violation. (App. 5, 15-17). The Superior Court of Pennsylvania affirmed this decision on December 24, 2018, and the Commonwealth's subsequent petitions for further appellate review were denied. (App. 1, 14, 24). It is the decision of the Superior Court from which the Commonwealth files the instant petition.

Procedural History

Following his conviction for Murder in the First Degree for shooting his wife Sharon Landis and subsequent unsuccessful direct appeal, William R. Landis, Respondent (hereinafter "Landis"), filed a petition for collateral relief under the Post-Conviction Relief Act, 42 Pa. C.S.A. § 9541, *et seq.* ("PCRA"). (App. 4). The petition alleged, *inter alia*, that trial counsel was ineffective for failing to present the testimony of a psychiatrist who would have testified that Landis lacked the requisite specific intent for Murder in the First Degree as a result of voluntary intoxication. (App. 4). The

PCRA court granted relief in the form of a new trial and the Commonwealth appealed. (App. 4). In an unpublished memorandum dated November 30, 2016, a panel of the Superior Court of Pennsylvania denied the Commonwealth's appeal and affirmed the PCRA court order granting Landis a new trial. (App. 4). Subsequent petitions for discretionary review were denied. (App. 20). Following the return of the record, the Commonwealth filed a motion to reinstate the charge of Murder in the Third Degree and two counts of Aggravated Assault on August 28, 2017. (App. 5, 20). The trial court denied the Commonwealth's motion by an order dated October 24, 2017. (App. 5, 15). In that order, the trial court ruled that reinstatement of Murder in the Third Degree on retrial is barred by double jeopardy and/or laches, as Landis "has not waived his [double jeopardy] protection," concluding that Landis "will be tried on the sole count of Murder of the First Degree." (App. 15).

The Commonwealth filed a timely appeal. Following submission of briefs by the parties, a panel of the Superior Court of Pennsylvania affirmed the order of the lower court in a published opinion dated December 24, 2018. (App. 1). A subsequent Petition for Reconsideration *En Banc* was denied on January 7, 2019, and the Supreme Court of Pennsylvania denied discretionary review on September 4, 2019. (App. 14, 24).

Factual History

On October 28, 2009, at approximately 9:20 p.m., Berks County Radio dispatched Spring Township Police officers to the residence of Landis to investigate a possible shooting. (App. 1-2). A man had called to report that a woman had been shot. (App. 2). It was later discovered that the caller was Landis. (App. 2). Landis' wife, Sharon Landis, was found dead from a gunshot wound to the head on the second floor of the residence. (App. 2). The victim also had other nonfatal gunshot wounds on her body. (App. 2). While performing a clearing operation of the residence, officers discovered Landis barricaded in the basement. (App. 2). Landis had a knife and two guns in his possession and threatened to shoot anyone who came down into the basement. (App. 2). While in the basement, Landis made several telephone calls to family and friends, and he mentioned his dead wife. (App. 2). Landis became increasingly intoxicated as the evening progressed. (App. 2). The Berks County Emergency Response Team was called to the scene, and Landis was eventually taken into custody after several hours. (App. 2).

REASONS FOR GRANTING THE WRIT

The Commonwealth of Pennsylvania seeks discretionary review of the Opinion of the Superior Court of Pennsylvania on the grounds that the Superior Court incorrectly decided the double jeopardy issue by finding that a not guilty verdict for the lesser offense of

Murder in the Third Degree constituted an acquittal, even though the defendant was convicted of the greater offense of Murder in the First Degree and that conviction was affirmed on appeal. This decision is inconsistent with relevant precedent of this Honorable Court in *Blueford v. Arkansas*, 566 U.S. 599, 611-612 (2012) and *Poland v. Arizona*, 476 U.S. 147 (1986). In addition, the factual scenario presented in the instant case – the effect of a conviction for a greater murder but an acquittal for a lesser included murder – has not yet been addressed by this Honorable Court’s double jeopardy jurisprudence. Thus the Superior Court decision on this issue also involved an important issue of federal law that has not been, but should be, settled by this Honorable Court.

