No. 10-

IN THE

Supreme Court of the United States

JAMES M. HARRISON,
Petitioner,

v.

DOUGLAS GILLESPIE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID M. SCHIECK
JONELL THOMAS
SCOTT BINDRUP
CLARK COUNTY SPECIAL PUBLIC DEFENDER
330 South Third Street
Suite 800
Las Vegas, NV 89155
(702) 455-6265

BRET WHIPPLE
1100 South Tenth Street
Las Vegas, NV 89104
(702) 257-9500

SRI SRINIVASAN
(*Counsel of Record*)
ssrinivasan@omm.com
LOREN L. ALIKHAN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioner

QUESTION PRESENTED

The en banc Ninth Circuit divided 6-5 on the following question presented:

Whether, when the jury in a capital case indicates that it is deadlocked among lesser sentences but has ruled out a capital sentence, the Double Jeopardy Clause entitles the defendant to ascertain whether the jury has in fact reached a decision against imposing the death penalty before the trial court declares a mistrial and discharges the jury.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended decision of the court of appeals sitting en banc is reported at 640 F.3d 888, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-59a. The prior opinion of the court of appeals sitting en banc is reported at 636 F.3d 472, and is reprinted at Pet. App. 60a-117a. The amended panel opinion of the court of appeals is reported at 596 F.3d 551, and is reprinted at Pet. App. 118a-168a. The original panel opinion of the court of appeals has been withdrawn, but is reprinted at Pet. App. 169a-215a. The opinion of the district court is unpublished, but is reprinted at Pet. App. 216a-224a.

JURISDICTION

The court of appeals issued its amended en banc decision on May 10, 2011, and ordered that no further petitions for rehearing be filed. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or

property, without due process of law." U.S. Const. amend. XIV, § 1.

INTRODUCTION

In the capital sentencing phase of petitioner's trial, the jury found one aggravating factor and 24 mitigating factors. In order to impose a sentence of death, the jury would have had to conclude unanimously that the 24 mitigating factors failed to outweigh the single aggravating factor, and then would have further needed to conclude unanimously that a death sentence was appropriate on the facts of the case.

The jury instead sent two notes to the trial judge indicating that it had ruled out a capital sentence and was deadlocked between two lesser, non-capital sentences—life without the possibility of parole and life with the possibility of parole. The trial court indicated its intention to declare a mistrial and discharge the jury based on the deadlock. Petitioner requested that the court first ascertain from the jury whether, as indicated by its notes, it had decided against the death penalty, which would have constituted an "acquittal" of a death sentence so as to preclude the State from seeking a capital sentence in a new penalty hearing. The trial court refused to do so, instead declaring a mistrial and discharging the jury without any effort to ascertain whether the jury had "acquitted" petitioner of a capital sentence.

The en banc Ninth Circuit, by a 6-5 vote, narrowly rejected petitioner's contention that the Double Jeopardy Clause entitled him to ascertain whether the jury had "acquitted" him of the death penalty before the trial court discharged the jury.

The Ninth Circuit's decision is incorrect under this Court's double-jeopardy jurisprudence; it presents an important question about the administration of the death penalty; it enables the State again to attempt to obtain a capital sentence against petitioner in a new penalty hearing even though there is every likelihood that the jury rejected the death penalty; and it directly implicates an entrenched split among state courts of last resort and federal courts about whether a defendant possesses a double-jeopardy entitlement to ascertain whether the jury has acquitted him of a charge when the jury indicates that it is deadlocked among lesser charges. This Court's review is warranted.

STATEMENT OF THE CASE

1. On August 29, 2002, Dan Miller was found dead in his apartment in Las Vegas. C.A. E.R. at 10. Petitioner and Anthony Dwayne Prentice, the victim's roommate, were charged with conspiracy to commit murder, burglary, and murder with the use of a deadly weapon. Pet. App. 217a. The trials were severed and the State sought the death penalty against both defendants. *Id.* Prentice's jury convicted him of conspiracy to commit murder and murder with the use of a deadly weapon. The jury rejected a capital sentence, however, instead sentencing Prentice to life in prison without the possibility of parole. *Id.* at 123a. Subsequently, a different jury found petitioner guilty of the same crimes. *Id.*

2. At his sentencing hearing, petitioner faced four possible sentences: death, life without the possibility of parole, life with the possibility of parole, and imprisonment for a term of years. Pet. App.

19a, 124a. To impose a death sentence under Nevada law, the jury had to go through several steps. First, it had to unanimously find the existence of at least one aggravating factor beyond a reasonable doubt. Next, it had to determine whether any mitigating factors existed and, if so, whether those mitigating factors outweighed the aggravating factor(s). If the jury unanimously concluded that there was at least one aggravating factor and no mitigating factors, or that the mitigating factors failed to outweigh the aggravating factors, then it would determine whether to impose a sentence of death, life without the possibility of parole, life with the possibility of parole, or imprisonment for a term of years. Alternatively, if the jury failed to determine unanimously that at least one aggravating factor existed, or if any juror concluded that the mitigating factors outweighed any aggravating factors, the jury could not impose a death sentence, but instead would select among the lesser, non-capital sentences. *Id.* at 18a-19a, 124a.

