

STATEMENT OF THE CASE

Before the Court are consolidated Bradley County indictments M-08-125 and M-08-455. This Rule 9(a) T.R.A.P. appeal deals with the aftermath of a judgment of acquittal on three (3) counts of First Degree Murder (Felony Murder) and one (1) count of Especially Aggravated Robbery. The only remaining counts in front of this Court are the three (3) lesser-included counts of facilitation to commit felony murder. To fully understand the current history of this case, the earlier procedural history is described below.

On January 17, 2007, an indictment (M-07-003) was returned against Defendant Blair charging her with three (3) counts of Conspiracy to Commit First Degree Murder (Counts 1-3) and one count of Aggravated Perjury (Count 4). That indictment alleged in substance that, on February 14, 1999, the Defendant conspired with Maurice Johnson and Michael Younger to commit the first degree premeditated murders of Dawn Rogers, Oriental James “O.J.” Blair, and Cayci Higgins. The indictment further alleged that on February 26, 2006, the Defendant intentionally gave a false sworn statement to law enforcement in connection with an investigation of these murders. (R. p. 116.) At the time of Defendant Blair’s indictment, a separate indictment (M-06-614) was already pending against Maurice Johnson charging him with the first degree premeditated murders of Dawn Rogers, Oriental James “O.J.” Blair, and Cayci Higgins, and a separate indictment (M-07-004) charged Michael Younger for his alleged involvement with these first degree premeditated murders. (R. p. 117.)

A second indictment (M-08-125) was returned against Defendant Blair on March 26, 2008. In that indictment, Defendant Blair was jointly charged with Johnson and Younger with Conspiracy to Commit First Degree Murder of Oreinthal James “O.J.” Blair (Count 1) and

Conspiracy to Commit Aggravated Robbery of Oriental James “O.J.” Blair (Count 7). These offenses were alleged to have occurred on or about February 13, 1999. (R. p. 118.)

Defendant Blair was arraigned in M-08-125 on May 2, 2008. That same day the State orally announced that it would nolle prosequi the three counts of Conspiracy to Commit First Degree Murder in case number M-07-003 (Counts 1-3), leaving the charge of Aggravated Perjury (Count 4) still pending. (R. p. 119.)

On May 14, 2008, Defendant Blair filed a Motion to Sever in M-08-125. (R. pp. 10-12.) After a July 31, 2008 hearing on this motion, the trial court granted severance by Order dated August 22, 2008, thereby severing Defendant Blair from Defendants Johnson and Younger. (R. p. 41.)

On September 18, 2008, Defendant Blair filed a Motion to Dismiss which alleged that the charge of Conspiracy to Commit Aggravated Robbery, as alleged in Count 7, was barred by the statute of limitations. (R. pp.44-46.) After a hearing on September 22, 2008, the trial court granted the Defendant’s motion. An order dismissing Count 7 on statute of limitations grounds was entered. (R. p. 57.)

Following the dismissal of the Conspiracy to Commit Aggravated Robbery count, the state sought a third indictment against Defendant Blair on October 8, 2008 (M-08-455). (R. pp. 61-62.) In this indictment, Defendant Blair was jointly charged with Johnson and Younger with one count of Conspiracy to Commit the Especially Aggravated Robbery of Oriental James “O.J.” Blair (Count 1), one count of Especially Aggravated Robbery of Oriental James “O.J.” Blair (Count 2), and three counts of First Degree Felony Murder for the murders of Oriental James “O.J.” Blair (Count 3), Cayci Higgins (Count 4) and Dawn Rogers (Count 5).

The state filed a Notice of Intent to Seek the Death Penalty against Defendant Blair in this indictment, and she was ordered held without bond. (R. p. 90.)

On November 17, 2008, Defendant Blair filed a Motion to Dismiss Counts 1 and 2 of Indictment Number M-08-455. Count 1 was Conspiracy to Commit the Especially Aggravated Robbery or Oriental James “O.J.” Blair and Count 2 was Especially Aggravated Robbery of Oriental James “O.J.” Blair. (R. pp. 97-100.)

On July 15, 2009, the trial court entered an order denying the Defendant’s Motion to Dismiss Counts 1 and 2 of the Indictment Number M-08-455. (R. pp. 348-354.)

On August 11, 2009, Defendant Blair filed an additional Motion to Dismiss Count One of Indictment Number M-08-455, Conspiracy to Commit Especially Aggravated Robbery for statute of limitations grounds, T.C.A. §39-12-107 and T.C.A. §40-2-101. (R. pp.443-452.)

The trial court dismissed Count One of Indictment Number M-08-455 as being time-barred by the statute of limitations.¹

Defendant Blair filed motions pursuant to Rule 404(b) to exclude alleged prior bad acts by the Defendant, and a 404(b) hearing was held on September 25, 2009. The court heard testimony from potential witnesses, Amy Lonas, Shawanda Arnwine, and Larry Hardy. (Tr. Vol. 1, pp. 1-25.)

At the conclusion of that hearing, there was a discussion on the record between the trial court and the state, in which the trial court specifically asked the prosecution to elect which of the remaining Counts of the consolidated indictments would be tried on September 29, 2009.

This discussion followed:

¹ The trial court found that an eight (8) year statute of limitations was applicable to conspiracy to commit especially aggravated robbery and that the alleged robbery occurred on February 14, 1999. The state failed to indict Defendant Blair until October 8, 2008, in violation of T.C.A. §40-2-101 and §39-12-107. Counsel recalls the trial court order upon information and belief. This court order is missing from the record.

THE COURT: Okay. One thing that I know is going to come up, the Indictments were consolidated in this case. Does the State know how they are going to proceed? It is something to think about, certainly.

GENERAL FISHER: We can let you know Monday. Would that be okay, Monday morning before 9?

THE COURT: We have got to know before you start?