In addition, the Commonwealth of Pennsylvania seeks discretionary review of the Opinion of the Superior Court of Pennsylvania on the grounds that the Superior Court decision involved an important issue of federal law that has not been, but should be, settled by this Honorable Court. The Commonwealth submits that Landis effectively waived his right to a double jeopardy claim for the offense of Murder in the Third Degree by seeking a defense of diminished capacity by voluntary intoxication upon retrial, which under Pennsylvania law, reduces Murder in the First Degree to Murder in the Third Degree. The effective waiver of the right to double jeopardy protection in this scenario has not been addressed by this Honorable Court, and thus this issue also presents a case of first impression.

For the foregoing reasons, the instant petition for writ of *certiorari* should be granted.

A. THE REINSTATEMENT OF THE CHARGE OF MURDER IN THE THIRD DEGREE AFTER A NOT GUILTY VERDICT IS PERMITTED BY THE DOUBLE JEOPARDY CLAUSE, AS LANDIS WAS CONVICTED OF THE GREATER OFFENSE OF MURDER IN THE FIRST DEGREE.

On appeal in state court, the Commonwealth argued that the not guilty verdict for Murder in the Third Degree was erroneous, as Landis was convicted of the greater offense of Murder in the First Degree and this conviction was affirmed on appeal. (App. 1, 7). However, the state court found that the reinstatement of Murder in the Third Degree was barred by double jeopardy. (App. 8). Because the state court decision elevated form over substance, this decision is inconsistent with the previous decisions of this Honorable Court in *Blueford v. Arkansas*, 566 U.S. 599, 611-612 (2012) and *Poland v. Arizona*, 476 U.S. 147 (1986). In addition, the issue of the effect of the Double Jeopardy Clause on an acquittal of a lesser included murder, when the defendant has been convicted for a greater murder, has not yet been addressed by this Honorable Court.

Resolution of the instant case turns on the interpretation of the Double Jeopardy Clause contained within the Fifth Amendment to the United States Constitution, which states in relevant part as follows:

“no person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”

U.S. Const. amend. V. Long-standing precedent dictates that once a defendant has been placed in jeopardy for an offense, and jeopardy ends with respect to that offense, the defendant may not be tried or punished a second time for the same offense. *See Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (*citing North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). This rule barring retrial is confined to cases where the prosecution’s failure to meet its burden is clear and a second trial would merely afford “the prosecution another opportunity to supply evidence that it failed to muster in the first proceeding.” *See Commonwealth v. Vogel*, 461 A.2d 604, 610 (Pa. 1984) (*quoting Burks v. United States*, 437 U.S. 1, 11 (1978)) (further citation omitted). “This prohibition [] prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance.” *See Vogel*, 461 A.2d at 610 (*quoting Green v. United States*, 355 U.S. 184, 187-188 (1957)).

However, once a defendant appeals from a conviction, and he is successful in having the conviction set aside, then this Honorable Court previously held that jeopardy has not terminated. *See Sattazahn*, 537 U.S. at 106 (*citing Stroud v. United States*, 251 U.S. 15 (1919)). “[T]he original conviction has, at the

defendant's behest, been wholly nullified and the slate wiped clean." *See Pearce*, 395 U.S. at 721. Accordingly, if a defendant is convicted of capital murder but sentenced to life imprisonment, and he is then awarded a new trial on appeal, the defendant can be subject to the death penalty upon retrial. *See Sattazahn*, 537 U.S. at 106 (citing *Stroud, supra*).

Unlike convictions, acquittals terminate the initial jeopardy, thus subjecting a defendant to a postacquittal factfinding process regarding guilt or innocence violates the Double Jeopardy Clause. *See Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) (citing *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984)).

In ascertaining whether an acquittal has occurred, "form is not to be exalted over substance." *Sanabria v. United States*, 437 U.S. 54, 66, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). Rather, we ask whether the factfinder has made "a substantive determination that the prosecution has failed to carry its burden." *Smith v. Massachusetts*, 543 U.S. 462, 468, 125 S. Ct. 1129, 160 L. Ed. 2d 914 (2005).