The jury received four forms to help navigate through the sentencing process under Nevada law. On the first form, the jury was to note whether it had found any of the aggravating factors urged by the prosecution. On the second, it was to note any mitigating factors it found. Pet. App. 7a-8a, 127a. The third form listed all four possible sentences and allowed the jury to select one; it was to be used only if the jury had first determined unanimously both that at least one aggravating factor had been proven and that the mitigating factors, if any, failed to outweigh the aggravators. The fourth form was to be used if any of the prerequisites to the death penalty

had not been met; it listed only the non-death sentences and permitted the jury to select among them. *Id.* at 8a, 127a. Notably, if the jury found an aggravating factor, but any juror determined that the mitigating factors outweighed the aggravating factors—thereby rendering petitioner ineligible to receive the death penalty—the verdict forms offered no way for the jury to denote that conclusion unless it could agree on which lesser sentence to impose. *Id.* at 127a.

Petitioner requested a bifurcated sentencing hearing, which would have altered the procedure just described by requiring the jury first to determine whether he was eligible to receive the death penalty (i.e., whether the jury unanimously concluded that any mitigating factors failed to outweigh any aggravating factors) before determining what sentence to impose. *See* Pet. App. 77a-78a (explaining Nevada bifurcation procedure). The State opposed the request for bifurcation, and the trial court denied it.

3. Petitioner's sentencing hearing lasted three days. The State argued that the jury should find two aggravating factors, and the defense argued that the jury should find twenty-three mitigating factors. The defense called a number of witnesses on petitioner's behalf, including several of petitioner's family members, a therapist who had worked with petitioner while he was in juvenile detention, and an expert witness who had conducted a forensic psychological evaluation of petitioner. Those witnesses testified to the following.

a. Petitioner was born in 1981 to parents who both abused drugs. 11/15/06 Tr. at 78-79. Petitioner's mother testified that, when petitioner was young, crystal meth "was an everyday part of [her] life for about two years." 11/16/06 Tr. at 156. Petitioner's family was poor; his father was illiterate; and the family moved frequently during his childhood. 11/15/06 Tr. at 79.

Petitioner's upbringing was marked heavily by abuse and neglect. When petitioner was about three, his mother had an affair and his father moved out. 11/15/06 Tr. at 79. Petitioner's biological father was almost entirely absent from his life from that point forward. *Id.*; *id.* at 143. His new stepfather, however, abused drugs, had difficulty holding a job, and was physically and emotionally abusive to petitioner, petitioner's mother, and petitioner's half-sister. *Id.* at 79-80. Like petitioner, his half-sister was adversely affected by her family experience while growing up—the State removed one of her two children from her custody and she voluntary surrendered custody of her other child. *Id.* at 160-61; 11/16/06 Tr. at 168-69. Petitioner's younger half-brother also suffered from their poor family situation, and was expelled from high school for stabbing a classmate. 11/16/06 Tr. at 62.

This pattern of abuse, in which petitioner's mother participated as both a victim and a perpetrator, ultimately led to petitioner's and his half-sister's being taken away from their parents for around six months. 11/15/06 Tr. at 83-84. During part of that time, petitioner's stepfather was incarcerated for abusing petitioner and his half-sister. *Id.* at 83. While his parents were absent, petitioner lived with

his maternal grandparents. *Id.* at 83-84. According to petitioner's grandparents, petitioner's behavior improved markedly during this period of love and stability. *Id.* at 158-59, 166-67. Petitioner did his homework, performed well in school, and caused no problems. *Id.* at 169.

After petitioner's mother and stepfather resumed custody of petitioner and his half-sister, his stepfather told petitioner that, if he ever again talked about the abuse, his stepfather would kill him. 11/15/06 Tr. at 84. The family's life of drug use, physical and emotional abuse, and frequent relocation resumed. *Id.* at 84-85. Petitioner later told staff members at a juvenile institution where he was incarcerated that he would prefer to live with his grandparents because his parents had shown so little interest in his life. *Id.* at 99.

b. Petitioner was diagnosed with attention deficit hyperactivity disorder at an early age, and was placed on Ritalin. 11/15/06 Tr. at 82. Petitioner performed well in school academically but experienced significant behavioral problems. *Id.* at 85. Sometimes his parents simply failed to take him to school at all. 11/16/06 Tr. at 161. As a teenager, petitioner was diagnosed with various behavioral disorders and bipolar disorder. 11/15/06 Tr. at 88-89. His parents were unwilling or unable to pay for counseling, *id.* at 98, and bought illegal drugs for themselves with money that should have been used to buy medication for petitioner, 11/16/06 Tr. at 164.

Petitioner's behavioral problems led to his induction into the juvenile detention system at the age of thirteen. 11/15/06 Tr. at 86. Around this time, peti-

tioner was raped by a 40-year-old male cousin. *Id.* at 87.

Petitioner spent the remainder of his childhood bouncing between institutions and foster care. 11/15/06 Tr. at 87-88. During that period—approximately four years—he rarely received any visits or letters from his parents. 11/16/06 Tr. at 163-64. His mother admitted that she "sort of abandoned him . . . during those years." *Id.* at 163.

Petitioner was released from the juvenile detention system at nineteen. 11/15/06 Tr. at 92-93. Shortly thereafter, he violated his juvenile probation by leaving the state. *Id.* at 93. He was homeless during this period and began using crystal meth, as his parents had done while raising him. *Id.*

c. Petitioner's circumstances began to improve when he became involved in an organization for homeless teenagers called Street Teens, and he found a mentor in one of the volunteers, named David Moreau. 11/15/06 Tr. at 93-94. Moreau became a father figure and convinced petitioner to try to turn his life around and join the military. *Id.* at 94. In order to become eligible for the military, petitioner needed to rectify his probation violation, so he returned to Idaho, where he had been on probation, and turned himself in. *Id.* at 30, 94. He served three months for the probation violation. Upon his release, he sought to join the Navy, but he was turned away because of his criminal history. *Id.* at 94.