GENERAL FISHER: Pardon?

THE COURT: We have got to know before you start.

GENERAL FISHER: Well, we will let you know this afternoon at – when do you start the charge?

THE COURT: Well, the charge is already started. It will change as you all make requests, and those requests need to be in writing. Any special requests, and obviously they may come up as things happen in the trial, but if you know special requests that you are going to have in writing, get those by Monday, and I am asking you that because you have all these alternative theories.

GENERAL FISHER: Yes.

THE COURT: Is the State going to elect, is my question, and Monday is good enough for that. Monday morning, if you can let the Court know that. (Tr. Vol. 1 pp. 36-37.)

On September 28, 2009, a jury was impaneled, and on September 29, 2009, the trial court was called to order. The indictment was read by the Attorney General, and the Defendant pled not guilty.²

The jury was sworn. At the time of the reading of the Indictment, the state proceeded on consolidated indictments charging the Defendant with Count 2, Especially Aggravated Robbery and Counts 3, 4, and 5, three counts of Felony First Degree Murder (Count 1 having been previously dismissed by the trial court). (Tr. Vol.1, pp. 40 et seq.)

After the close of the state's proof and pursuant to Rule 29 of the *Tennessee Rules of Criminal Procedure*, Defendant Blair moved for a judgment of acquittal. (Tr. Vol. 5, p. 674-

² The State orally set aside the Notice of Intent to Seek the Death Penalty thirty (30) days before trial in this matter.

679.) The trial court denied the Defendant's motion for judgment of acquittal. (Tr. Vol. 5, p. 685, line 18.) At the close of all the proof, Defendant Blair renewed her motion for a judgment of acquittal. (Tr. Vol. 6, p. 795-799.) During a recess after the presentation of the renewed Rule 29 motion for a judgment of acquittal, the court (in chambers with the presence of all counsel) advised that it was reserving a decision on the motion for judgment of acquittal. (Tr. Vol. 6, p. 801, lines 5-15.)

The trial court then charged the jury (Tr. Vol. 7, p.808). The state gave closing argument, (Tr. Vol. 7, p. 835), the defense gave closing argument (Tr. Vol. 7, p.840), and the state gave the rebuttal close (Tr. Vol. 7, p. 856). Lastly, the final court charge was given (Tr. Vol. 7, p.862) and jury deliberations began.

Deliberations continued into October 2, 2009, and at approximately 3:26 p.m. the court was called to order. The court indicated that it had received a note from the jury.

THE COURT: Okay. And you have sent out a note as foreman of the jury that you believe that no further deliberations will bring this jury to a unanimous verdict. Is that correct?

JURY FOREMAN: Correct.

THE COURT: And the jury is hopelessly deadlocked?

JURY FOREMAN: Yes.

THE COURT: Okay, as to the charge of Especially Aggravated Robbery, has the jury been able to reach a verdict?

JURY FOREMAN: No, your Honor.

THE COURT: As to the charge of Felony Murder in the Perpetration of an Especially Aggravated Robbery, has the jury been able to reach a verdict?

JURY FOREMAN: No.

THE COURT: Alright. And if that is the unanimous decision of the jury, would each juror please raise their right hand? The record should reflect that each juror

has raised their right hand. We will be in recess while the jury leaves, no one else will leave the court room or the justice center at this time. (Tr. Vol. 7, pp.883-884.)

At this time, additional arguments on Rule 29 were allowed by the trial court, and the state proceeded and the Defendant responded. (Tr. Vol. 7, pp.884-897.) The court ruled as follows:

“As to Count Two of the Indictment, wherein Twanna Blair is charged with Especially Aggravated Robbery, I will grant the judgment of acquittal.” (Tr. Vol. 7, p.897, line 22-24.)

“As to Count Three, as to the charge of and for the same reasons, the charge of First Degree Murder during the perpetration of an Especially Aggravated Robbery, I grant the judgment of acquittal.” (Tr. Vol. 7, p. 898, lines 8-11.)

“As to her criminal responsibility for the conduct of another, the State failed to properly present proof of all essential elements of criminal responsibility for the conduct of another. As the lesser included offense of Second Degree Murder, the court grants the Defendant’s motion for judgment of acquittal.” (Tr. Vol. 7, p. 898, lines 11-16.)

“However, as to the lesser-included offense of facilitation to commit murder during the perpetration of an especially aggravated robbery, a mistrial will be declared based upon the jurors’ inability to reach any verdict in that count.” (Tr. Vol. 7, p. 898, lines 20-24.)

“As to Count Four, the charge of First Degree Murder during the perpetration of an Especially Aggravated Robbery, the Defendant’s motion for judgment of acquittal will be granted, based on the same facts and reasons.” (Tr. Vol. 7, p. 899, lines 5-8.)

“As to Count Five, the Defendant’s motion for judgment of acquittal of First Degree Murder during the perpetration of an Especially Aggravated Robbery will be granted, based on the State’s failure to prove properly all the essential elements of criminal responsibility for the conduct of another.” (Tr. Vol. 7, p. 899, lines 14-19.)

Defendant Blair, through counsel, filed a Motion to Dismiss the remaining charges, the facilitation of a felony, and filed a memorandum in support on October 23, 2009. (R. p.528.)

On November 20, 2009, the state raised a Motion to Reconsider. (Tr. Vol. 7, p. 907.) The trial court denied the state's Motion to Reconsider the Judgments of Acquittal. (Tr. Vol. 7, p. 910, lines 17-25.)

On December 2, 2009, the trial court entered an order denying Defendant Blair's Motion to Dismiss the remaining counts of facilitation to commit murder during the perpetration of an especially aggravated robbery counts. The trial court was of the opinion that this ruling is appealable, and the court granted the Defendant permission to file an interlocutory appeal, pursuant to Rule 9 of the *Tennessee Rules of Appellate Procedure*.