See Blueford v. Arkansas, 566 U.S. 599, 611-612 (2012). But see *Evans v. Michigan*, 568 U.S. 313, 320 (2013) ("an acquittal due to insufficient evidence precludes retrial, whether the court's evaluation of the evidence was 'correct or not,' [United States v.] Martin Linen, 430 U.S. [564], at 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642 [1977], and regardless of whether the court's decision flowed from an incorrect antecedent ruling of law").

Accordingly, jeopardy terminates when a determination has been made that the evidence is insufficient to establish the defendant's factual guilt. *See Blueford*, 566 U.S. at 612 (citing *Smalis, supra*, 476 U.S. at 144).

For double jeopardy purposes, the instant case is factually unique. In his first trial, Landis was found guilty of Murder in the First Degree, but found not guilty of Murder in the Third Degree. (App. 3). Under Pennsylvania law, this is legally impossible, as Murder in the Third Degree is a lesser included offense of Murder in the First Degree. *See Commonwealth v. Feaser*, 723 A.2d 197, 201 (Pa. Super. 1999). However, the verdict was recorded, and this conviction was affirmed on direct appeal. (App. 4). On collateral review, Landis was successful in obtaining a new trial based on a claim that trial counsel was ineffective for failing to present a defense of diminished capacity by voluntary intoxication. (App. 4). Under Pennsylvania law, a successful defense of diminished capacity by voluntary intoxication will reduce Murder in the First Degree to Murder in the Third Degree by negating the specific intent to kill, as discussed in full below. *See Commonwealth v. Spotz*, 47 A.3d 63, 90 (Pa. 2012); 18 Pa. C.S.A. § 308. The Commonwealth then sought the reinstatement of the charge of Murder in the Third Degree consistent with the anticipated defense at the upcoming retrial. (App. 5, 20). This motion was denied on double jeopardy grounds, and that decision was affirmed on appeal by the Superior Court of Pennsylvania. (App. 15, 1). The Supreme Court of Pennsylvania declined to hear the issue. (App. 24).

While research has failed to reveal precedent from this Honorable Court under similar circumstances – where the defendant is convicted of the higher offense but mistakenly acquitted of the lesser included offense¹ – the decision in *Poland v. Arizona*, 476 U.S. 147 (1986) is instructive. In *Poland*, the defendant was convicted of capital murder and sentenced to death based upon a judicial finding of the existence of two aggravating factors: (1) the murder was committed for pecuniary gain and (2) the murder was committed in an “especially heinous, cruel or depraved manner.” *See Poland*, 476 U.S. at 149. On defendant’s appeal the conviction was reversed, and the Supreme Court made a specific finding that the evidence was insufficient to support the second aggravating circumstance. *See Poland*, 476 U.S. at 150. On retrial, the defendant was again convicted of capital murder, both aggravating factors were found to exist, as well as a third aggravator based upon a prior violent felony conviction, and the defendant was again sentenced to death. *See Poland*, 476 U.S. at 150.

In examining the challenge to the death sentence based upon the Double Jeopardy Clause, this Honorable Court cited the general rule:

¹ Notably, the state court disapproves of any practice where a defendant may be acquitted of lesser degrees of murder but convicted of higher degrees of murder. *See Commonwealth v. Terry*, 521 A.2d 398 (Pa. 1987), *cert. denied*, 482 U.S. 920 (1987), *overruled on other grounds*, *Commonwealth v. Frey*, 554 A.2d 27 (Pa. 1989), *cert. denied*, 494 U.S. 1038 (1990). (App. 11).

when a defendant obtains reversal of his conviction on appeal, “the original conviction has been nullified and ‘the slate wiped clean.’ Therefore, if the defendant is convicted again, he constitutionally may be subjected to whatever punishment is lawful, subject only to the limitation that he receive credit for time served.” [*Bullington v. Missouri*, 451 U.S. 430,] 442 [1981] (quoting *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969)).