Petitioner attempted to stabilize his life and secure a job for several months in the hopes of improving his chances of being allowed to enlist. 11/15/06

Tr. at 95. Soon, however, he became romantically involved with a woman who had drug problems, and he again began abusing drugs himself. *Id.* Petitioner and his girlfriend married on April 12th, 2002, but the marriage collapsed after only 16 days. *Id.* Around the same time, petitioner's mentor, David Moreau, passed away from cancer. *Id.* at 95-96. Devastated and suicidal, petitioner began increasing his use of crystal meth until he was using the drug several times a day. *Id.* at 96.

By late August 2002, petitioner was abusing crystal meth every "two or three hours" and was not sleeping at all. 11/15/06 Tr. at 96. He identified August 22, 2002—his 21st birthday—as the date on which he was going to try to stabilize his life. *Id.* But the drug binge continued, and when the murder occurred one week later, on August 29, 2002, petitioner was in a drug-induced state. *Id.* at 108.

4. a. At the close of the sentencing hearing, the jury retired to deliberate. The jury ultimately sent two separate notes to the trial judge informing the judge that they were deadlocked between imposing a sentence of life imprisonment with the possibility of parole and a sentence of life imprisonment without the possibility of parole. Pet. App. 4a, 230a. The trial court stated that, "[f]or the record, we had two notes from two different jurors indicating that the jury was deadlocked between life with and life without." *Id.* at 230a.[1]

---

[1] The trial court indicated that the jury notes would be entered into the record, but that did not take place. *See* Pet. App. 4a n.1.

The judge informed counsel that she was inclined to ask the jurors whether further deliberations would be productive, and if they indicated no, she would dismiss the jury due to their deadlock. One of petitioner's attorneys responded that the judge should first inquire whether the jurors had made any determinations as to petitioner's eligibility for the death penalty—specifically, whether they had found any aggravating circumstances, and, if so, whether they had unanimously concluded that any mitigating factors failed to outweigh the aggravating factors. Pet. App. 4a-5a, 231a. Counsel suggested that the court ask each juror if he or she had determined that the mitigating factors outweighed the aggravating factors, in which case no capital sentence could be imposed. *Id.* at 5a, 231a. Petitioner's other attorney further requested that the court inquire whether the jury had unanimously eliminated the death penalty as a punishment, "because one of the notes to the Court indicated just that." *Id.* at 5a, 231a. The State did not dispute that the jury's notes manifested that the jury had ruled out a capital sentence, but the State nonetheless objected to the request that the trial court question the jurors, arguing that the court instead should look at the verdict forms alone without any further questions to the jury. *Id.* at 5a, 231a-32a.

The judge acknowledged that if the jury had signed the aggravating-factor form without finding any aggravating circumstances, that would indicate that the jury had found no aggravating factors beyond a reasonable doubt and, accordingly, the State would be barred from seeking the death penalty in a new sentencing proceeding. Pet. App. 5a-6a, 232a.

But, as the judge explained, if the jury had found both aggravating factors and mitigating factors, the verdict forms provided no way for the jury to denote that the mitigating factors outweighed the aggravating factors, or vice versa. *Id.* at 232a. Instead, the only option for the jury was to designate any agreed-upon sentence. *Id.* The judge stated that "the fact they're not considering the death penalty" would not "tell us where they are in terms of the aggravators and the mitigators." *Id.* at 6a, 233a.

b. The trial judge called the jury into the courtroom and asked if further deliberations would be productive or if the jury instead was at an impasse on the sentence. The foreperson responded that the jury was at an impasse. Pet. App. 6a-7a, 233a-34a. The trial court then asked for the jury's verdict forms, declared a mistrial, and discharged the jury. *Id.* at 7a, 234a. The trial court did not, as petitioner's attorneys had requested, attempt to ascertain from the jury whether it had ruled out a capital sentence. The entire process took roughly three minutes. *Id.* at 233a, 235a.

The first two verdict forms indicated that the jury had found one of the two aggravating factors urged by the State, and had found twenty-four mitigating factors (every factor urged by the defense and one additional factor found independently by the jury). Pet. App. 7a-8a. The final pair of verdict forms for designating petitioner's sentence was left blank because the jury had been deadlocked on what sentence to impose. *Id.* at 8a.

5. In the event of a jury deadlock on the appropriate sentence in a capital-sentencing proceeding,

Nevada law permits impaneling a new jury and conducting a new sentencing hearing. *See* Nev. Rev. Stat. § 175.556(1). On June 20, 2007, petitioner filed a motion in state court to prevent the State from seeking the death penalty in a new penalty hearing. He argued that, under the Double Jeopardy Clause, he could not be subjected to a sentence of death in a new penalty proceeding. Pet. App. 8a.

In support of his claim, petitioner submitted affidavits from three jurors, including the foreperson. Pet. App. 8a-9a, 237a-45a. Each of the three jurors stated that he or she had determined that the mitigating factors outweighed the aggravating factors—thereby rendering petitioner ineligible to receive the death penalty—and would have so stated had the judge inquired of them before discharging the jury, even though the verdict forms offered them no way to note that finding. Each affidavit further stated that all twelve jurors had agreed during deliberations that death would not be an option during the deliberations. *Id.* at 9a, 237a-45a. And each affidavit stated that the jurors disagreed as between life with parole and life without parole. *Id.* at 239a, 242a, 245a. The State submitted an affidavit from a fourth juror, who stated that "[t]he death penalty was never 'off the table' as a potential punishment option for me as a juror." *Id.* at 9a, 246a.[2]

---

[2] It bears noting that the fourth affidavit is not inconsistent with the three affidavits submitted by the defense. Even if a capital sentence was never off the table "as a potential punishment for me [*i.e.*, the fourth affiant] as a juror," Pet. App. 9a, 246a, Nevada law foreclosed a capital sentence if *any* individual juror concluded that the mitigating factors outweighed the aggravating factors. *See Evans v. State*, 28 P.3d 498, 517 (Nev.