On January 15, 2010, this Court entered an order stating the Defendant's application to file an interlocutory appeal was granted, pursuant to 9(a) T.R.A.P.

STATEMENT OF THE FACTS

Detective Eric Hampton testified at trial that early on the morning of February 14, 1999, he received a call from the dispatcher of a quad-shooting: four (4) individuals had been recently shot at an apartment in Cleveland, Tennessee. Three of those individuals were pronounced dead at the scene, and one, Twanna Blair, was still alive. Upon arriving at the scene, Detective Hampton observed medics taking Twanna Blair out of the apartment on a gurney to the paramedic unit at the scene. (Tr. Vol. 1, p. 79, lines 11-25). Detective Hampton testified that he observed the three deceased individuals, O.J. Blair, Cayci Higgins, and Dawn Rogers, inside the apartment with apparent injury wounds “to their upper torsos toward their heads.” (Tr. Vol. 1, p. 80, lines 2-6).

Detective Hampton then observed the rear entrance leading into the apartment where Twanna Blair, O.J. Blair, Cayci Higgins, and Dawn Rogers were found. At the rear entrance, Detective Hampton observed physical evidence of forced entry. (Tr. Vol. 1 p. 81, line 25.)

Detective Hampton testified that he was the lead detective on the case from 1999 until he left the Cleveland Police Department in 2004. He treated Twanna Blair as a victim, in part due to the physical evidence, and in part because there was no evidence to indicate that she was anything other than a victim. (Tr. Vol. 1, p. 90, lines 1-6.)

Detective Hampton testified that he took a statement from Twanna Blair at Erlanger Hospital shortly after the incident, at approximately 3:00 p.m. on February 14, 1999. Twanna Blair related the following information:

“She was in the kitchen area with Dawn, and at the rear door, there was a knock. She was uncertain who it was and was not expecting any company at that time. She approached the door, looking, trying to look out the window, if I recall correctly, she did not actually see who it was but saw figures in the little small platform porch leading up to the door. She stated, ‘Who is it?’ Before she knew it, the door was forced open, and once the door was forced open, she was grabbed

and taken basically to the floor. Male individuals came in and identified themselves as Bradley County Police, as she indicated to me. As she was on the floor, they began to ask, make statements, asked if there were any drugs, 'Where are the drugs?' We are not certain as to how many, she said there could have been two, three or maybe four, she was not certain. And they ran into the living room area where O.J. was and put him on the floor, and Dawn was placed on the floor and secured as well. At that point, she indicated she heard a pop, and she was shot, and this was to her lower back and torso area. She was bound and she indicated by what I identified in the photos as the wire ties or 'flexi-cuffs.' At that point, she indicated that she could hear some talking, but she could not determine who exactly they were, and she could not identify who they were. The voices did not sound familiar to her. She indicated that she thought she was dying at that point. Her lower body was a little numb. She began to pray and wonder exactly what was going to happen at this point. She could hear Dawn having a conversation with the assailant, one of the individuals, at which point she said she heard multiple shots. At some point, Cayci was brought downstairs, and more shooting erupted. At that point, she said the individuals left, she was bound at the wrists, with her hands behind her back in the flexi-cuffs or wire ties. At that point, she began to try to get herself loose but could not. She went over to the dishwasher still in the kitchen area, retrieved a knife, and was able to cut herself loose. She got a phone that was on the charger, knocked it down and utilized the phone to call 911." (Tr. Vol. 1, p.92, lines 1-25; p. 93, lines 1-13.)

Detective Hampton said he tried to get Twanna Blair to give a description of the assailants. She said one had a brown coat, all had short hair. Detective Hampton asked her if she had seen them before, and she said no. According to Detective Hampton, Twanna Blair "could not determine, and throughout the whole investigation at that time, was not certain whether they were white, black, or Hispanic or what." (Tr. Vol. 1, p. 94, lines 1-8).

Detective Hampton learned that the probable motivation for the shootings was a dispute between O.J. Blair, Twanna Blair and individuals in Sweetwater, Tennessee, that had occurred the day before the shooting. Specifically Detective Hampton testified that he had learned through his investigation there was an altercation in Sweetwater at a party some twenty-seven (27) hours before the shootings. (Tr. Vol. 1, p. 125, lines 4-23.)

Twanna Blair indicated that she was in Sweetwater, and there was a house party that she and O.J. Blair had attended. Ms. Blair told Detective Hampton that at that incident there was a

fight and a shooting as well. When Detective Hampton asked whether she was involved, Blair said she was basically involved because she had been fighting another young woman. Detective Hampton asked her specifically about O.J. Blair and whether he was involved, and she confirmed that O.J. Blair was involved in the fighting.

There was proof developed at trial that at the Sweetwater party, Maurice Johnson and Michael Younger (the co-defendants) had been the other individuals involved in fighting and shooting at O.J. Blair.

Detective Hampton testified that initially Twanna Blair told him that she did not believe that the Cleveland shooting was drug related, but upon further questioning, she admitted that she did know that O.J. Blair was involved in some small amounts of drug sales, and this could have been a factor in the shooting stemming from the earlier fight at the Sweetwater party. (Tr. Vol. 1 p. 95, lines 10-24).

Detective Hampton testified that there were no drugs or paraphernalia found at the Cleveland apartment. There was no indication of any drug use at the apartment. There were no weapons found at the apartment, and there was no indication of any weapons having been stored in the apartment. (Tr. Vol. 2, p. 131, lines 19-25; p. 132, lines 1-8.)

Detective Hampton testified no money was missing from the victims, as far as he could tell from his investigation. (Tr. Vol. 1, p. 132, lines 16-18.)

Medical Examiner, Dr. Ron Toolsie, testified as to the cause of death for each of the three victims. As to O.J. Blair, Dr. Toolsie testified that the cause of death was craniocerebral trauma due to close-range gunshot wound to left occiput in a manner of death ruled a homicide. (Tr. Vol. 1, p. 187, lines 19-23.)

