Supreme Court, U.S.
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No. 10-1320

IN THE
Supreme Court of the United States

ALEX BLUEFORD,
Petitioner,
v.

STATE OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Arkansas Supreme Court

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
*Counsel of Record
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St., NW, Suite 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms and structural safeguards it guarantees.

This case raises the question whether the Double Jeopardy Clause of the Fifth Amendment, applied to the states through the Fourteenth Amendment, permits the government to subject a criminal defendant to a second trial for the same serious offences a jury had acquitted him of, simply because the jury had deadlocked on a lesser-included offense. As an organization dedicated to the Constitution's text and history, CAC has an interest in safeguarding the right not to be placed twice in jeopardy of life or limb for the same crime and ensuring the integrity of the jury as a constitutional bulwark of liberty.

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be granted in this case to resolve a troubling split among state courts concerning the interpretation of the Fifth Amendment's Double Jeopardy Clause. Below, the Arkansas Supreme Court held that the Double Jeopardy Clause did not prevent the state from retrying Alex Blueford on charges that the jury in his first trial had unanimously rejected, relying on the fact that the jury had deadlocked on a lesser-included offense. The state court refused to apply the Double Jeopardy Clause to the jury's acquittal on the two more serious charges, even though, under Arkansas law, the jury could not have considered the lesser-included offense without first acquitting Blueford of the more serious offenses. This ruling conflicts with the judgment of five other state courts.

The ruling of the Arkansas Supreme Court not only conflicts with the opinions of other state courts, it is manifestly inconsistent with the text and history of the Double Jeopardy Clause. The Double Jeopardy Clause, like many aspects of the Bill of Rights, has its origins in English common law. English common-law precedent, this Court's jurisprudence, and the debates over the framing of the Bill of Rights plainly establish that the Double Jeopardy Clause prohibits the government, following acquittal by a jury, from subjecting a defendant to a second trial or prosecution for the same crime. There is nothing in the Clause's text or history to suggest that this fundamental protection against government overreaching is

inapplicable to partial verdicts or the functional equivalent of a partial verdict, as in this case. Indeed, this Court's protection of "implicit acquittals" suggests that it is of no constitutional moment that the jury's acquittal in this case was not reflected in any order or judgment.

Had the capital murder and first-degree murder offenses been the only charges sent to the jury at Blueford's criminal trial, there could be no serious question that, after the jury's announcement in open court that they had voted unanimously to acquit Blueford on those two charges, the Double Jeopardy Clause would bar the state from retrying him on those offenses. The result should not be any different simply because, after the jurors told the trial court that they voted unanimously to acquit Blueford of the more serious charges against him, the jury deadlocked on the lesser-included offense of manslaughter. While Arkansas is surely free to retry Blueford on the two lesser-included charges that the jury did not resolve—manslaughter and negligent homicide—the Double Jeopardy Clause forbids a second trial on the more serious charges that were unanimously rejected by the jury.

To resolve these important constitutional questions about the interpretation of the Double Jeopardy Clause, about which the courts below are divided, *amicus* urges the Court to grant the Petition for Certiorari. Review is necessary here because the court below "has decided an important question of federal law that has not been, but should be, settled by this Court." S. Ct. Rule 10(c).

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO CLARIFY THE SCOPE OF THE DOUBLE JEOPARDY CLAUSE'S PROTECTION OF JURY ACQUITTALS.

The Petition for a Writ of Certiorari in this case presents an important, recurring, and unresolved question concerning the meaning of the Fifth Amendment's constitutional prohibition on double jeopardy that has divided the state courts: whether the Double Jeopardy Clause prohibits a defendant from being subjected to a second trial for a serious offense when the jury acquitted him of that offense, but deadlocked on a lesser-included offense. *See* Pet. at 13-18 (setting forth split among state courts).[2]

In complex criminal cases involving greater and lesser-included offenses, like Alex Blueford's,

