NO. 21-870

IN THE

Supreme Court of the United States

MICHIGAN,

PETITIONER,

V.

TRESHAUN TERRANCE,

RESPONDENT.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

First Question:

In its current petition the State asks this Court to re-open Wayne Circuit Court No. 16-001235-FC to revive the dismissed felony murder charge, or perhaps the vacated second-degree murder plea conviction. The appeal from the orders in that that file was concluded years ago, including with this Court denying the State's petition for certiorari. Does this Court lack jurisdiction over that matter?

Second Question:

As the reviewing state courts found, Mr. Terrance prevails under this Court's existing precedent. The State offers this Court no compelling reason to revisit and overturn the rule of *Ashe* or *Yeager*. Are there compelling reasons to keep them intact?

Third Question:

This Court is not generally an error correction court. *Ashe* and *Yeager* squarely applied to entitle Mr. Terrance to the relief he received in state court in this appeal, i.e., the dismissal of the torture charge. Should this Court reject the State's alternative argument that *Ashe* and *Yeager* were misapplied here?

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Statement of the Case

In May 2016, Mr. Treshaun Terrance stood trial in Wayne County Circuit Court File No. 16-001235-FC (WCC 16-001235-FC) on charges of first-degree premeditated murder[1] and first-degree felony murder[2] predicated on the underlying offense of torture.[3] (Amended Felony Information 16-001235-FC). The State could have charged Mr. Terrance in that file with torture as a separate offense, but it chose not to.

The State alleged that Mr. Terrance, then seventeen years old, beat and suffocated his girlfriend, Dalona Tillman, causing her death. (T V, 44-56).[4] The defense argued that the State had not proven that Mr. Terrance had committed these acts, which he had denied committing when interrogated by the police. *Id*. at 56-70. In closing argument, the State rightly told the jury that the only element in contention for them to decide was identity, i.e., whether Mr. Terrance was the perpetrator.

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[1] MCL 750.316(1)(a).

[2] MCL 750.316(1)(b). In Michigan, first-degree felony murder consists of the elements of second-degree murder committed during the commission or attempted commission of an enumerated felony. *People v. Aaron*, 409 Mich. 672, 725 (1980).

[3] MCL 750.85.

[4] The trial transcript references are to WCC 16-001235-FC. The May 2016 trial will be cited by volume number, then page number.

At trial, the State 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). In closing, the State 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). The defense argued that the State had not proven that Mr. Terrance had committed these acts, which he had denied committing when interrogated by the police. (*Id*. at 56-70).

In closing argument, the State 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).
>
> ***
>
> "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).
>
> ***
>
> "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).
>
> ***
>
> 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).

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> 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).

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).

In rebuttal, the State 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 Mr. Terrance's denials were not credible, including dissecting his statements during the police interrogation. (V 72-78). The State did not separate out the acts that she alleged constituted the torture (the beating) from the death culminating from the alleged torture. For example, the prosecutor argued, "So, I just would submit to you that this woman was in the fight of her life." (V 77). The prosecutor concluded by stating: "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).

At the close of Mr. Terrance's trial, the jury was instructed on premeditated and felony murder, as well as the lesser-included offense of second-degree murder.[5] After deliberating for approximately two days, the jury acquitted Mr. Terrance of first-degree premeditated murder and the lesser-included second-degree murder

[5] MCL 750.317.

charge. VII 12, Verdict Form, WCC 16-001235-FC. The jury indicated that it could not reach a verdict on the first-degree felony murder charge. V 8.

On September 12, 2016, the State filed a second amended information, this time charging Mr. Terrance only with first-degree felony murder. (Second Amended Information, 16-001235-FC). That same day Mr. Terrance pled guilty to a reduced count of second-degree murder. P 4, 8.[6] In exchange, Mr. Terrance received a sentence agreement of 28-45 years in prison. P 3-4.