The trial court denied petitioner's motion, and the Nevada Supreme Court subsequently denied petitioner's petition for a writ of mandamus. Pet. App. 10a.

6. a. On June 20, 2008, Petitioner filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, in the United States District Court for the District of Nevada. Petitioner argued that the Double Jeopardy Clause barred the State from seeking the death penalty in a new penalty-phase trial. Pet. App. 10a. The district court denied the petition. *Id.* at 11a.

b. The Ninth Circuit granted a certificate of appealability. Pet. App. 227a-28a. On appeal, petitioner argued that the Double Jeopardy Clause precluded the State from seeking the death penalty in a new penalty hearing because the trial court erred by declaring a mistrial without first polling the jury on whether it had reached a verdict on the death penalty. *Id.* at 11a. A panel of the court of appeals granted a stay of the pending state-court resentencing proceedings, agreed that the Double Jeopardy Clause prevented the State from again seeking the death penalty against petitioner, and granted the habeas petition. *Id.* at 165a.

2001) ("[I]f at least one [juror] determines that the mitigating circumstances outweigh the aggravating [circumstance], the defendant is not eligible for a death sentence."). Accordingly, the jury might well have ruled out a capital sentence based on the conclusions of individual jurors (including the three jurors who submitted affidavits for the defense) to the effect that the 24 mitigating factors outweighed the one aggravating factor, even if some other juror would have preferred to consider a capital sentence.

c. The court of appeals voted to rehear the case en banc, Pet. App. 226a, and in a 6-5 decision, disagreed with the panel disposition and affirmed the district court, *id.* at 91a.[3]

The majority concluded that neither Nevada law nor the Double Jeopardy Clause entitled petitioner to ascertain, before the jury was discharged, whether the jury had ruled out a capital sentence. Accordingly, the majority rejected petitioner's contention that there was no "manifest necessity" for the state court to declare a mistrial without first polling the jury. Pet. App. 83a. In the majority's view, any such jury poll could "have a coercive effect on the jury" and might "elicit the jury's tentative or preliminary vote rather than its final verdict." *Id.* at 84a.

Chief Judge Kozinski issued a concurring opinion. Pet. App. 92a-93a. He mistakenly believed that petitioner had never filed a motion to bifurcate the capital sentencing proceeding, which, if granted, would have enabled the jury to "render a verdict on his death eligibility." In Chief Judge Kozinski's view, "this would be a much harder case" had petitioner "made a timely request for some such procedure, and had the trial judge denied it." *Id.* at 92a.

---

[3] The en banc court unanimously concluded that "28 U.S.C. § 2241 is the proper vehicle for asserting a double jeopardy claim prior to (or during the pendency of) a [second] trial," and that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) therefore does not apply. Pet. App. 12a. AEDPA governs only in circumstances involving a person in custody pursuant to a state court judgment, and here, "it is undisputed that the Nevada courts have not yet entered judgment against" petitioner because he has yet to be sentenced. *Id.*

Judge Thomas, joined by four additional judges, dissented. Pet. App. 93a-111a. The dissent explained that "[t]here was no need, much less manifest necessity, for discharging the jury in this case without conducting the requested jury poll that would have answered the question of whether the jurors had reached a death penalty verdict." *Id.* at 94a. Accordingly, the dissent would have held that the Double Jeopardy Clause precluded the State from seeking a capital sentence in a new penalty hearing. *Id.*

Judge Reinhardt also issued a separate dissenting opinion, joined by Judge Thomas. Pet. App. 111a-17a. In his view, "[g]iven that separate capital penalty proceedings are held for the express purpose of determining whether the defendant is eligible for capital punishment under objective criteria prescribed by the legislature, there is never a manifest necessity to declare a mistrial without first inquiring as to whether the jury was, or would be, able to arrive at a unanimous conclusion regarding the defendant's death-eligibility." *Id.* at 115a (citation omitted).

d. Because Chief Judge Kozinski's concurrence—which supplied the sixth vote in a 6-5 disposition—was premised on the mistaken belief that petitioner had not filed a motion to bifurcate the sentencing proceedings, petitioner filed a motion asking the court of appeals to take judicial notice of petitioner's bifurcation motion and the trial court's denial of it,

and he additionally sought rehearing of the en banc disposition on that basis.[4]

On May 10, 2011, the court of appeals granted petitioner's motion for judicial notice, denied petitioner's motion for rehearing by a 6-5 vote, and issued an amended en banc opinion that again affirmed the district court by a 6-5 vote. Pet. App. 2a, 3a-32a. Chief Judge Kozinski withdrew his previously filed concurring opinion without additional comment. *Id.* at 2a.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Review To Clarify That The Double Jeopardy Clause Entitles A Capital Defendant To Ascertain Whether He Has Been "Acquitted" Of The Death Penalty In The Circumstances Of This Case

1. The basic premise of the Double Jeopardy Clause "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged of-

---

[4] These documents were not initially included in the record on appeal because the district court denied petitioner's habeas petition without requesting an answer, and thus the parties had no notice below of the potential relevance of petitioner's request for bifurcation, and no occasion to compile a more complete record. *See* Habeas Corpus Rule 5 (where petition is not dismissed, respondent must provide court with, *inter alia*, "parts of the transcript that the respondent considers relevant"); Habeas Corpus Rule 7 ("If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition."); *see also* C.A. Pet. for Reh'g at 6-7 (2/28/2011); C.A. Mot. Requesting Ct. to Take Jud. Notice at 3-4 (2/28/2011).

