No.

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER,

v.

TRESHAUN TERRANCE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

KYM L. WORTHY
Wayne County Prosecuting Attorney

JON P. WOJTALA
Chief of Research, Training, and Appeals

DAVID A. MCCREEDY (P56540)*
Principal Appellate Attorney
1441 St. Antoine, Room 1116
Detroit, Michigan 48226
(313) 224-3836
dmccreed@waynecounty.com

*** Counsel of Record**

STATEMENT OF THE QUESTIONS

Respondent was charged with premeditated murder and felony murder (with torture as the predicate) for the suffocation death of his live-in girlfriend. A jury acquitted him of count one but could not reach a verdict on count two. Before the retrial on count two, Respondent pleaded guilty to a reduced charge of second-degree murder. The trial court had to vacate the conviction, however, because under federal issue preclusion doctrine, the jury's not-guilty verdict on count one precluded retrial on count two. The Michigan Court of Appeals later held that issue preclusion also barred retrial on the torture predicate because the count-one acquittal necessarily determined that Respondent was not the perpetrator.

There are three questions:

1. Since issue preclusion is a civil doctrine and not originally part of the double jeopardy clause, should it apply in criminal cases? Should *Ashe v Swenson* be overturned?

2. Since issue preclusion only applies when a jury has *necessarily decided* an issue, should the fact that the jury *hung* on that issue in another count defeat the doctrine's application? Should *Yeager v US* be overturned?

3. Since a rational jury could have grounded Respondent's acquittal of murder in something other than reasonable doubt as to his identity as the perpetrator (such as lack of intent to commit murder), should issue preclusion bar retrial on other counts simply because it may have been *more likely* that he was acquitted on the basis of identity? Should the Michigan state courts' failure to apply *Ashe* and *Yeager's* "no rational jury" standard be overturned?

PRIOR PROCEEDINGS

1. On January 28, 2016, Respondent was charged with first-degree premeditated murder and first-degree felony murder, and he was arraigned on the information on February 18, 2016 in Michigan's Third Circuit Court, docket number 16-001235-01-FC. A jury trial began May 12, 2016, and concluded May 20, 2016, with the jury acquitting on count one and a mistrial declared on count two.
2. On September 12, 2016, Respondent pleaded guilty to second-degree murder instead of going to trial on count two. That conviction was vacated by the Third Circuit Court on May 19, 2017.
3. The order vacating Respondent's conviction was affirmed by the Michigan Court of Appeals on July 28, 2017 in docket number 338938, and by the Michigan Supreme Court on October 31, 2017 in docket number 156394. This court denied Petitioner's petition for certiorari on March 26, 2018 in docket number 17-1097.
4. On May 19, 2017, Respondent was charged with torture arising out of the same facts and circumstances, and he was arraigned on the information on June 27, 2017 in Michigan's Third Circuit Court, case number 17-005253-01-FC. The Circuit Court entered an order denying Respondent's motion to dismiss on March 12, 2018.

5. The trial court's order was reversed by the Michigan Court of Appeals on March 5, 2019 in docket number 343154, and leave to appeal was denied by the Michigan Supreme Court on September 10, 2021 in docket number 159516.

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The State of Michigan, by **KYM L. WORTHY**, Prosecuting Attorney for the County of Wayne; **JON P. WOJTALA**, Chief of Research, Training, and Appeals; and **DAVID A. MCCREEDY**, Assistant Prosecuting Attorney, respectfully petitions for a writ of certiorari to review the judgment of the Michigan Court of Appeals, entered in this cause on March 5, 2019, with an order denying leave entered by the Michigan Supreme Court on September 10, 2021.