Through appellate counsel, Mr. Terrance moved to vacate the second-degree murder conviction and to dismiss the first-degree felony murder charge as being in violation of the state and federal prohibitions on Double Jeopardy and, alternatively, for ineffective assistance of trial counsel where his counsel failed to move for dismissal of the felony murder count and instead had Mr. Terrance plead guilty to a crime of which he had been acquitted. (Defendant's Motion to Vacate Convictions and Dismiss Charges, WCC 16-001235-FC).[7] The State conceded that the circuit court must grant the motion under binding precedent from this Court. MH 5/19/17, 4.[8] The State indicated its intent to appeal all the way to this Court to ask it to

[6] Mr. Terrance's September 12, 2016 plea will be cited by P, then page number.

[7] This was the subject of the State's prior appeal in WCC 16-001235-FC, which has long been final. *People v. Terrance*, unpublished order of the Court of Appeals, entered August 24, 2017 (Docket No. 338938), granting Defendant's motion for affirmance; *leave denied*, *People v. Terrance*, 501 Mich. 911 (2017), *cert. denied*, *Michigan v. Terrance*, 138 S. Ct. 1334 (2018).

[8] This post-conviction motion hearing from the prior case, WCC 16-001235-FC, will be cited by MH 5/19/17, then page number.

overturn its existing precedents. MH 5/19/17, 4. The Wayne County Circuit Court granted the defense motion. (5/19/17 Trial Court Order Granting Motion to Vacate/Dismiss, WCC 16-001235-FC).

While conceding that Michigan's appellate courts were bound by the same U.S. Supreme Court precedents, the State appealed the circuit court's order. The Michigan Court of Appeals granted Mr. Terrance's motion to affirm the circuit court's order (Court of Appeals Order, 338938). The Michigan Supreme Court denied leave to appeal, and later the U.S. Supreme Court denied certiorari. *People v. Terrance,* 501 Mich. 911 (2017), *cert. denied*, *Michigan v. Terrance*, 138 S. Ct. 1334 (2018).

Meanwhile, in the instant case number, WCC 17-005253-FC, the State filed a torture charge against Mr. Terrance based on the same incident that was the subject of WCC 16-001235-FC. On October 12, 2017, Mr. Terrance filed a motion to dismiss the charge against him, on the bases of (1) prosecutorial vindictiveness and (2) double jeopardy. On March 12, 2018, the Wayne County Circuit Court denied the defense motion. MH 3/12/18, 11; 3/12/18 TC order denying motion to dismiss.[9]

The Michigan Court of Appeals granted Mr. Terrance's interlocutory application for leave to appeal and stayed further proceedings in the trial court. (5/17/18 COA Order). Following briefing and oral argument, on March 5, 2019, the Court of Appeals issued an opinion reversing the trial court's order denying the motion to dismiss the torture charge. (3/5/19 COA Opinion).

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

> 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).

The State sought leave to appeal in the Michigan Supreme Court. That court ordered supplemental briefing and heard oral argument on the State's application. Ultimately, the Michigan Supreme Court denied leave to appeal. *People v. Terrance,* 963 N.W.2d 373 (2021).

Summary of Argument

This Honorable Court lacks jurisdiction over Wayne County Circuit Court File No. 16-001235-FC (WCC 16-001235-FC), containing jury trial acquittals on first- and second-degree murder charges. In the same case, the State improperly re-charged Mr. Terrance with felony murder. Mr. Terrance, succumbing to the State's pressure and ineffective assistance of his own counsel, entered a constitutionally prohibited plea to second-degree murder. The appeal from WCC 16-001235-FC was final years ago, after the state appellate court system affirmed the vacation of Mr. Terrance's invalid second-degree murder plea conviction and the dismissal with prejudice of the felony murder charge, and this Court denied the State's petition for certiorari on March 26, 2018. *People v. Terrance*, unpublished order of the Michigan Court of Appeals, entered August 24, 2017 (Docket No. 338938) (granting Defendant's motion for affirmance), *leave denied*, *People v. Terrance*, 501 Mich. 911 (2017), *cert. denied*, *Michigan v. Terrance*, 138 S. Ct. 1334 (2018). The State improperly seeks to re-open that murder file with this petition for certiorari, which arises from a newer file, WCC 17-005253-FC, where Mr. Terrance was charged with a single count of torture.