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[2] *Compare* App. to Pet. for Cert. at 12a-14a; *People v. Richardson*, 184 P.3d. 755 (Colo. 2008) (en banc); *State v. Booker*, 293 S.E.2d 78 (N.C. 1982); *State v. Bell*, 322 N.W.2d 93 (Iowa 1982); *People v. Hickey*, 303 N.W.2d 19 (Mich. Ct. App. 1981); *State v. McKay*, 535 P.2d 945 (Kan. 1975); *People v. Hall*, 324 N.E.2d 50 (Ill. App. Ct. 1975) (all rejecting double jeopardy claim) *with State v. Fielder*, 118 P.3d 752 (N.M. Ct. App. 2005); *State v. Tate*, 773 A.2d 308 (Conn. 2001); *Whiteaker v. State*, 808 P.2d 270 (Alaska Ct. App. 1991); *Stone v. Superior Court*, 646 P.2d 809, 816-17 (Cal. 1982); *State v. Pugliese*, 422 A.2d 1319 (N.H. 1980) (all finding double jeopardy violation). *See also Commonwealth v. Roth*, 776 N.E.2d 437 (Mass. 2002) (finding double jeopardy violation but holding that it was error for the trial court to take a partial verdict on greater and lesser-included offenses).

Arkansas law instructs juries to consider the charges one at a time, beginning with the most serious and proceeding to lesser-included offenses only after the jury has unanimously voted to acquit the defendant of the more serious charges. The jury that heard Alex Blueford's case followed these instructions, voting to acquit Alex Blueford of charges of capital and first-degree murder before deadlocking on the lesser-included offense of manslaughter. As the forewoman of the jury explained in open court, the jury was "unanimous against" the charges of capital and first-degree murder, but could not unanimously resolve the manslaughter charge. *See* App. to Pet. for Cert. at 19a. Because of the deadlock, the jury did not consider the least serious of the four charges against Blueford, negligent homicide. *Id.* at 20a.

Despite the clear and uncontroverted fact that the jury had unanimously acquitted Alex Blueford of the two most serious charges against him, the Arkansas Supreme Court held that the Double Jeopardy Clause, applied to the states by the Fourteenth Amendment, did not forbid Arkansas from retrying him on those charges because the jury deadlocked on a lesser-included charge. Adopting what it described as the view of "the majority of jurisdictions," App. to Pet. for Cert. at 12a, the Arkansas Supreme Court held that the State was free to retry Blueford on all charges, including the two most serious charges unanimously rejected by the jury. The court rejected the "minority view"—that the Double Jeopardy Clause prohibits retrial of offenses of which the jury acquitted the defendant—as

unpersuasive and contrary to prior Arkansas Supreme Court precedent. App. to Pet. for Cert. at 13a.

Amicus urges this Court to grant *certiorari* to resolve this conflict and clarify the scope of the Double Jeopardy Clause's protection of jury acquittals. By holding that Arkansas could prosecute Blueford for capital and first-degree murder, notwithstanding the jury's unanimous rejection of both charges, the decision below threatens core constitutional values at the heart of the Fifth and Fourteenth Amendments. Giving prosecutors a second chance to convict Blueford of charges a jury has unanimously rejected sharply conflicts with the Constitution's text and history and numerous decisions of this Court. *See, e.g.*, *Green v. United States*, 355 U.S. 184, 190 (1957) (holding that jury's refusal to convict on first-degree murder charge was an "implicit acquittal" protecting the defendant from retrial since "[h]e was forced to run the gantlet once on that charge and the jury refused to convict him"). While the State, of course, is free to retry Blueford on the charges on which the jury deadlocked or did not decide, the Double Jeopardy Clause makes the jury's vote to acquit Blueford on capital and first-degree murder charges final.

A. The Text and History of the Fifth Amendment's Double Jeopardy Clause Prohibit Retrial After Jury Acquittal.

The Double Jeopardy Clause of the Fifth Amendment provides "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. In incorporating into the Constitution this critical safeguard of liberty, the framers of the Fifth Amendment secured to all persons an individual right against "being subjected to the hazards of trial and possible conviction more than once for an alleged offense," *Green*, 355 U.S. at 187, and a structural protection of trial by jury. Where the jury votes to acquit, exercising its "overriding responsibility to stand between the accused and a potentially arbitrary or abusive Government," *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977), retrial is absolutely barred.