OPINIONS AND ORDERS BELOW

The Michigan Third Circuit Court order vacating Respondent's second-degree murder conviction, entered on May 19, 2017, is unpublished, and is located in the Appendix at 28a. The order by the Michigan Court of Appeals on August 24, 2017 affirming the trial court is unpublished, and is located in the Appendix at 27a. The order by the Michigan Supreme Court on October 31, 2017, denying leave to appeal is reported at 501 Mich 911, 902 NW2d 879 (2017), and is located in the Appendix at 26a. The Third Circuit Court's order denying Respondent's motion to dismiss on March 12, 2018 is unpublished, and is located in the Appendix at 25a. The Michigan Court of Appeals majority opinion reversing the trial court, entered on March 5, 2019 is unpublished, and is located in the Appendix at 3a-15a. The order by the Michigan Supreme Court denying leave to appeal entered on September 10, 2021 is at 963 NW2d 373 (2021), and is located in the Appendix at 1a-2a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1). This petition is timely filed within 90 days after an order was entered, on September 10, 2021 by the Michigan Supreme Court, denying the People's application for leave to appeal from the Michigan Court of Appeals opinion dated March 5, 2019.

CONSTITUTIONAL PROVISION INVOLVED

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

> No person shall be … subject for the same offence to be twice put in jeopardy of life or limb.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Respondent called 911 to report that his live-in girlfriend—21-year-old Dalona Tillman—had stopped breathing. He claimed that she had sustained her injuries in a fight the day before. When emergency medical personnel arrived, Respondent and the victim were the only ones present. The victim was on the couch, not breathing, with no pulse. She was, however, still warm, without rigor mortis. EMS was unable to revive the victim, and she was pronounced dead at the hospital.

The medical examiner determined that the victim had not been beaten to death as claimed by Respondent. While she had over 70 bruises, cuts, and abrasions on her body, the cause of death was suffocation. Since Respondent was the only person who could have done it, he was charged with two counts of first-degree murder: premeditated murder, and felony murder with torture as the predicate offense.

At a jury trial in 2016, he was acquitted of premeditated murder, but the jury hung on felony murder. A retrial was scheduled on the felony murder, but instead respondent took a plea to the reduced charge of second-degree murder.

Shortly thereafter, Respondent filed a motion to vacate his plea, and while objecting to relief, Petitioner acknowledged that *Yeager v US,* 557 US 110 (2009), prohibited the retrial on the felony-murder charge and required that Respondent's plea be vacated. According to *Yeager,* the jury's acquittal on the lesser-included charge of second-degree murder under the premeditated count precluded him from being re-tried on the felony murder count, even though the jury could have, but did not, actually acquit him on that count or the lesser-included under that count. Petitioner proceeded to appeal the trial court's dismissal in state appellate courts, but conceded that *Yeager* and *Ashe v Swenson,* 397 US 436 (1970), were binding precedent. Petitioner then challenged the application of *Ashe* and *Yeager* in this Court, and certiorari was denied.

Respondent was then charged with torture, since the jury had never considered that charge at trial. But a split court of appeals ruled that torture was also barred by *Yeager* issue preclusion, because according to those courts the jury necessarily determined that respondent was not the perpetrator. The Michigan Supreme Court denied leave, with three dissenting justices.

But *Ashe* and *Yeager* continue to be wrong in (1) applying issue preclusion in the criminal context and (2) applying it to hung juries. Not only that, but (3)

even *Ashe* and *Yeager* do not apply where an alternative rational basis exists for the jury's acquittal. Here, the jury could just as easily have grounded their acquittal on a reasonable doubt about respondent's intent, rather than a lack of proof regarding his identity as the perpetrator. Thus, this petition for certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I.

> *Because issue preclusion is a civil doctrine which never was, and should not be, a part of the double jeopardy clause.* Ashe v Swenson *should be overturned.*

There can be little doubt that issue preclusion is a civil doctrine not originally a part of the Fifth Amendment's double jeopardy clause. As Justice Scalia comprehensively explained in his dissents in *Yeager v US,* 557 US 110 (2009), and *Grady v Corbin,* 495 US 508 (1990), and as Justice Gorsuch highlighted in *Currier v Virginia,* 138 S Ct 2144 (2018), 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 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. And offenses are distinct if they each contain at least one unique element. *Blockburger v US,* 284 US 299 (1932).