As to Cayci Higgins, Dr. Toolsie testified that she suffered a close-range, small caliber gunshot wound to the left side of the back of her head at the base of the skull. She also suffered a recent laceration or tear to the skin of her right cheek. (Tr. Vol. 1, p. 191, lines 2-18.)

Dawn Rogers was shot twice. She had a close-range, small caliber gunshot wound to the back left side of her neck. There were also fractures at the base of her skull, which is typical of a projectile-related injury. (Tr. Vol. 1, p. 192, lines 16-25.) She also had a second gunshot injury, and the entry site was to the front, or anterior, surface of the left neck. The bullet had exited through her cheek. (Tr. Vol. 1, p.193, lines 8-21.)

Twanna Blair suffered a serious contact gunshot injury to her back. Dr. Oscar Guillamondegui's expert testimony was played for the jury by video deposition. Dr. Guillamondegui testified as to the seriousness of her injury and the potential likelihood of death and/or paralysis, as well as the nature and circumstances of Defendant Blair's injuries. (Tr. Vol.4, p. 728 and Exhibits 65 and 65(a).)

The State called TBI witnesses Ray Depriest, Teri Arney, and Oakley McKinney, as well as Flight Nurse Paula Sultz, all of whom provided general descriptions of the crime scene, the TBI's investigation, and the medical evacuation of Twanna Blair. (Tr. Vol. 3, pp. 214-267, 285-309, 310-326.) In addition, Teri Arney testified about the firearms and tool markings. However, none of the testimony of these individuals included any incriminating evidence against Defendant Blair.

The only testimony that could be considered potentially incriminating was the testimony of Stacy Clabough. Clabough testified that she was supposed to have met Defendant Blair and others on the night of February 13, 1999, in Chattanooga, Tennessee, but they did not appear. Clabough testified that she had been at a club in Chattanooga, and she remembers that after

hearing “last call,” that she left. (Tr. Vol. 4, p. 403, lines 9-18.) After she left the club, she testified that she went by the apartment in Cleveland. “I knocked on the door, and Tart [Twanna Blair] cracked the door and said either that they were going to bed or had already gone to bed, and I just left.” (Tr. Vol. 4, p. 404, lines 10-14.) As she was leaving, Clabough claims that she saw Maurice Johnson seated in a car in a parking lot located behind and diagonal to Defendant Blair’s apartment. (Tr. Vol. 4, p. 405, lines 11-25.) Clabough says that Johnson was seated in the car, looking toward her. (Tr. Vol. 4, p. 406, lines 1-6.) Clabough also testified that she, at the time of the trial, was in custody, having violated her probation for prescription fraud. (Tr. Vol. 4, p. 401, lines 6-13.)

On cross-examination, Clabough described the time frame in which the exchange took place with Defendant Blair as, “I don’t know. Long enough for me to ask ‘what’s up...’ She said they were going to bed or were in bed, and I turned around and went back and got in my car.” (Tr. Vol. 4, p. 413, lines 22-25; p. 414, lines 2-6.)

There was no evidence linking Defendant Blair to the three homicides except the fact that she was merely present during the quadruple shooting on Valentine’s Day 1999.

The case against Twanna Blair was largely formed from voluntary statements that she gave to law enforcement and the discrepancies that some in law enforcement thought those statements contained. (See Testimony of TBI Special Agent Danny Fay describing Defendant Blair’s interview with Detective Duff Brumley and TBI Special Agent Luke Mahonen (Tr. Vol. 4, p. 471, lines 9-15) and Defendant Blair’s lengthy video statement to these three officers. (Tr. Vol. 4, pp. 473-542.))

STANDARD OF REVIEW

Whether Double Jeopardy principles bar a defendant's mistrial is a question of law with constitutional implications; therefore, the Appellate Court's review is *de novo* with no presumption of correctness afforded to the trial court. *State v. Houston*, 2010 Tenn. Crim. App. Lexis 197 at *18 (Tenn. Ct. App. 2010). *See* Appendix A.

LAW AND ARGUMENT

Respectfully, Ms. Blair asserts that her acquittal in M-08-455 of Count 2 of especially aggravated robbery, Counts 3, 4, and 5 of felony first-degree murder, and the lesser-included charges of second-degree murder precludes the State from retrying her on the lesser-included charges of facilitation to commit first-degree felony murder, based upon Double Jeopardy and its corollary collateral estoppel. Part I of this section focuses on Tennessee law and the Tennessee Supreme Court's recent decision in *State v. Thompson*, 285 S.W.3d 840 (Tenn. 2009). *See* Appendix B. Part II focuses on the United States Supreme Court's recent decision in *Yeager v. United States*, 129 S.Ct. 2360, 174 L.ED.2d 78 (2009). *See* Appendix C.

I. The facilitation of felony murder charges analyzed under the Tennessee Supreme Court's Decision in *State v. Thompson*.