Assuming, arguendo, that the State really means to ask this Court to grant certiorari only to reinstate the dismissed torture charge contained in the current file WCC 17-005253, the State's instant petition must fail as did its last petition. The State recycles the same arguments raised in its prior petition in WCC 16-001235-FC/SCOTUS 17-1097, with the addition of a few mentions of *Currier v. Virginia*, 138 S. Ct. 2144 (2018). But nothing in *Currier* changed the legal landscape such that this

Court should now consider overturning the precedents of *Ashe v. Swenson*, 397 U.S. 436 (1970) or *Yeager v. United States*, 557 U.S. 110 (2009).

The State does not even offer an analysis under *stare decisis* principles as to why this Court should overturn these precedents. The State cannot point to any clamor for this Court to overturn them nor to any evidence of unworkability of the doctrines. This is likely because *Ashe* and *Yeager* only forbid instances of extreme prosecutorial overreach, such as in Mr. Terrance's case.

The State's final effort in its petition, to try to convince this Court to become a court of mere error correction and to hold that *Ashe* and *Yeager* were misapplied in this instance, is unavailing. The State's petition concerns an unpublished opinion from Michigan's intermediate appellate court, which is not even precedential within Michigan. In any event, *Ashe* and *Yeager* squarely applied to entitle Mr. Terrance to the relief he received in state court in this appeal, i.e., the dismissal of the torture charge. This Court's Double Jeopardy precedents hold the State to the consequences of its strategic decisions.

Reasons for Denying the Petition

I. In its current petition the State asks this Court to re-open Wayne Circuit Court No. 16-001235-FC to revive the dismissed felony murder charge, or perhaps the vacated second-degree murder plea conviction. The appeal from the orders in that that file was concluded years ago, including with this Court denying the State's petition for certiorari. This Court does not have jurisdiction over that matter.

In arguments I and II of its petition regarding WCC 17-005253-FC, the State asks this Court to overturn its precedents in *Ashe v. Swenson*, 397 U.S. 436 (1970), and *Yeager v. United States*, 557 U.S. 110 (2009), and to revive the dismissed felony murder charge from WCC 16-001235-FC. Petition for Certiorari, pp. 8, 13. But this Honorable Court lacks jurisdiction over WCC 16-001235-FC—indeed, this Court already denied the State's petition for certiorari in that matter. *See* Supreme Court Rule 13.1.[10]

The appeal from WCC 16-001235-FC was final years ago. In that case, Michigan's appellate court system affirmed both the trial court's vacation of Mr. Terrance's second-degree murder plea conviction and the dismissal with prejudice of the felony murder charge. *People v. Terrance*, unpublished order of the Michigan Court of Appeals, entered August 24, 2017 (Docket No. 338938) (granting Mr.

[10] Rule 13.1 provides, "Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is fled with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is fled with the Clerk within 90 days after entry of the order denying discretionary review."

Terrance's motion for affirmance); *leave denied*, *People v. Terrance*, 501 Mich. 911 (2017). This Court denied the State's petition for certiorari on March 26, 2018. *Michigan v. Terrance*, 138 S. Ct. 1334 (2018). The State cannot re-open and revive the long-final appeal in WCC 16-001235-FC with a petition for certiorari arising from the newer file, WCC 17-005253-FC, which contains only a single charge of torture.[11]

[11] In Issues I and II of its current petition, the State does not ask this Court to reinstate the dismissed torture charge from the file/judgment over which this Court does have jurisdiction, WCC 17-005253-FC.