Issue preclusion as an aspect of double jeopardy wasn't added until 1970, in *Ashe v Swenson,* 397 US 436 (1970).[1] As the Court knows, Bob Fred Ashe was prosecuted seriatim for a robbery that had multiple victims. The only issue at the initial trial was Ashe's identity as one of the perpetrators, and he was acquitted. Ashe was then convicted at a second trial involving a different victim, and on habeas review this Court reversed, holding that—because the first jury had determined that reasonable doubt existed as to identity—the state could not re-litigate that issue.

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[1]*Ashe* found its roots in *US v Oppenheimer,* 242 US 85 (1916). In *Oppenheimer,* the defendant's indictment was quashed because it was outside the Bankruptcy Act's one-year statute of limitations. A subsequent case held that the statute of limitations did not apply in such prosecutions, and so the government re-indicted. But this Court ruled that the second indictment was barred by res judicata, despite the fact that the defendant had never been placed in jeopardy. Unfortunately, the *Oppenheimer* Court's entire jeopardy analysis consisted of little more than 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.

Whether the reversal in *Ashe* may have been correct on other grounds is not relevant here; the opinion's reliance on issue preclusion for its result was most certainly error. As this Court went to great lengths to explain in *Standefer v US,* 447 US 10 (1980), there are multiple reasons to confine issue preclusion to civil cases.

Unlike a prosecutor, civil litigants have extensive rights of discovery, and it is that full and fair opportunity to litigate which constitutes the "prerequisite of estoppel." *Id.* at 22. More importantly, unlike a civil party, the prosecution may never obtain a directed verdict in its favor, nor a judgment notwithstanding the verdict, when the proofs clearly demand it. Similarly, the prosecution cannot appeal a trial loss as being against the great weight of the evidence, or a blatantly erroneous legal ruling that leads to an unfavorable verdict, as any civil party can. *Id.* 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.

Adding issue preclusion to criminal cases is not only legally untenable, it is also unfair, and this case demonstrates why. This Court's precedent has established that, when a jury cannot return a verdict and a mistrial is declared, jeopardy does not end but continues through the re-trial. *Richardson v US,* 468 US 317, 325 (1984). In that regard, the *Richardson* Court acknowledged 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.[2] Here, the felony-murder count was not terminated in an acquittal or a conviction. To the contrary, it resulted in a hung jury, and bedrock principles of criminal jurisprudence entitle the People of Michigan to try that count through to verdict. The prosecution in any criminal case is due that much, and the double jeopardy clause requires no less a result. For these reasons, as amplified by Justice Scalia's dissents in *Yeager* and *Grady,* Chief Justice Burger's dissent in *Ashe,* and the majority opinion in *Currier,* certiorari should be granted, and *Ashe's* adoption of issue preclusion in the criminal context overturned.

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[2]Or the court directs a verdict based on legally insufficient evidence of guilt, where no rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. See *Michigan v Wolfe,* 440 Mich 508, 515 (1992).

II.

Because even if double jeopardy includes issue preclusion, that doctrine shouldn't apply when a jury's inability to reach unanimity on one count disproves that it necessarily decided that same issue in the defendant's favor on another count: Yeager v US *should be overruled.*

If this Court keeps *Ashe* issue preclusion, it should at least discard *Yeager*; it is fanciful to conclude that—in acquitting on one count but failing to reach a verdict on another count with the same issue—a jury has actually decided that issue in the defendant's favor, especially when the defendant bears the burden of proof in this area.[3]

As the First, Eighth, and District of Columbia Circuits all observed pre-*Yeager,* it is the practical and logical reality that the jury has acted inconsistently for issue preclusion purposes when it acquits on one count while failing to reach a verdict on another count that necessarily follows. See *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)). That is, it cannot be said that a jury has decided an issue in the defendant's favor when, if it had truly done so, it would have also acquitted on other counts.