The Double Jeopardy Clause has its origins in English common law, and the Americans of the founding generation viewed the prohibition on double jeopardy as a fundamental right essential to the protection of liberty from government over-reaching. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1781, at 659 (1833) (calling the prohibition on double jeopardy "another great privilege secured by the common law"). The Double Jeopardy Clause was one of several amendments in the Bill of Rights that "fortify and guard th[e] inestimable right of trial by jury," *United States v. Gibert*, 25 F. Cas.

1287, 1294 (C.C.D. Mass. 1834) (Story, J.), a "part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power." 3 STORY, COMMENTARIES ON THE CONSTITUTION, § 1773, at 652-53.

In his famous Commentaries on the Laws of England, William Blackstone described the two common law pleas, *autrefois acquit* and *autrefois convict*, that inspired the text of the Double Jeopardy Clause. "[T]he plea of *autrefois acquit*, or a former acquittal, is grounded on the universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once . . . . [W]hen a man is once fairly found not guilty . . . before any court of competent jurisdiction, he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *335. Blackstone explained that the second of these pleas, "*autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given," also "depends on the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime." *Id.* at *336.

Blackstone's analysis highlighted the close connections between trial by jury, a right Blackstone called "the grand bulwark of [every Englishman's] liberties," *id.* at *349, and double jeopardy principles. As Blackstone observed, "[T]here hath yet been no instance of granting a new trial where the prisoner was *acquitted* up on

the first. If the jury, therefore, find the prisoner not guilty, then he is for ever quit and discharged of the accusation . . . ." *Id.* at *361. Double jeopardy principles, dating all the way back to Blackstone, thus "safeguard not simply the individual defendant's interest in avoiding vexation but also the integrity of the initial petit jury's judgment." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 96 (1998).

Drawing on Blackstone, the framers of the Bill of Rights wrote this critical guarantee against government overreaching explicitly into the Constitution, providing "a double security against the prejudices of judges, who may partake of the wishes and opinions of government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy." 3 STORY, COMMENTARIES ON THE CONSTITUTION, § 1774, at 653. Debates over the Bill of Rights explicitly affirmed the fundamental double jeopardy principle that a jury's acquittal is final, barring either a new trial or a successive prosecution.

During debates on an early version of the Double Jeopardy Clause proposed by James Madison,[3] the framers repeatedly affirmed the finality of a jury's acquittal, barring a second trial or prosecution. Rep. Roger Sherman observed that

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[3] Madison's initial proposal provided that "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." Annals of Congress, 1st Cong., 1st Sess. 451-52 (1789).

"the courts of justice would never think of trying and punishing twice for the same offence. If the person was acquitted on the first trial, he ought not to be tried a second time." Annals of Congress, 1st Cong., 1st Sess. 782 (1789). Rep. Samuel Livermore noted that "[m]any persons may be brought to trial . . . but for want of evidence may be acquitted; in such cases, it is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence." *Id.* In this respect, the Double Jeopardy Clause provided an important structural protection of trial by jury, a right James Madison noted was "as essential to secure the liberty of the people as any one of the pre-existent rights of nature." *Id.* at 454.

Madison's initial proposal was amended in the Senate. In its final form, the Fifth Amendment's Double Jeopardy Clause used "the more traditional language employing the familiar concept of jeopardy, . . . language that tracked Blackstone's statement of the principles of *autrefois acquit* and *autrefois convict*." *United States v. Wilson*, 420 U.S. 332, 341-42 (1975).

The Double Jeopardy Clause included in the Bill of Rights did not originally apply to the actions of state governments, but eighty years later, "[t]he constitutional amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3028 (2010). Introducing the Fourteenth Amendment in the Senate, Jacob Howard explained that its broad text protected against state action all of the "personal rights

guaranteed and secured by the first eight amendments of the Constitution," Cong. Globe, 39th Cong., 1st Sess. 2765 (1866), including the Fifth Amendment's prohibition on double jeopardy.