II. As the reviewing state courts found, Mr. Terrance prevails under this Court's existing precedent. The State offers this Court no compelling reason to revisit and overturn the rule of *Ashe* or *Yeager*. On the other side of the equation, there are compelling reasons to keep them intact.

Even if the State only means to ask this Court to grant certiorari to reinstate the dismissed torture charge in WCC 17-005253-FC—which is the only matter currently within this Court's jurisdiction—the State's current petition must still fail. The State recycles the same arguments it raised in its prior petition in WCC 16-001235-FC/SCOTUS 17-1097, concerning the previously vacated second-degree murder conviction and dismissed felony murder charge, with the addition of a few mentions of *Currier v. Virginia*, 585 US __; 138 S. Ct. 2144 (2018). But nothing in *Currier* changed the legal landscape such that this Court should now consider overturning the precedents of *Ashe* or *Yeager*.

The issue preclusion component of Double Jeopardy instructs that, when an issue of ultimate fact has once been determined by a valid and final judgment, e.g., a jury verdict, that issue cannot be relitigated in a later prosecution. *Ashe,* 397 U.S. at 443. To determine what a jury necessarily decided 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*, 397 U.S. at 443 (citations omitted). "A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it." *Yeager,* 557 U.S. at 122. 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 122–23.

Just four years ago, in *Currier*, this Court reaffirmed the *Ashe* framework though noting it was "a significant innovation in our jurisprudence" and that some justices had dissented in both *Ashe* and *Yeager*. *Currier*, 585 US __; 138 S. Ct. at 2149–50. This Court continues to acknowledge the guarantee against double jeopardy "recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek." *Id.* at 2149. That type of injustice is what the Double Jeopardy clause is protecting Mr. Terrance from in this matter.

In *Currier*, this Court merely clarified that a defendant cannot use the rule of *Ashe* to prevent a second trial where the defendant *invites the error* by seeking or consenting to have charges severed into different trials. *Id.* at 2150–51. Here, Mr. Terrance did not invite the error. In fact, the opposite occurred: the State strategically chose not to bring a charge of torture when it brought the murder charges, which included a charge of felony murder predicated on torture.[12]

Nor did this Court in *Currier* overrule *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam), which confirms that relief for Mr. Terrance was proper. *Turner* involved a murder that occurred during a robbery. Prosecutors believed the defendant had

[12] In Michigan, the State is permitted to obtain convictions for both felony murder and the predicate offense underlying it. *People v. Ream*, 481 Mich. 223 (2008). It is highly unusual for the State not to charge both.

participated in the robbery and murder. 407 U.S. at 366. A state statute required that the murder charge be the sole charge in one file alone with no other charges appended. *Id*. at 367. After a jury acquitted Turner of the murder charge, the State tried to bring him to trial on a robbery charge. *Id*., at 366–67. Even though state statute dictated the sequential trials, this Court held that the defendant was entitled to assert the issue preclusion aspect of Double Jeopardy and held that the case was "squarely controlled by *Ashe*." *Id*. at 370. The jury's verdict of not guilty implied a factual determination that Turner was "not present at the scene." *Id*. at 369. Thus, the Court treated the murder and robbery in Turner as the same offense.

Here, it was not Mr. Terrance who sought severance as the defendant had in *Currier*. Rather, the State strategically chose to charge Mr. Terrance with murder but not torture. The State likewise chose not to request that the jury be instructed on any form of manslaughter. And the State chose to try the case as resting only upon the element of identity, in the hope that leaving the jury with an all or nothing choice between murder and acquittal would result in a murder conviction. But the State lost its gamble when the jury acquitted Mr. Terrance, necessarily finding that he was not the perpetrator of the assault that resulted in Ms. Tillman's death. Now, much like the defendant in *Currier*, the State here seeks to be excused from the consequences of its voluntary, strategic choice. This Court must deny the State's request as it denied Currier's.