fense, 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." *Green v. United States*, 355 U.S. 184, 187-88 (1957). Thus, where the defendant has been acquitted of a crime, the Double Jeopardy Clause establishes an absolute bar against retrial for the same offense. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

Double jeopardy protections also bar any retrial in circumstances extending beyond those in which an initial trial ends in an acquittal. That is because "the Double Jeopardy Clause affords a criminal defendant a '*valued right to have his trial completed by a particular tribunal*.'" *Oregon v. Kennedy*, 456 U.S. 667, 671-72 (1982) (emphasis added) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)); *see also, e.g.*, *Swisher v. Brady*, 438 U.S. 204, 214 (1978) (same); *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (same). Double jeopardy therefore may attach "[e]ven if the first trial is not completed." *Washington*, 434 U.S. at 503. "Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Id.* at 505.

Of particular salience, circumstances in which it is "necessary to discharge a jury before a trial is concluded" can jeopardize a defendant's "valued right to have the trial concluded by a particular tribunal." *Washington*, 434 U.S. at 505. Accordingly, the Double Jeopardy Clause bars the State from retrying a defendant when the court declares a mistrial and discharges the jury over the defendant's objection,

unless there was "manifest necessity" to declare the mistrial. *Id.* This Court has explained that, "in view of the importance of the right" to "have the trial concluded by a particular tribunal," and "the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar." *Id.* And that burden—to demonstrate "manifest necessity"—"is a heavy one." *Id.*

2. This Court has long recognized that the Double Jeopardy Clause applies to capital-sentencing proceedings. In *Bullington v. Missouri*, 451 U.S. 430 (1981), the Court explained that capital-sentencing proceedings "resemble[] a trial on the issue of guilt or innocence," in that the jury must "determine whether the prosecution has 'proved its case'" that the death penalty is appropriate. *Id.* at 439, 444. Consequently, when the jury imposes a life sentence instead of the death penalty, "the jury has . . . acquitted the defendant of whatever was necessary to impose the death sentence." *Id.* at 445 (internal quotation marks omitted). The sentencer's determination that the defendant does not "deserve[] the death penalty" is treated as an "acquittal" of the death sentence for double jeopardy purposes, thus preventing the State from seeking the death penalty in any resentencing or retrial. *Id.* at 446.

This Court has consistently reaffirmed the now-settled rule under *Bullington* that a sentencer's decision against imposing a capital sentence constitutes an acquittal of that sentence, foreclosing any effort to impose a sentence of death in a retrial. *See, e.g.*, *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003);

Poland v. Arizona, 476 U.S. 147, 152-53 (1986); *Arizona v. Rumsey*, 467 U.S. 203, 209-12 (1984).

3. a. In this case, petitioner was denied his "valued right" under the Double Jeopardy Clause "to have his [capital] trial completed by a particular tribunal." *Kennedy*, 456 U.S. at 671-72 (internal quotation marks omitted). There is every indication that the "particular tribunal" that sat in his judgment had ruled out a capital sentence; yet the trial judge, over petitioner's objection, declared a mistrial and discharged the jury without ascertaining whether it had reached a conclusion as to a sentence of death. Under the well-established rule, the trial court could declare a mistrial and discharge the jury only if there were a "manifest necessity" to do so. *See, e.g.*, *Renico v. Lett*, 130 S. Ct. 1855, 1863 (2010); *Washington*, 434 U.S. at 505. And while a deadlocked jury can establish a "manifest necessity" to declare a mistrial, *see e.g.*, *Lett*, 130 S. Ct. at 1863, here, all indication was that the jury was deadlocked only as between two *non*-capital sentences, such that further deliberations as between *those sentences* might have been unfruitful. But there was plainly no manifest necessity to discharge the jury without at least asking whether it had ruled out a *capital* sentence, as there was no basis whatever for supposing that the jury was deadlocked on that issue.

To the contrary, it is undisputed that two separate jurors submitted two separate notes to the trial judge "indicating that the jury was *deadlocked between life with and life without*." Pet. App. 4a, 230a (emphasis added). The trial court specifically stated as much "[f]or the record," *id.* at 230a, and further referenced "the fact they're *not considering the death*

penalty," *id.* at 6a, 233a (emphasis added). The State, neither contemporaneously nor since, has ever disputed the trial court's understanding that the jury was "deadlocked between life with and life without" and was "not considering the death penalty." Nor did the State dispute the statement of petitioner's counsel that "one of the notes to the Court indicated" that "they unanimously eliminated [the] death penalty as a punishment." *Id.* at 231a.