In *State v. Thompson*, 285 S.W.3d 840 (Tenn. 2009), the Tennessee Supreme Court held that because a defendant in a previous trial had been acquitted of attempted first degree murder which was a predicate offense and essential element to the prosecution of felony murder, then collateral estoppel (which is a “corollary of the constitutional protection against Double Jeopardy”) should bar and preclude a subsequent prosecution for felony murder. *Id.* at 855.

a. Procedural and Factual History

In *Thompson*, the Defendant was initially charged with the premeditated first-degree murder (Count I) of Robinson and the attempted first-degree murder of Burgins (Count III). *Id.* at 842. Later, the state charged the Defendant with first-degree felony murder (Count II) of Robinson which was predicated upon the attempt to commit the first-degree murder of Burgins. *Id.*

Procedural History of *State v. Thompson*

	Charged Offense	Results of First Trial	Between First and Second Trial	Second Trial
Count I	Premeditated 1st Degree murder of Robinson	Guilty of second degree murder	Tenn. Ct. App. reversal based on failure to instruct jury on definition of 'knowing'; new trial on second degree murder	Guilty of voluntary manslaughter
Count II	Felony murder of Robinson predicated on attempted 1st degree murder of Burgins	Hung jury; mistrial declared	New trial on felony murder; Defendant argues there can be no felony murder because the jury's original finding of attempted second degree murder in Count III is not a predicate for felony murder	Guilty of second degree murder; eventually reviewed by Tennessee Supreme Court
Count III	Attempted 1st degree murder of Burgins	Guilty of attempted second degree murder	State declines to prosecute	

In April 2002, the Defendant was tried and a jury convicted him in Count I of the second-degree murder of Robinson, which was a lesser-included offense of premeditated first-degree murder. *Id.* The jury also convicted him of the attempted second-degree murder of Burgins which was a lesser included offense to the attempted first-degree murder in Count III. *Id.* The jury was unable to reach a verdict as to Count II (felony murder) and a mistrial was declared. *Id.* The Defendant appealed. *Id.* The Court of Criminal Appeals reversed finding that the trial court had failed to provide an adequate instruction to the jury as to the definition of “knowing.” *See*

State v. Thompson, No. E2003-00569-CCA-R3-CD, 2004 WL 1592817 (Tenn.Crim.App. July 16, 2004). The Defendant then received a new trial. *Thompson*, 285 S.W.3d at 842.

After the case was remanded, the Defendant filed a motion to strike Count II (the felony first-degree murder count) from the indictment. *Id.* The Defendant argued that because the Defendant was convicted on the lesser charge of attempted second-degree murder of Burgins, then he was acquitted of the primary charge of attempted first-degree murder. *Id.* He also argued that since attempted second-degree murder is not a predicate felony for the charge of felony murder, the State would be barred by collateral estoppel and principals of Double Jeopardy from prosecuting the first-degree felony murder count. *Id.* The Court denied the Defendant's motion and he was convicted following a second jury trial. *Id.*

b. The fundamental protections of the Double Jeopardy Clause

The Tennessee Supreme Court reviewed the retrial. They discussed the fundamental protections underlying the Double Jeopardy Clause of the Fifth Amendment and the Double Jeopardy provisions contained in Article 1, § 10 of the Tennessee Constitution. *Id.* at 847. Those protections are: “(1) protection against a second prosecution after an acquittal; (2) protection against a second prosecution after conviction; and (3) protection against multiple punishments for the same offense.” *State v. Denton*, 938 S.W.2d 373, 378 (Tenn. 1996); *State v. Pickett*, 211 S.W.3d 696, 705 (Tenn.2007). The policy behind the Double Jeopardy Clause in Tennessee is that the State should not be able “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 [when] innocent he may be found guilty.” *State v. Smith*, 871 S.W.2d 667, 671 (Tenn.

1994) (quoting *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)).

The *Thompson* Court then explored the history of the relationship between the criminal law concept of Double Jeopardy and the civil law concept of collateral estoppel.³ *Thompson*, 285 S.W.3d at 847-848. The Court noted that while collateral estoppel first began as a civil concept, it later became “recognized as grounded in the constitutional protection of double jeopardy” in criminal cases in Federal courts.⁴ *Id.* at 848. More recently, Tennessee courts followed suit and recognized the criminal law applicability of the concept. *Id.* at 849 (citing *State v. McKennon*, 6 S.W.3d 508, 511 (Tenn.Crim.App.1998); *State v. Vickers*, 985 S.W.2d 1, 7 (Tenn.Crim.App.1997); *State v. Allen*, 752 S.W.2d 515 (Tenn.Crim.App.1988)).

c. In Thompson, the trial on the felony murder count was a “subsequent” trial for purposes of Double Jeopardy.

Before it could reach the main collateral estoppel issue, the Court had to determine whether the Criminal Court of Appeals erred in its refusal to classify the new trial on the mistried count of felony murder as a “subsequent” trial for Double Jeopardy purposes. *Id.* at 851. The Criminal Court of Appeals had previously concluded that the initial jeopardy from the first trial had been extended since the felony murder count was mistried. *Id.* at 846 (stating “[t]he three counts were launched together in the stream of this prosecution, and we do not deem the acquittal on the attempt to commit first degree murder as a “prior suit” for collateral estoppel purposes”).

3 The *Thompson* Court cited to the comparison of the doctrine of collateral estoppel with res judicata found in *Massengill v. Scott*, 738 S.W.2d 629 (Tenn. 1987)(emphasis added): “The doctrine of res judicata bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the former suit. Collateral estoppel operates to bar a second suit between the same parties and their privies on a *different cause of action* only as to issues which were actually litigated and determined in the *former suit*.”

4 Calling it “perhaps the leading case on the subject,” the *Thompson* Court cited favorably to the United States Supreme Court's decision of *Ashe v. Swenson*, 397 U.S. 436 (1970). *Ashe* is discussed more fully in the next section.

The Tennessee Supreme Court disagreed. *Id.* at 851. The Court found that the new trial was “subsequent” since “an issue essential to the success of the felony murder prosecution had been fully and finally resolved prior to the remand on the charge in Count I and the retrial on the charge of Count II.” *Id.* The Court went on to note that, because an acquittal is final upon entry, “the verdict in the first trial acquitting the Defendant on the charge of the attempted first degree murder of Burgins had, therefore, become final before the retrial on the felony murder charge.” *Id.* at 854.

d. In Thompson, an 'essential element' necessary to prove felony murder had already been determined as a result of the defendant's acquittal on the attempted first degree murder charge.