The State does not offer an analysis under *stare decisis* principles as to why this Court should overturn *Ashe* and *Yeager*.[13] The State relies heavily on Justice Scalia's dissents in *Yeager* and *Grady v. Corbin*, 495 U.S. 508 (1990) and on Chief Justice Burger's dissent in *Ashe*. But dissents are not law. Even Justice Scalia acknowledged there are *stare decisis* reasons for keeping the rule of *Ashe*. *Yeager*, 557 U.S. at 128-29; *cf. Grady v. Corbin*, 495 U.S. 508, 528 (1990) (Scalia, J., dissenting) (acknowledging *Ashe* as precedent), overruled by *United States v. Dixon*, 509 U.S. 688 (1993).[14] The State cannot point to any clamor from lower courts for this Court to overturn these precedents nor to any evidence of unworkability of the doctrines. This is likely because the doctrines of *Ashe* and *Yeager* forbid only extreme instances of prosecutorial overreach.

On the other hand, there are compelling reasons to keep *Ashe* and *Yeager* intact. The Double Jeopardy Clause prevents an unwarranted second bite at the apple, protecting 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
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> (2) the preservation of the finality of judgments. *Currier v. Virginia*, 585 US __; 138 S. Ct. 2144, 2158 (2018) (internal citations omitted).

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[13] Though the State does not mention *Turner*, 407 U.S. 366, its petition also requests by implication that this Court overturn *Turner*.

[14] In *Dixon*, this Court applied the same-elements test and did not address issue preclusion. 509 U.S. at 705 ("Of course the collateral-estoppel issue is not raised in this case.").

To allow the State to re-try Mr. Terrance based on a new theory, which it strategically chose to forego in the first trial, would set dangerous precedent and 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 U.S. at 117-118.

The State 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 State prevails here, prosecutors will be permitted to hold the predicate felony to a felony murder charge in reserve in every case, as a fall back in the event they do not obtain the felony murder conviction at the first trial.[15] Criminal trials are not meant to be rehearsals or to be used as tools by the State to test different theories and strategies until one works.

Adopting the State's position here would also increase the risk of forced or false guilty pleas because, as happened here, 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. The State trumpets Mr. Terrance's now-vacated, unconstitutional plea to second-degree murder from WCC 16-001235-FC that occurred after his acquittal. That plea came from a scared, worn-down teenager, who had been subjected to a lengthy pre-trial incarceration and remained incarcerated—a

[15] In 2008, the Michigan Supreme 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 U.S. 299 (1932), overruling its prior precedent of *People v. Wilder*, 411 Mich. 328 (1981).

teenager who both the State and trial defense counsel led to mistakenly believe he was still under threat of a life without parole sentence (by nature of the felony murder charge).[16]

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."[17] "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." [18] Accordingly, young people are more likely than adults to enter false

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[16] This Court may not consider Mr. Terrance's vacated plea against him as the plea—and everything that transpired pursuant to 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 U.S. 220, 224 (1927); *People v. Moore*, 391 Mich. 426 (1974) (a constitutionally infirm conviction cannot be used by a court against a defendant), relying on *United States v Tucker*, 404 US 443 (1972).

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

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

guilty pleas.[19] A growing body of research demonstrates this.[20] 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.[21] Another recent study indicates that juveniles are twice as likely as young adults to plead guilty when factually innocent.[22]

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 than usual to the government with its vast resources. Eventually, stamina and/or assets run out.

Finally, the State also seems to acknowledge that this Court's decision in *Ashe* may be correct on grounds other than Double Jeopardy, presumable Due Process grounds. Petition for Certiorari, p 7. So, the State is really asking this Court to engage in an academic exercise that lacks real-world consequences.

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[19] 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) ("Psychological research establishes conclusively that juveniles are far more likely than adults to falsely confess.").

[20] *Id*.

[21] 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).

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

III. This Court should reject the State's alternative request that this Court hold that *Ashe* and *Yeager* were misapplied here. This Court is not generally an error correction court. In addition, *Ashe* and *Yeager* squarely applied to entitle Mr. Terrance to the relief he received in state court in this appeal, i.e., the dismissal of the torture charge.