It is also undisputed that the jury found only one aggravating factor and *24* mitigating factors, even adding a mitigating factor to the 23 requested by the defense. Pet. App. 7a-8a. That is unsurprising in light of the very strong mitigation case presented by the defense. *See supra* at 5-9. Under Nevada law, a conclusion by any *single* juror that the 24 mitigating factors outweighed the sole aggravating factor would have compelled a non-capital sentence. *See Evans v. State*, 28 P.3d 498, 517 (Nev. 2001) ("[I]f at least one [juror] determines that the mitigating circumstances outweigh the aggravating [circumstance], the defendant is not eligible for a death sentence."). It therefore is no surprise that the jury submitted notes manifesting that it had ruled out a capital sentence, or that the trial court would have understood that the jury was deadlocked between two non-capital sentences and was "not considering the death penalty." Pet. App. 6a, 233a.[5]

---

[5] In addition, as explained, *see supra* at 12, three jurors submitted affidavits confirming that the jury had ruled out a capital sentence. While a fourth juror submitted an affidavit suggesting that she personally did not consider a capital sentence to be "off the table," that assertion is consistent with the jury as a unit having concluded that a capital sentence was off

In those circumstances, there could be no manifest necessity to declare a mistrial without first asking the jury whether it had reached a conclusion as to a sentence of death. The trial court did precisely that, however. And in doing so, the trial court denied petitioner his valued right under the Double Jeopardy Clause to obtain a capital sentencing result from the particular jury that sat in his judgment.

Nothing in the en banc Ninth Circuit majority's analysis remotely demonstrates otherwise. The majority emphasized the absence of any dispute concerning the jury's deadlock, and further reasoned that, in circumstances involving a deadlock, courts should take care to avoid coercing jurors and should avoid assuming that preliminary conclusions by the jury constitute a final verdict. Pet. App. 25a-28a. All of that may be true in the abstract. But as explained, while there was undisputedly a jury deadlock here, that deadlock concerned non-capital sentences, not the propriety of a capital sentence; and any risk of coercion—even if credible—thus would concern a decision as between those *non*-capital alternatives. With regard to the ostensible need to avoid attaching undue significance to preliminary jury determinations, petitioner's entire argument is that, in light of the jury's notes and the trial court's understanding of those notes, he was entitled to

---

the table based on the conclusion of one or more jurors that the mitigating evidence outweighed the aggravating evidence. *See supra* at 12 n.2; *see also* Pet. App. 9a n.4 (indicating that juror affidavits "explain the full context and procedural history of the case," although the court "may not consider jurors' testimony addressing the jury's deliberative process unless the testimony" bears on the existence of extraneous influences on the jury deliberations).

have the jury asked whether it *had* reached a final decision against a sentence of death. In all events, the majority's stated "concerns about potential judicial coercion and the lack of finality in a jury's preliminary conclusions," *id.* at 28a, simply cannot justify the trial court's denial of petitioner's constitutional right to have his capital trial completed by the particular tribunal that sat in his judgment.

b. This case presents an especially strong vehicle for vindicating that principle because petitioner made every effort to protect his rights. Petitioner filed a pre-trial motion to bifurcate the sentencing proceedings between a death-eligibility phase and a sentence-selection phase, which could have afforded a vehicle for obtaining a formal jury determination against a capital sentence—based on, for instance, the absence of unanimous agreement that the mitigating factors failed to outweigh the sole aggravating factor. *See* Pet. App. 92a-93a (Kozinski, C.J., concurring). The State opposed petitioner's request for a bifurcated proceeding, however, and the trial court denied it. Petitioner then objected—with two separate objections made by two separate attorneys—when the trial court indicated an inclination to discharge the jury based on the apparent deadlock. Petitioner's counsel explained that the court should first ascertain whether the jury had ruled out a capital sentence, as the jury's notes had indicated. Again, however, the State opposed petitioner's request, and again the trial court denied it.

The Double Jeopardy Clause generally allows the State "one full and fair opportunity to present [its] evidence to an impartial jury." *Washington*, 434 U.S. at 505. Here, the State had a full and fair op-

portunity to present its case in favor of a capital sentence; there is every indication that the State's effort failed to persuade the jury; and the State—at every turn—opposed petitioner's efforts to determine whether the jury had in fact rejected a sentence of death. The State nonetheless now intends again to seek a capital sentence against petitioner and gain an entirely new opportunity to make its case in favor of death, presumably with the benefit of lessons learned from its initial—apparently failed—effort. The court of appeals' disposition would permit the State to do so. This Court should grant review to deny the State a *second* "full and fair opportunity," to obtain a capital sentence, which would afford the State one more opportunity than the Double Jeopardy Clause permits.

c. The Court should also grant certiorari because this case raises an important issue "regarding the administration of the death penalty." *Bullington*, 451 U.S. at 437. This Court's "'duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.'" *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (granting certiorari in capital case where there was reason to question whether the court of appeals had applied the correct standard) (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)); *see also Gamache v. California*, 131 S. Ct. 591 (2010) (Sotomayor, J., respecting denial of certiorari) (quoting *Burger*). Given the need for heightened reliability where a capital sentence is at stake, and the corresponding basis for heightened scrutiny, this Court has not hesitated to grant review to rectify significant errors arising in capital cases. *See, e.g.*, *Sears v. Upton*, 130 S. Ct. 3259

(2010) (per curiam); *Jefferson v. Upton*, 130 S. Ct. 2217 (2010) (per curiam); *Magwood v. Patterson*, 130 S. Ct. 2788 (2010).

This is plainly such a case. Petitioner, in all likelihood, had been acquitted of the death penalty; and the jury would have made that clear had the trial court put the inquiry to it, as petitioner had requested, before declaring a mistrial. Yet the State, despite having *opposed* petitioner's request to ascertain whether the jury had acquitted him of a capital sentence, now stands poised to gain a second try to obtain a capital sentence before a new jury. Accordingly, review would be warranted here even if the case did not directly implicate an entrenched conflict among the lower courts. *See infra* at 25-31.