See Poland, 476 U.S. at 152. However, an exception to this general rule has been recognized in those instances where the prosecution has failed to present sufficient evidence. *See Poland*, 476 U.S. at 152 (citing *Bullington*, 451 U.S. at 443). Thus the relevant inquiry was whether the sentencing judge or reviewing court found that the prosecution had not proven its case, and thus the defendant was “acquitted” of the death penalty. *See Poland*, 476 U.S. at 154 (citing *Arizona v. Rumsey*, 467 U.S. 203, 209-210 (1984)).

While the defendant urged this Honorable Court to hold that the failure to find that the evidence was sufficient for one aggravating circumstance was tantamount to an acquittal for double jeopardy purposes, this Honorable Court refused to do so. *See Poland*, 476 U.S. at 155. “*Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has ‘decided that the prosecution has not proved its case’ *that the death penalty is appropriate.*” *Id.* (emphasis in original). Accordingly, the failure to find the evidence insufficient to support the existence of one aggravating circumstance did not acquit the defendant of the death

penalty, and the Double Jeopardy Clause was not violated when the same aggravating factors were sought and found upon retrial. *See Poland*, 476 U.S. at 156-157.

In light of the above precedent, the decision of the state court is respectfully incorrect. While the jury did find Landis not guilty of Murder in the Third Degree, they did convict Landis of the greater offense of Murder in the First Degree. (App. 3). Notably, this conviction was affirmed on direct appeal. (App. 4). Because the evidence was sufficient to support the elements for the higher degree of murder, the evidence was necessarily sufficient to support the elements of the lesser included degree of murder as well, in spite of the verdict. To find that the recordation of an erroneous not guilty verdict constitutes an acquittal for double jeopardy purposes, when the evidence was sufficient to support the conviction for this offense, elevates form over substance – a process which was specifically rejected in *Blueford*, *supra*.

Like *Poland*, the elements of Murder in the Third Degree were part of the greater offense of Murder in the First Degree, under Pennsylvania law. Accordingly, the failure to convict on the lesser murder did not invalidate the conviction for the greater murder, as evidenced by the affirmation of the latter conviction on direct appeal. (App. 4). By analogy, because there has been no acquittal of the greater murder, there is no double jeopardy bar to seeking a conviction for the lesser murder offense upon retrial. This argument is further supported by Landis' expressed intent to seek

a diminished capacity defense by voluntary intoxication upon retrial, which if successful, would reduce the *mens rea* from Murder in the First Degree to Murder in the Third Degree. Because Murder in the Third Degree is a lesser included offense of Murder in the First Degree, and because the evidence was sufficient to support a conviction for Murder in the Third Degree regardless of the erroneous verdict, the state court respectfully erred in finding that the Double Jeopardy Clause bars the reinstatement of Murder in the Third Degree. Accordingly, the decision of the state court should be reversed, and the case remanded for retrial including the charge of Murder in the Third Degree.

B. IN ADDITION, LANDIS EFFECTIVELY WAIVED HIS CLAIM TO DOUBLE JEOPARDY PROTECTION FOR MURDER IN THE THIRD DEGREE BY SEEKING A DEFENSE OF DIMINISHED CAPACITY BY VOLUNTARY INTOXICATION UPON RETRIAL.

On appeal in state court, the Commonwealth raised a second issue: whether the trial court erred by ruling that the defendant is permitted to present a diminished capacity defense where the Commonwealth is barred from retrying Landis on Murder in the Third Degree. (App. 5). In its opinion, the panel found that discussion of this issue is premature, instead deferring to the trial court to decide whether Landis may present evidence of his diminished capacity on retrial. (App. 13). However, because Pennsylvania law dictates that

a successful diminished capacity defense by voluntary intoxication reduces Murder in the First Degree to Murder in the Third Degree, the presentation of this defense in the instant case effectively waives any double jeopardy claim for the retrial on the charge of Murder in the Third Degree. This is a novel issue that has not yet been addressed by this Honorable Court.