It is now firmly established under this Court's precedents that the Fifth Amendment's Double Jeopardy Clause "is a fundamental ideal in our constitutional heritage that . . . appl[ies] to the States through the Fourteenth Amendment," *Benton v. Maryland*, 395 U.S. 784, 794 (1969), and forbids the government—whether state or federal—from retrying a defendant following a jury's acquittal. "[I]ncorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment,'" *McDonald*, 130 S. Ct. at 3035 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)).

Consistent with the text and history of the Fifth Amendment, this Court has repeatedly held that retrial following an acquittal is strictly prohibited. In interpreting the Double Jeopardy Clause to give "absolute finality to a jury's verdict of acquittal," *Burks v. United States*, 437 U.S. 1, 16 (1978), this Court has drawn specifically on the Fifth Amendment's text and history, quoting at length from Blackstone and demonstrating that his Commentaries "greatly influenced the generation that adopted the Constitution," *Green*, 335 U.S. at 187 (discussing Blackstone), and informed the specific wording of the Fifth Amendment's Double Jeopardy Clause. *See Wilson*, 420 U.S. at 341-42.

It is thus no surprise that the Court has recognized that "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." *Martin Linen*, 430 U.S. at 571 (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)); *see also Green*, 355 U.S. at 188 ("[A] verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.'") (quoting *Ball*, 163 U.S. at 671). As Justice Scalia has observed, giving the government a second chance to prove an acquitted defendant guilty of the same crime "would violate the very core of the double jeopardy prohibition." *Monge v. California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting).

B. The Authority of Courts to Declare a Mistrial Must Be Exercised Consistent With the Fifth Amendment's Protection of Jury Acquittals.

These fundamental principles do not lose their force here simply because the jury that heard Blueford's case was not able to resolve all of the charges against him. While, of course, the Fifth Amendment does not prevent the government from retrying Blueford on charges of which he "has not been convicted or acquitted," *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824), once the jury

acquitted Blueford of the two most serious charges, the court's duty under the Constitution was to enter a verdict of acquittal on those charges. A court's wide discretion to call a mistrial where "there is a manifest necessity for the act, or the ends of public justice would be defeated," *id.* at 580, ends where the jury has, in fact, acquitted the defendant of all or some of the charges against him or her. *See also Renico v. Lett,* 130 S. Ct. 1855, 1862-64 (2010).

The Fifth Amendment's prohibition on double jeopardy protects the jury's judgment that the defendant is not guilty of the charges and is entitled to an acquittal, not the ministerial act of reducing their vote to a judgment. The framers, who were concerned that "the prejudice of judges . . . may partake of the wishes and opinions of the government," 3 STORY, COMMENTARIES ON THE CONSTITUTION, § 1774, at 653, gave the jury final say over a defendant's guilt or innocence. Indeed, the Double Jeopardy Clause applies even when the jury enters no formal verdict or judgment of acquittal, convicting only on lesser charges. *See Green*, 335 U.S. at 190 (holding that jury's refusal to convict on first-degree murder charge was an "implicit acquittal" protecting the defendant from retrial since "[h]e was forced to run the gantlet once on that charge and the jury refused to convict him"). It is thus of no constitutional moment that the jury's acquittal was not reflected in any order or judgment.

Under the text and history of the Double Jeopardy Clause, the jury's acquittal of Blueford on

charges of capital and first-degree murder were final, forever barring a second trial on those charges. Blueford should not be deprived of Double Jeopardy protections simply because the jury could not agree on all of the charges against him. *Cf. Commonwealth v. Cook*, 6 Serg. & Rawle 577, 581-83 (Pa. 1822) (finding mistrial improper as to all defendants where jury acquitted two defendants of the charges, but deadlocked on third defendant).

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
**Counsel of Record*
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

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