The importance of the question presented and the need for this Court's guidance is further evidenced by the extraordinary difficulty this case presented for the Ninth Circuit. A divided panel held that the Double Jeopardy Clause barred the State from seeking the death penalty against petitioner on resentencing. The court of appeals subsequently voted to withdraw the panel opinion and hear the case en banc. Sitting en banc, the Ninth Circuit reversed the panel decision in a closely divided 6-5 opinion, with the crucial sixth vote based on a mistaken factual premise. The court then divided 6-5 on whether to grant rehearing of its en banc disposition, and issued an amended en banc opinion denying relief to petitioner by the same 6-5 vote. Pet. App. 1a-59a. The Ninth Circuit's disposition, as explained, is entirely out of step with this Court's decisions and with basic principles of double jeopardy law. This Court should grant review to correct the Ninth Circuit and

vindicate petitioner's valued right to a capital sentencing verdict from the jury that sat in his judgment.

II. The Question Presented Directly Implicates An Intractable Split Among State And Federal Courts

1. This case also directly implicates an intractable split in the lower courts on the application of the Double Jeopardy Clause in criminal cases where the jury may have reached a result on one of several charged counts but is unable to reach a verdict on all counts, and the trial court refuses to take steps to ascertain whether the jury in fact has ruled out guilt on that one count. While this case arises in the capital-sentencing context, the parallel issue frequently arises in cases when the jury reaches a decision to acquit on a greater offense but deadlocks on whether to convict on a lesser-included offense or offenses. In both contexts, the legal issue is the same: when a jury is deadlocked but indicates that it may have ruled out the most serious of multiple charges presented to it (whether a capital sentence or a greater-included offense), does the Double Jeopardy Clause entitle the defendant to ascertain whether the jury has reached a determination on that charge before the court declares a mistrial and dismisses the jury? Indeed, the State has relied on many of the decisions making up one side of the conflict in arguing that petitioner's double jeopardy argument lacks merit. *See, e.g.*, C.A. E.R. at 102-05.

a. Eight jurisdictions, including multiple state courts of last resort, have answered that question in the affirmative, at least where there was a request

that the court ascertain whether the jury reached a partial verdict or where the jury's statements indicated that they may have reached such a verdict. *See Wallace v. Havener*, 552 F.2d 721 (6th Cir. 1977); *State v. Tate*, 773 A.2d 308 (Conn. 2001); *Stone v. Superior Court*, 646 P.2d 809 (Cal. 1982); *State v. Castrillo*, 566 P.2d 1146 (N.M. 1977), *overruled in part on other grounds*, *State v. Wardlow*, 624 P.2d 527 (N.M. 1981); *Bair v. State*, 551 S.E.2d 84 (Ga. Ct. App. 2001); *Commonwealth v. McCord*, 700 A.2d 938 (Pa. Super. Ct. 1997); *Whiteaker v. State*, 808 P.2d 270 (Alaska Ct. App. 1991); *see also State v. Woodson*, 658 A.2d 272 (Md. 1995) (state conceded on appeal that double jeopardy barred a lesser-included offense count where the earlier jury had indicated that it had acquitted on the count but the judge refused to accept the partial verdict unless the jury came to a conclusion on the greater offense). The New Hampshire Supreme Court has reached the same conclusion, drawing on decisions of this Court but resting its conclusion on the state constitution. *See State v. Pugliese*, 422 A.2d 1319, 1320 (N.H. 1980).

These courts have relied on the long-standing principle that a mistrial declared over the defendant's objection will bar retrial unless the declaration was a "manifest necessity." *See, e.g.*, *Tate*, 773 A.2d at 324 (citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)). Because manifest necessity does not exist until a judge has "explore[d] all reasonable alternatives to declaring a mistrial," *id.* at 325, these courts have held that the failure to ascertain whether the jury has ruled out an offense (at least where it is reasonable to believe that the jury

may have reached a decision or where the defendant requests the inquiry) bars retrial on the offenses on which the jury may have reached a decision, *id.*

b. Meanwhile, nine other state courts (including Nevada), again including multiple state courts of last resort, as well as one federal district court, have found that it does not violate the Double Jeopardy Clause to retry a defendant on a charged offense, even where there are indications that the jury had in fact reached a unanimous verdict on the offense and was instead deadlocked on other questions. *See Kenyatta v. Smith*, No. 83-5996, 1989 WL 39496 (S.D.N.Y. Mar. 16, 1989); *Blueford v. State*, 2011 Ark. 8 (2011), *petition for cert. filed*, 79 U.S.L.W. 3636 (U.S. Apr. 25, 2011) (No. 10-1320); *People v. Richardson*, 184 P.3d 755 (Colo. 2008) (en banc); *Daniel v. State*, 78 P.3d 890, 906 (Nev. 2003) (en banc) (*per curiam*); *State v. Bell*, 322 N.W.2d 93 (Iowa 1982); *State v. Booker*, 293 S.E.2d 78 (N.C. 1982); *State v. McKay*, 535 P.2d 945 (Kan. 1975); *People v. Hickey*, 303 N.W.2d 19 (Mich. Ct. App. 1981); *People v. Hall*, 324 N.E.2d 50 (Ill. App. Ct. 1975); *see also Commonwealth v. Roth*, 776 N.E.2d 437 (Mass. 2002) (endorsing view against partial verdicts but holding that double jeopardy barred retrial on the facts of the case). While acknowledging that it would be "desirable, for many reasons," to poll a jury as to whether it had acquitted on any of the questions presented to it, *Roth*, 776 N.E.2d at 446, these courts have concluded that polling the jury could potentially coerce it into returning a verdict that it would not otherwise return and that responses to such inquiries might be inaccurate, *id.* at 447-48.