In its Order dated October 24, 2017, the trial court ruled that reinstatement of Murder in the Third Degree on retrial is barred by double jeopardy and/or laches, as Landis “has not waived his [double jeopardy] protection,” concluding that Landis “will be tried on the sole count of Murder of the First Degree.” (App. 15-16). Landis was granted a new trial after the trial court found counsel ineffective for failing to pursue a diminished capacity defense. (App. 4). Although his second trial has not yet commenced, Landis provided notice of his intent to advance a defense of diminished capacity due to voluntary intoxication.

“A defense of diminished capacity, whether grounded in mental defect or voluntary intoxication, is an extremely limited defense available only to those defendants who admit criminal liability but contest the degree of culpability based upon an inability to formulate the specific intent to kill . . . A diminished capacity defense does not exculpate the defendant from criminal liability entirely, but instead negates the element of specific intent. For a defendant who proves a diminished capacity defense, first-degree murder is mitigated to third-degree murder.” *Commonwealth v. Spotz*, 47 A.3d 63, 90 (Pa. 2012).

In Pennsylvania, it is well-established that a defendant who wishes to pursue a diminished capacity defense *must* admit criminal liability for third-degree murder. *See Commonwealth v. Williams*, 980 A.2d 510, 527 (Pa. 2009). The Commonwealth posits that the notice of a diminished capacity defense operates as a waiver of any double jeopardy protection for third-degree murder, should any protection actually apply. By advancing a diminished capacity defense by voluntary intoxication, Landis is *asking* to be convicted of Murder in the Third Degree.

As the panel noted in its opinion, under *Commonwealth v. Larkins*, 829 A.2d 1203 (Pa. Super. 2003), *appeal denied*, 870 A.2d 321 (Pa. 2005), waiver of double jeopardy protections on retrial is theoretically possible. (App. 8). While this Honorable Court has previously held that an appeal requesting a new trial does not function as a waiver of the right to be free from double jeopardy, *see North Carolina v. Pearce, supra*, 395 U.S. at 727 (*citing Green v. United States*, 355 U.S. 184, 191-193 (1957)), the Commonwealth has been unable to locate precedent from this Honorable Court where the defendant is requesting a conviction for a charge for which he had previously been acquitted. In that respect, the Commonwealth argues that the decision in *Larkins* properly resolves this issue and serves as persuasive authority for this Honorable Court. *See Commonwealth v. Bostic*, 456 A.2d 1320, 1322 (Pa. 1983) (“At least in the ‘multiple punishments’ context, it seems clear that the double jeopardy proscription embodied by the Fifth Amendment of the United States

Constitution is coextensive with that embodied by Article I, section 10 of the Pennsylvania Constitution.”).

Under *Larkins*, where double jeopardy protections may actually harm a defendant’s interests, he or she may waive them. *See Larkins*, 829 A.2d at 1206. However, the state court concluded that “unlike *Larkins*, this case does not present a scenario in which [the Defendant] would benefit from waiving his double jeopardy rights . . . ” (App. 8). The Commonwealth respectfully disagrees, as Landis has stated his intent to pursue a defense that results in a waiver of his double jeopardy protection for his own benefit.

In *Larkins*, just as in the instant matter, the defendant was convicted of first-degree murder and acquitted of third-degree murder in his first trial, then granted collateral relief in the form of a new trial. *See Larkins*, 829 A.2d at 1204. At his second trial, *Larkins*’ request for a *jury charge* on third-degree murder and voluntary manslaughter was denied on double jeopardy grounds. *See Larkins*, 829 A.2d at 1204. On appeal, the state court concluded that *Larkins* could have waived his double jeopardy protection. *See Larkins*, 829 A.2d at 1204. Notably, the *Larkins* court did not suggest that it would have been proper to instruct the jury as to third-degree murder and treat a guilty verdict on that count as a legal nullity. To the contrary, *Larkins* suggests that waiver of double jeopardy protections was not only possible, but *required* if the defendant wished to have the jury instructed on third-degree murder. *See Larkins*, 829 A.2d at 1205-1206 (emphasis added). Absent such a waiver, the panel in

Larkins found that the trial court properly refused to charge the jury on the lesser included offenses and affirmed the judgment of sentence. *See Larkins*, 829 A.2d at 1205-1206.