In its analysis, the *Thompson* Court noted that “the single question presented in this case is whether collateral estoppel applies as a bar to the prosecution of the felony murder charge...” *Id.* at 849-850. The Court recognized that as to Count III's attempted first degree murder charge, proof of premeditation was essential to the conviction. *Id.* at 851. The jury, however, convicted him of second degree attempted murder, which lacks the element of premeditation. *Id.* Therefore, their verdict necessarily established that the evidence was insufficient as to the element of premeditation. *Id.* at 852.

The Court then borrowed the Eleventh Circuit's two step inquiry in as to whether collateral estoppel applies in a mistrial: “First, courts must examine the verdict and the record to see what facts, if any, were necessarily determined in the acquittal at the first trial...Second, the court must determine whether the previously determined facts constituted 'an essential element' of the mistried count.” *Id.* at 854 (citing *United States v. Shenberg*, 89 F.3d 1461, 1478 (11th Cir. 1996)).

Applying this framework, the *Thompson* Court determined that:

The Defendant could not have been convicted of felony murder absent sufficient proof of one of the predicate offenses as enumerated by statute. The first jury rejected the element of premeditation, critical for the crime of attempted first degree murder. Attempted second degree murder did not qualify under existing law. After a careful review of this record, it is apparent that there was no other basis for a prosecution for felony murder in the second trial...***Because an essential element of the offense had been previously resolved by a jury in a manner favorable to the Defendant, the doctrine of collateral estoppel should have precluded the State from proceeding with the prosecution of the felony murder under both the United States Constitution and independently under the Tennessee Constitution.***

Id. (emphasis added).

Having found that the trial was “subsequent” for purposes of Double Jeopardy, and that an essential element of felony murder had already been litigated in favor of the defendant in the previous trial, and the Tennessee Supreme Court concluded that Double Jeopardy, and its corollary of collateral estoppel, precluded re-trial for felony murder.

e. Like in Thompson, an essential element necessary to prove felony murder has been determined in Ms. Blair's favor as a result of her acquittal on the especially aggravated robbery count.

As mentioned above, the *Thompson* court found the Eleventh Circuit's framework useful in determining whether collateral estoppel applies in a mistrial: “First, courts must examine the verdict and the record to see what facts, if any, were necessarily determined in the acquittal at the first trial...Second, the court must determine whether the previously determined facts constituted 'an essential element' of the mistried count.” *Id.* at 854.

The “verdict and the record” in Ms. Blair's case clearly shows that the facts presented during the trial were insufficient to prove she committed especially aggravated robbery. The trial court ruled unequivocally that “[a]s to Count Two of the Indictment, wherein Twanna Blair is charged with especially aggravated robbery, I will grant the judgment of acquittal.” (Tr. p. 15, line 1-12.) The trial court then immediately explained the basis for the ruling: “the law is very clear that mere presence is not enough to be criminally responsible for the conduct of another,

and I do not find that any reasonable juror could find all the essential elements beyond a reasonable doubt...that the defendant knowingly obtained or exercised control of the property of O.J. Blair.” *Id.*

Having determined that the facts were insufficient to prove especially aggravated robbery, the next inquiry is whether the those facts constitute an 'essential element' of the mistried facilitation counts. The trial court instructed the jury as follows: In order to convict Ms. Blair, the State must prove the following essential elements beyond a reasonable doubt:

1. That the defendant knew that another person intended to commit the specific felony of Murder During the Perpetration of an ***Especially Aggravated Robbery*** ... but did not have the intent to promote or assist the commission of the offense or to benefit in the proceeds or results of the offense; and
2. That the defendant furnished substantial assistance to that person ***in the commission of a felony***; and
3. That the defendant furnished such assistance knowingly. (emphasis added).

Both the 1st and 2nd elements of facilitation require proof of especially aggravated robbery. In *Thompson*, there was only one 'essential element' that had already been determined in the previous trial – the lack of premeditation. In this case, however, the lack of *every element* that makes up the crime of especially aggravated robbery has already been determined. Since the especially aggravated robbery charge has already been decided in favor of Ms. Blair, there is no “predicate offense” to charge her with.

Thompson proclaimed that “[t]he Defendant could not have been convicted of felony murder absent sufficient proof of one of the predicate offenses as enumerated by statute.” *Id.* This statement applies equally to the present case. In *Thompson*, the alleged predicate offense was attempted first degree murder, and it failed because of a jury's previous finding that there was no premeditation. In the case at bar, the alleged predicate offense is especially aggravated

robbery, and it fails because of the trial judge's acquittal on the especially aggravated robbery charge. Like in *Thompson*, it is clear that an essential element of felony murder has previously been decided in favor of the defendant, precluding its re-litigation in a subsequent trial.

f. An essential element of “facilitation” has been determined in Ms. Blair's favor as a result of the trial court's finding that the state failed to prove all elements of criminal responsibility for another.

Although *Thompson's* facts did not involve a facilitation count, the rule of law it announces – that collateral estoppel prohibits retrial on a count where an essential element has previously been determined in favor of a defendant – applies equally to the facilitation count against Ms. Blair. Specifically, the following analysis shows that the 'furnishes substantial assistance' element found in the facilitation statute is included in the 'solicits, directs, aids, or attempts to aid' element found in the criminal responsibility statute. Because the trial court found that the State had failed to prove *all elements* for criminal responsibility for another, the State is now estopped from retrying her on a facilitation charge that contains one of those elements.

The facilitation statute states, in pertinent part:

A person is criminally responsible for the facilitation of a felony, if knowing that another person intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly ***furnishes substantial assistance*** in the commission of the felony. T.C.A. § 39-11-403(a)(emphasis added)(hereafter referred to as “facilitation”).

The criminal responsibility statute states, in pertinent part:

A person is criminally responsible for an offense committed by the conduct of another, if:

- (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person ***solicits, directs, aids, or attempts to aid*** another person to commit the offense; T.C.A. § 39-11-402 (emphasis added)(hereafter referred to as “criminal responsibility”).