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[3] *Dowling v US,* 493 US 342, 351 (1990).

This case is a perfect example: if Respondent's jury had found reasonable doubt that he was the perpetrator, there would have been no reason to hang on count two. Instead, jurors sent out four notes saying they were deadlocked, and were instructed two of those times to keep deliberating, and on the third sent home for the night and required to re-start discussions the next morning. Given the multiple instructions encouraging the jury to reach a verdict, and the presumption that jurors follow instructions,[4] Respondent can't possibly demonstrate that his jury decided he wasn't the perpetrator but then refused or forgot to render the corresponding verdict on count two.

Thus when a jury cannot reach a verdict on a count that would necessarily follow from an acquitted count if the jury necessarily decided the issue in question, trial and appellate courts may not speculate that jurors were confused about one count but not the other, or were exhausted after a long trial and so just gave up. See *Yeager* at 121. Instead, courts must face the fact that the jury—in rendering an inconsistent nonverdict—demonstrated that they did not, in fact, decide the contested issue in the defendant's favor, thereby making unavailable to the defendant a claim of issue preclusion.

This analysis might be different if the government had decided to proceed seriatim against

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[4] *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.").

Respondent, as did the prosecution in *Ashe*: trying the same underlying issue on successive prosecutions after an acquittal. But when, as here, the same issue underlies more than one charge and the charges are tried 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 second-degree murder under count two, while acquitting him of second-degree murder under count one, likely signaled the jurors' conclusion that there was insufficient proof of premeditation, and an inability to agree whether torture had been proven beyond a reasonable doubt on count two. It is apparent that the jury did not then properly consider second-degree murder as a lesser included offense on either count, otherwise they would have reached a verdict on both (or neither) counts.[5]

In other words, to paraphrase the majority in *Bravo-Fernandez,* "the jurors in this case might not have acquitted on the [premeditated murder count] absent their belief that the [felony murder count] would [remain viable]." See *Bravo-Fernandez v US,*

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[5]The jury was not given the option of finding Respondent not guilty of second-degree murder specifically. The verdict form for count one listed premeditated murder, second-degree murder, and not guilty.

137 S Ct 352 (2016). Like in the Court of Appeals cases cited above, if the jury here had really concluded that Respondent did not murder the victim, they 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 is inapplicable because Respondent cannot meet his burden.

Moreover, there can be no doubt that Respondent killed Dalona Tillman, because not only did he later admit to it under oath, by his own statements and the testimony of the responding EMS technicians he was the only one who could have done it. Respondent claimed that Tillman had been beaten up the day before and succumbed to those injuries on the day of her death. But in fact she had been asphyxiated and her body was still warm; Respondent turned out to be the only one with her at the time. Additionally, in the ambulance on the way to the hospital, Respondent went so far as to say that he "didn't want to take her last breath."

Given the unassailable evidence of identity, it is highly likely that Respondent's jury acquitted on the basis of intent. That is, Respondent called 911, stayed until EMS came, and rode with the ambulance to the hospital. The 911 call itself, which was admitted into evidence, demonstrated Respondent's angst and supported the inference that he hadn't intended to kill Tillman. Correspondingly, Tillman had seventy-plus cuts, abrasions, and contusions all over her body, none

of which contributed to her death, and as mentioned, Respondent told EMS that he hadn't meant for the smothering to be fatal. Thus, reasonable doubt as to Respondent's specific intent to kill and/or premeditation explains why the jury would acquit on premeditated murder but not felony murder.

To summarize, Respondent 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 double jeopardy. Certiorari should be granted so that this Court can overturn *Yeager,* and so that the People of Michigan can obtain the verdict on felony murder that they are entitled to.

III.