In the instant matter, Landis has stated his intention to pursue a defense which concedes guilt for the lesser-included offense of Murder in the Third Degree despite his previous acquittal for that offense. Thus, *Larkins* and the instant matter are indistinguishable: both cases involve a defendant who stands to benefit from conviction for a lesser-included offense despite the fact that he was previously acquitted for that offense. Moreover, both cases involve scenarios where a defendant would prefer to have the jury *instructed* as to Murder in the Third Degree without actually being exposed to conviction for that offense.

Larkins asked the trial court to instruct the jury on third-degree murder but treat a guilty verdict to that count as a “finding of not guilty,” thus ending the case in his favor. *See Larkins*, 829 A.2d at 1206. Landis intends to make the same request. He has filed notice of his intent to pursue a defense in which he will ask the jury to find him guilty of Murder in the Third Degree while simultaneously arguing that despite his request, he cannot be found guilty of the same offense because of double jeopardy. Such an absurd scenario has no basis in law and was roundly rejected by the *Larkins* court when it found that, despite his request for a jury charge on third-degree murder, the record suggested that *Larkins* had been unwilling to waive

his double jeopardy rights for that offense. *See Larkins*, 829 A.2d at 1205-1206.

In light of this analysis, the state court respectfully misapprehended the effect of the trial court's order. The trial court ruled in effect that, absent an *express* waiver of double jeopardy protections by Landis, reinstatement of Murder in the Third Degree is barred on retrial. (App. 15). This ruling leaves the door open for Landis to advance a defense in which he concedes he is guilty of Murder in the Third Degree for killing his wife without actually exposing himself to conviction for that offense. This is exactly the scenario that *Larkins* rejected, finding no error where the trial court refused to instruct the jury on third-degree murder absent a waiver of double jeopardy protections and reinstatement of that offense. *See Larkins*, 829 A.2d at 1205-1206. Here, like *Larkins*, despite an unwillingness to *expressly* waive his double jeopardy rights, the notice of intent to pursue a diminished capacity defense should operate as a waiver of those rights.

As a practical matter, the state court decision creates a significant problem on retrial. Given that Landis has stated his intention to advance an involuntary intoxication defense but refuses to expressly waive his double jeopardy protection for Murder in the Third Degree, there are only two conceivable approaches to instructing the jury on how it is to complete the verdict slip. Under the first possible scenario, the jury will be instructed on the law of diminished capacity by voluntary intoxication, and they will have the option of finding Landis guilty of Murder in the Third Degree on the

verdict slip. However, should the jury return a guilty verdict on this offense, the conviction would be a legal nullity because, according to the trial court, the charge is barred by double jeopardy. This scenario would deceive the jury into believing they just convicted a man who admits shooting his wife with malice when, unbeknownst to them, they actually just rendered a full acquittal.

The other possible option would be to remove Murder in the Third Degree from the verdict slip, thus ignoring the law regarding diminished capacity as a defense, but allow Landis to present evidence of diminished capacity by voluntary intoxication. Under this approach, the jury would be misled into believing that under our law, if they believe Landis lacked a specific intent to kill due to voluntary intoxication, he is not guilty of any crime. With either approach, the jury will be misled. In the first scenario described above, it will be deceived as to the effect of its verdict. Under the second scenario, it will be misled as to the law of this Commonwealth. Under *Larkins*, which states that double jeopardy can be waived like most other constitutional rights, treating the voluntary intoxication defense as a waiver to double jeopardy as to Murder in the Third Degree alleviates these practical concerns created by the problematic ruling of the state court.

Admittedly, there are no prior decisions of this Honorable Court on the issue of whether a voluntary intoxication defense conceding guilt for Murder in the Third Degree operates as a waiver to any double jeopardy protections that may exist as to Murder in the

Third Degree on retrial. Moreover, despite the proclamation in *Larkins* that double-jeopardy waiver is possible, there is a scant authority on the subject. Therefore, we respectfully pray this Honorable Court grant the instant petition for a writ of *certiorari* to address this important issue of first impression.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests this Honorable Court to grant this petition for a writ of *certiorari*.

Respectfully submitted,

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