In *State v. Fowler*, 23 S.W.3d 286 (Tenn. 2000), the Tennessee Supreme Court held, *inter alia*, that “facilitation of a felony is a lesser-included offense when one is charged with criminal responsibility for the actions of another...” See Appendix D. In reaching that conclusion, the Tennessee Supreme Court took guidance from its previous decision in *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999). The *Burns* court had determined that an offense is a lesser included offense of another if:

- (a) all of its statutory elements are included within the statutory elements of the offense charged; or
- (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
 - (1) ***a different mental state indicating a lesser kind of culpability***; and/or
 - (2) a less serious harm or risk of harm to the same person, property or public interest; or
- (c) it consists of
 - (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b);
 - (2) an attempt to commit the offense charged or an offense that otherwise meets the definition in part (a) or (b); or
 - (3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser included offense in part (a) or (b). *Id.* at 466-467 (emphasis added).

Per part (b)(1) of the *Burns* framework, facilitation's statutory language “...but without the intent required for criminal responsibility...” shows that facilitation contemplates “a different mental state indicating a lesser kind of culpability” than criminal responsibility. Other than the mental state, however, part (a) of the *Burns* framework requires that for facilitation to be a lesser included of criminal responsibility, *all* of the other statutory elements of facilitation must be included in criminal responsibility. As previously mentioned, it is well settled that facilitation is

indeed a lesser included offense of criminal responsibility. Therefore, it logically follows that facilitation's element of 'furnishes substantial assistance' *must* be included in criminal responsibility's element of 'solicits, directs, aids, or attempts to aid.'

Turning to the facts of the case at bar, it is clear that the trial court repeatedly held that there was insufficient evidence that Ms. Blair was criminally responsible for the conduct of another:

The State has failed to properly present proof of all the elements, and I say and emphasize properly present proof of ***all elements of criminal responsibility*** for the conduct of another. The law is very clear that ***mere presence is not enough to be criminally responsible*** for the conduct of another, and I do not find that any reasonable juror could find ***all the essential elements beyond a reasonable doubt***... (Tr. Vol.7, p. 897, line 25; p. 898, lines 1-6.)(emphasis added).

As to her criminal responsibility of the conduct of another, the State failed to properly present proof of ***all essential elements of criminal responsibility*** for the conduct of another...As the Court previously stated, ***mere presence is not enough to be held responsible for the conduct of another***. (Tr. Vol.7, p. 898, lines 11-18.)(emphasis added).

As to Count Five, the defendant's motion for judgment of acquittal of first degree murder during the perpetration of an especially aggravated robbery will be granted based on the State's failure to prove properly ***all the essential elements of criminal responsibility*** for the conduct of another. As to the lesser included offense of second degree murder, the motion for judgment of acquittal will be granted based on the State's failure to properly present proof of ***all the essential elements of criminal responsibility*** for the conduct of another... (Tr. Vol.7, p. 899, lines 14-23.)(emphasis added).

Per the analysis used by the *Thompson* court, the "verdict and record" is clear that the State failed to prove *all essential elements* of criminal responsibility. The evidence was insufficient to show anything other than Ms. Blair's presence at the crime scene, and the trial court ruled that no reasonable juror could conclude otherwise. Ms. Blair's acquittal of criminal responsibility and the State's failure to prove anything other than Ms. Blair's presence necessarily means that the State failed to prove that she had solicited, directed, aided or attempted to aid the perpetrators.

Per *Fowler* and *Burns*, facilitation's 'substantial assistance' element must be included in criminal responsibility's 'solicits, directs, aids, or attempts to aid' element since facilitation is a lesser included offense of criminal responsibility. *Therefore one of the elements of criminal responsibility constitutes an essential element in the mistried facilitation count.* Since Ms. Blair has been acquitted of criminal responsibility which includes the element of soliciting, directing, aiding, or attempting to aid, then she must also be acquitted of facilitation's substantial assistance element. In other words, an essential element of facilitation has previously been decided in favor of the defendant. The State is now collaterally estopped from re-litigating that element in a subsequent trial.

g. Like in Thompson, a new trial for Ms. Blair on the felony murder element or the facilitation element would be a “subsequent” trial for purposes of Double Jeopardy.

As explained above, *Thompson* also stands for the proposition that a new trial becomes a “subsequent” trial for purposes of Double Jeopardy and collateral estoppel once an issue essential to the success of the new prosecution has been previously resolved by the entry of a valid judgment of acquittal. *Id.* at 846

In the case at bar, an acquittal on all of the elements of especially aggravated robbery and criminal responsibility for another was entered on October 2, 2009. An acquittal is final upon entry. *Id.* at 854. It is irrelevant whether the trial court or a jury acquitted Ms. Blair.

The acquittal on the especially aggravated robbery and criminal responsibility charges means that several essential elements of the facilitation of the felony murder charge have already been determined in Ms. Blair's favor. As a result, issues essential to the success of the facilitation of felony murder charge have already been resolved by an entry of a valid judgment of acquittal. Therefore, any new trial on the facilitation of felony murder charge would qualify

as a subsequent trial for purposes of collateral estoppel and be in violation of the Double Jeopardy Clause of the Tennessee Constitution.