2. This deep split is outcome-determinative here. Petitioner's life would no longer be in jeopardy if the Nevada Supreme Court or the Ninth Circuit had adopted the double jeopardy rule followed in the Sixth Circuit, Alaska, Connecticut, Georgia, New Mexico, Pennsylvania, and Maryland. In particular, several courts would have held that there was no manifest necessity to declare a mistrial on the question of whether petitioner should receive the death penalty, because the less drastic step of ascertaining whether the jury had reached a verdict on that specific question remained available. *See, e.g.*, *Tate*, 773 A.2d at 324-25 (finding that there was no manifest necessity to declare a mistrial on greater offenses where the jury's questions during deliberation indicated that they may have acquitted on those charges and the defendant requested that the judge poll the jury to determine whether they had reached a partial verdict); *Stone*, 646 P.2d at 820 (finding that where an earlier jury indicated that it had voted to acquit defendant of greater offenses and trial court refused defendant's motion to accept partial verdict, double jeopardy barred retrial on those greater offenses).

The threat of the death penalty remains in this case, however, because Nevada and the Ninth Circuit—as the State urged, *see* C.A. E.R. at 102-05—followed the alternative rule. *See Daniel*, 78 P.3d at 906 (holding that "the district court was not required to poll the jurors" as to whether they had unanimously rejected the death penalty); Pet. App. 20a (citing *Daniel* for the proposition that the court need not poll a jury as to whether it has unanimously acquitted on the death penalty).

3. This Court should resolve the disagreement among the lower courts on whether, in a case like this one where the jury indicates that it is deadlocked but has reached a result on one option presented to it, and the defendant requests that the judge attempt to ascertain whether the jury in fact reached a verdict as to that option, a mistrial declared over the defendant's objection will bar retrial on that charge. The split has persisted among the states for more than 30 years. *See, e.g.*, *Castrillo*, 566 P.2d at 1149 ("We are aware that our holding in this case is . . . a departure from the approach taken in other jurisdictions."). It is frequently recurring. *See, e.g.*, *Blueford*, 2011 Ark. at 8; *Richardson*, 184 P.3d at 755; *Daniel*, 78 P.3d at 906; *Tate*, 773 A.2d at 308; *Bair*, 551 S.E.2d at 84. And it is highly consequential, potentially determining whether a defendant may be again tried for a capital offense, *see, e.g.*, *Blueford*, 2011 Ark. at 8, and sometimes—as in this case—determining even more directly whether a life remains in jeopardy.

The arguments on both sides have been set forth and examined by numerous courts, and conflict nonetheless persists. *See, e.g.*, *Blueford*, 2011 Ark. at 8 (court citing cases on the issue from eleven states and declaring itself "simply unpersuaded" by the cases finding a double-jeopardy violation). There is no reason for this Court to defer resolution of the issue.

This case affords a highly suitable vehicle for addressing the issue. As explained, there is every indication that the jury had decided to rule out a capital sentence; petitioner has preserved his double-jeopardy claim at every relevant step; petitioner

carefully objected to the trial court's decision to discharge the jury without attempting to ascertain whether the jury had reached a decision on the propriety of a capital sentence; and the court of appeals fully addressed the merits of petitioner's double-jeopardy claim. This case arises in the capital-sentencing context rather than in the context of greater- and lesser-included offenses, but the governing legal principles are the same, and the resolution of the double-jeopardy issue in one context will apply in the other context.

If the Court wishes to consider the double-jeopardy question separately in the capital-sentencing and greater/lesser offense contexts, the Court also has before it a pending petition for a writ of certiorari in a case involving greater- and lesser-included offenses. *See Blueford*, No. 10-1320. The Court may wish to consider granting the petitions in both cases and calendaring them together for oral argument.

The Court should grant certiorari in this case in all events because, even if the Court were to reject the double-jeopardy argument in the context of greater and lesser offenses, the Court should still rule in petitioner's favor in the capital-sentencing context. Insofar as the question whether there is "manifest necessity" to declare a mistrial may turn in some measure on the degree of "necessity" demanded by the context, the argument that there is no "manifest necessity" to discharge the jury before ascertaining whether it has reached a result on the most serious option presented to it has added force in the capital-sentencing context: this Court has cited the need for "a greater degree of accuracy" in a

capital case "than would be true in a noncapital case," *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993), and "the 'qualitative difference of death from all other punishments'—namely, its severity and irrevocability—'requires a correspondingly greater degree of scrutiny of the capital sentencing determination' than of other criminal judgments," *Schriro v. Summerlin*, 542 U.S. 348, 363 (2004) (Breyer, J., dissenting) (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)). The showing required to establish a "manifest necessity" is correspondingly heightened in the context of a capital-sentencing proceeding.

At the very least, if this Court grants certiorari in the *Blueford* case, it should hold the petition in this case pending the disposition of that case, and should dispose of this case appropriately in light of the result in that case.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may also wish to consider granting the petitions in this case and in *Blueford*, No. 10-1320, and calendaring the cases together for oral argument. At the very least, if the Court grants the petition in the *Blueford* case, it should hold the petition in this case pending the disposition of *Blueford*, and dispose of this case appropriately in light of the result in that case.

Respectfully submitted,

DAVID M. SCHIECK
JONELL THOMAS
SCOTT BINDRUP
CLARK COUNTY SPECIAL
PUBLIC DEFENDER
330 South Third Street
Suite 800
Las Vegas, NV 89155
(702) 455-6265

BRET WHIPPLE
1100 South Tenth Street
Las Vegas, NV 89104
(702) 257-9500

SRI SRINIVASAN
(*Counsel of Record*)
ssrinivasan@omm.com
LOREN L. ALIKHAN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

August 8, 2011