This petition concerns an unpublished opinion from Michigan's intermediate appellate court; it is not even precedential within Michigan. It is not worthy of this Court's time and effort to act simply as an error-correction court. *See* Supreme Court Rule 10a. Further, the Michigan Court of Appeals correctly held, based on this Court's well-settled precedent, that the torture charge against Mr. Terrance violates the issue-preclusion component of the Double Jeopardy Clause. The State cannot use criminal trial as dress rehearsals or moot court exercises, all the while holding accused persons incarcerated for years, wearing down their wills, and exhausting their resources to defend themselves. Criminal defendants are held to the consequences of their attorneys' sound strategic decisions even if those decisions do not result in success.[23] Likewise, the State cannot escape its strategic decisions just because it regrets them.

The State asks this Court to reverse the Michigan Court of Appeals (MCOA). But the MCOA 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 assault preceding death and the death. The jury determined that Mr. Terrance was not the person who assaulted Ms. Tillman.

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[23] *Currier,* 585 US __; 138 S. Ct. 2144*; Strickland v. Washington*, 466 U.S. 668, 680–81, 689–691 (1984).

The issue preclusion component of Double Jeopardy means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, e.g., a jury verdict, that issue cannot again be relitigated in a later prosecution. *Ashe,* 397 U.S. 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,* 397 U.S. 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*, 557 U.S. 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 122–23.

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. This 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 (1948). **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**. *Ashe,* 397 U.S. at 444 (footnote citations omitted) (emphasis added).

If, in a state that has general verdicts, all the government is required to do to avoid a determination of issue-preclusion on a contested element from the first trial is 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,* 397 U.S. 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." *Id.,* quoting Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Har. L. Rev. 1, 38 (1960).

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,* 397 U.S. at 445. The same is true in Mr. Terrance's case.

The State 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.[24] Notably, neither party asked for an instruction on manslaughter. The State's new hypothesis was not a theory that the State or the defense advanced at trial. Rather, the State asserted this theory for the first time on appeal. The MCOA 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).

The State 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' arguments, 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 State put

[24] Please see the extensive quotes from closing arguments in the Statement of the Case, above.

forth for the first time on appeal. The MCOA majority 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 State'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 F.3d. 89, 93 (D.C. 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 of Appeals 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 undertook 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 State's logic in this case, after Ashe was acquitted of robbery, the State should have been able to try Ashe again on a charge of home invasion and/or larceny from a person for that same poker player, as well as on a plethora of charges as to the other poker players, based on a theoretical argument—untethered to the actual trial record—that the jury acquitted based on an element other than identity. 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 Mr. Terrance's favor, retrial on new charges based on the same facts is barred here as it was in *Ashe*.

This Court's opinion in *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam), confirms that relief for Mr. Terrance was proper. *Turner* involved a murder that occurred during a robbery. Prosecutors believed the defendant had participated in the robbery and murder. 407 U.S. at 366. A state statute required that the murder charge be the sole charge in one file alone with no other charges appended. *Id.*, at 367. After a jury acquitted Turner of the murder, the State tried to bring him to trial on a robbery charge. *Id.*, at 366–367. Even though state statute dictated the sequential trials, this Court held that the defendant was entitled to assert the issue preclusion aspect of Double Jeopardy and held that the case was "squarely controlled by *Ashe*." *Id.*, at 370. The jury's verdict of not guilty implied a factual determination that Turner was "not present at the scene." *Id.* at 369. Thus, this Court treated the murder and robbery in Turner as the same offense.

The State'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 State had a full and fair opportunity to try Mr. Terrance. Nothing prevented the State from bringing the torture charge at the first trial. The State just regrets its strategic choices. The State, like criminal defendants, is held to the consequences of their attorneys' strategic decisions.

Conclusion

Therefore, Respondent Treshaun Terrance requests that certiorari be denied.

Respectfully submitted,

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