II. The Facilitation of Felony Murder Charges analyzed under the United State Supreme Court's Decision in *Yeager v. United States*

In *Yeager v. United States*, 129 S.Ct. 2360, 174 L.ED.2d 78 (2009), decided June 18, 2009, the United States Supreme Court held that a jury's verdict of acquittal on some counts and a jury's failure to return a verdict on other counts does not affect the acquittals' preclusive force under collateral estoppel and the Double Jeopardy Clause.

a. Procedural and Factual History

Yeager was one of several defendants who were charged with multiple counts of insider trading, wire fraud, and money laundering during the Enron scandal. *Id.* at 2363. The jury acquitted Yeager on the fraud counts but failed to reach a verdict on the insider-trading and money laundering counts. *Id.* at 2364. After refining a new indictment to focus solely on Yeager, the government attempted to retry the him on some of the insider trading and money laundering counts. *Id.*

Yeager moved to dismiss the new indictment, arguing that "the acquittals on the fraud counts precluded the Government from retrying him on the insider trading counts." *Id.* Specifically, Yeager contended that the jury's acquittal on the fraud counts necessarily meant that he did not possess material, non-public, insider information, which would in turn be a critical fact necessary to prove the government's case in a subsequent trial. *Id.*

The Fifth Circuit affirmed the District Court's denial of Defendant's motion to dismiss the indictments, although on different grounds. *Id.* The Fifth Circuit reasoned that the hung counts, along with the acquittals, made it "impossible to decide with any certainty what the jury necessarily determined" about whether he possessed material insider information. *Id.* at 2365.

The Supreme Court rejected the Fifth Circuit's analysis, finding that “a hung count hardly makes the existence of any fact...more probable or less probable,” and that “consideration of hung counts has no place in the issue preclusion analysis.” *Id.* at 2368.

b. The United States Supreme Court's Analysis

In its analysis, the United States Supreme Court relied heavily on its previous decision in *Ashe v. Swenson*, 397 U.S. 436 (1970), which “squarely held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial.” *Yeager*, 129 S.Ct. at 2366. In the case, Ashe was accused of being one of six masked gunmen who robbed a group of poker players. *Id.* At the first trial, the jury acquitted Ashe of being one of the robbers. *Id.* In a subsequent trial only a few weeks after the first, the government attempted to prove that Ashe had robbed a different one of the six players. *Id.* Because Ashe had already been acquitted of being one of the robbers in the first trial, the United States Supreme Court held that the State was collaterally estopped from putting him on trial again for the same offense. *Id.* at 2366-2367. The Court reasoned that “when an issue of ultimate fact has once been determined by a valid and final judgment of acquittal, it cannot again be litigated in a second trial for a separate offense.” *Id.* at 2367 (internal citations omitted).

Guided by the decision in *Ashe*, and its reasoning concerning the hung counts, the Supreme Court concluded that ***“if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charges for which that is an essential element.”*** *Id.* at 2368-2369 (emphasis added).

c. Whether Ms. Blair committed especially aggravated robbery was a critical issue of ultimate fact in the charges against her, and the verdict that decided that issue in her favor protects her from prosecution for any charges for which that is an essential element.

The United States Supreme Court's decision in *Yeager* makes a two step inquiry: 1) has a critical issue of ultimate fact been previously determined in favor of the accused, and 2) would that critical issue of ultimate fact constitute an essential element in a new prosecution against the accused. *See id.*

As has been explained above, especially aggravated robbery is an essential element of the facilitation of felony murder charge. In Ms. Blair's original trial, the trial court ruled that the evidence was insufficient to show that she had committed especially aggravated robbery, and that ruling established a critical issue of ultimate fact. Because that critical issue of ultimate fact was decided in Ms. Blair's favor, per *Yeager*, that verdict protects her from retrial on the facilitation of felony murder count where the predicate felony is especially aggravated robbery.

d. Whether Ms. Blair solicited, directed, aided, or attempted to aid in the felony-murder was a critical issue of ultimate fact in the charges against her, and the verdict that decided that issue in her favor protects her from prosecution for any charges for which that is an essential element.

As previously mentioned, it is well settled that facilitation is a lesser included offense of criminal responsibility. *Fowler*, 23 S.W.3d at 288. Because the only difference between the statutes is the degree of intent, the 'furnishes substantial assistance' element found in facilitation must be included within the 'solicit, direct, aid, or attempt to aid' element found in the criminal responsibility statute. *See Burns*, 6 S.W.3d at 466-467.

The trial court ruled that the evidence was insufficient for *all elements* of criminal responsibility, and that mere presence was not enough. (Tr. p. 15, line 1-12); (Tr. p. 15, line 22-24); (Tr. p. 16, lines 18-25; p.17, lines 1-6.) That ruling created a critical issue of ultimate fact that was decided in favor of Ms. Blair. Because the remaining facilitation charge requires the

government to prove the element of 'furnishes substantial assistance' – which is included in criminal responsibility's 'solicit, direct, aid, or attempt to aid' element – the trial court's previous verdict acquitting her of criminal responsibility protects Ms. Blair from prosecution on the lesser included facilitation charge.

CONCLUSION

Ms. Blair was acquitted of all felony first degree murder charges, especially aggravated robbery and criminal responsibility for another by the trial court. These critical issues of ultimate fact have been determined by a valid and final judgment.

In this case, facilitation to commit first-degree murder during a felony requires the State to prove all of the elements of especially aggravated robbery. Because Ms. Blair was previously acquitted of all the elements of a especially aggravated robbery, the State is now precluded from any retrial because this critical issue of ultimate fact has already been determined in Ms. Blair's favor.

Similarly, facilitation to commit first-degree murder during a felony requires the State to prove the element of 'furnishes substantial assistance.' Because Ms. Blair was previously acquitted of all elements of criminal responsibility, which includes the element of 'substantial assistance,' the State is now precluded from any retrial because this critical issue of ultimate fact has already been determined in Ms. Blair's favor.

Based on the holdings in *Thompson* and *Yeager*, and on the above analysis, this Court should find that the doctrines of Double Jeopardy and collateral estoppel bar any future retrial for the remaining facilitation counts under both the United States and Tennessee Constitutions.

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The undersigned hereby certifies that a true and correct copy of this Brief has been served upon the following individuals via first-class mail, postage pre-paid, on this the _____ day of April, 2010:

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