> *Because even if* Ashe *and* Yeager *preclude retrial on murder, the jury's acquittal still leaves open the possibility that Respondent committed torture and involuntary manslaughter. Michigan courts blatantly misapplied* Ashe *and* Yeager *in barring retrial altogether.*

While the Fifth Amendment plainly bars the government from engaging in multiple attempts to convict a citizen for the same crime, that protection is limited to "offenses." But the Michigan Court of Appeals barred Respondent's prosecution for torture—an offense unquestionably different from the

murder he was acquitted of. See *Blockburger,* 284 US 299 at 304. As indicated above, Respondent's jury did not conclusively determine that he wasn't the *cause* of Tillman's death—only that he did not *commit murder*. Nothing prevents a second jury from finding beyond a reasonable doubt that Respondent tortured Tillman, or even that he killed her while acting with gross negligence.

As above, the evidence and verdict at the 2016 trial are in no way inconsistent with a finding that defendant caused Tillman's death. Again, *Ashe / Yeager* issue preclusion bars a criminal re-prosecution after a not-guilty verdict in a first trial *only* if no rational jury "could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe,* 397 US at 444. 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 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 Tillman: involuntary manslaughter was not one of the jury's options. In other words, while *Ashe* and *Yeager* require the (unwarranted, see above) conclusion that the jurors agreed the prosecution either had not proved Respondent's identity or his intent for murder,[6]

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[6]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

jurors were not asked to decide whether cutting off Tillman'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 *Michigan v Datema,* 448 Mich 585, 606 (1995).

That is, the evidence is at least consistent with the theory that Respondent wanted only to torture Tillman, but not to kill her, do great bodily harm to her, or act in wanton and wilful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. As stated, 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 that the evidence was insufficient to prove *either* that Respondent caused Tillman'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.

Respondent's rejoinder in state court—and the Michigan Court of Appeals' rationale for reversing the trial court—was that both the prosecution and the defense took an all-or-nothing approach to the case:

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is to cause death or great bodily harm. See *Michigan v Goecke,* 457 Mich 442, 464 (1998).

according to the attorneys, Respondent was either guilty as charged or guilty of nothing. According to the Court of Appeals majority, no rational juror could have veered from the course set by the parties and decided the case on any ground other than who done it. But that holding ignores the explicit instructions that were given to the jury; namely that jurors don't have to cater to the parties' theories of the case.

As all juries are instructed in Michigan, and as Respondent's jury was instructed here, *the jurors* 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.

Thus, Respondent'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. As such, Respondent cannot prove conclusively that the acquittal represented the factual determination that he did not torture, smother, and kill Tillman.

Even the Court of Appeals majority 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." Appendix at 11a. Respondent's reaction to Tillman's

unresponsiveness gave rise to the inference that he abused her but did not intend to kill her. At the very least, Michigan courts should be instructed to allow this case to proceed on that basis.

Conclusion

The People of Michigan are entitled to one full and fair opportunity to prove that Respondent tortured and murdered Dalona Tillman. And it is well established that the relevant "opportunity" includes a re-trial on any count the initial jury hung on. Critically for purposes of this petition, there is nothing in the double jeopardy clause, properly understood, that would prevent such a retrial. Further, even if the Fifth Amendment includes issue preclusion, the doctrine cannot apply here because Respondent's jury could rationally have acquitted him of murder on a basis other than the one he seeks to preclude; therefore at the very least re-trial should proceed on charges, like torture or involuntary manslaughter, that the initial jury did not decide.

Ashe should be overruled and this case remanded for re-trial on felony murder. Short of that, *Yeager* should be overruled and this case remanded for re-trial on felony murder. Short of that, the Michigan Court of Appeals should be overruled and this case remanded for re-trial on any charge, other than murder, which is supported by the facts.

RELIEF

Therefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

KYM L. WORTHY
Wayne County Prosecuting Attorney

JON P. WOJTALA
Chief of Research, Training, and Appeals

DAVID A. MCCREEDY
Principal Appellate Attorney

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