No. 11-168

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

MOTION FOR LEAVE TO FILE AND BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

Pursuant to Rule 37.2(b), Constitutional Accountability Center, by and through undersigned counsel, respectfully moves for leave to file this brief *amicus curiae* in support of the Petition for a Writ of Certiorari. Counsel for Petitioner, Sri Srinivasan, has consented to the filing of this brief; counsel for Respondent, Steven Owens of the Clark County District Attorney's Office, has withheld consent.

Amicus Constitutional Accountability Center (CAC) has an interest in this case as an organization dedicated to fulfilling the progressive promise of our Constitution's text and history. As such an organization, CAC has an interest in safeguarding the constitutional 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. CAC has already filed an *amicus* brief in support of the Petition for a Writ of Certiorari in *Blueford v. Arkansas*, (No. 10-1320), which raises questions similar to this Petition with respect to the guilt phase of a criminal proceeding. *Amicus* has an interest in ensuring that double-jeopardy protections are maintained in the capital sentencing context as well. CAC regularly provides *amicus* support to this Court to detail relevant constitutional text and history, *see, e.g.*, *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3030, 3033 n.9 (2010) (citing *amicus* brief filed by CAC on behalf of esteemed constitutional law professors).

Movant respectfully asks leave of the Court to file its *amicus curiae* brief in support of the Petition in the above-captioned case.

Respectfully submitted,

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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 seek the death penalty for a criminal defendant after a proceeding in which the jury indicated that it had rejected the State's case for a capital sentence and was deadlocked between a life sentence with or without parole. As an organization dedicated to the Constitution's text and history, CAC has an interest in safeguarding the constitutional right not to be placed twice in jeopardy of life or limb for the

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[1] Counsel for all parties received notice 10 days prior to the due date of *amicus's* intention to file this brief. Counsel for Petitioner has consented to the filing of this brief; Counsel for Respondent has withheld consent. Accordingly, pursuant to Rule 37.2(b), a motion for leave to file is presented to the Court as part 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.

same crime and ensuring the integrity of the jury as a constitutional bulwark of liberty. CAC filed a brief *amicus curiae* in support of the Petition for a Writ of Certiorari in *Blueford v. Arkansas*, (No. 10-1320), which raises questions similar to this Petition with respect to the guilt phase of a criminal proceeding.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari raises the important question whether the Double Jeopardy Clause precludes the State from seeking the death penalty in a new sentencing hearing before a second jury, when, despite clear indications that the first jury had rejected the State's case for a capital sentence, the trial court declared a mistrial without first polling the jury to ascertain whether it had reached a decision on the death penalty.

The text and history of the Double Jeopardy Clause and this Court's jurisprudence 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. This fundamental precept applies not only to the guilt phase of a criminal trial but also to capital sentencing proceedings. Because a jury must "determine whether the prosecution has 'proved its case'" that the death penalty is appropriate, when a 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." *Bullington v. Missouri*, 451 U.S. 430,

444-45 (1981). It is well-settled that a sentencing jury's rejection of the prosecution's case for the death penalty constitutes an acquittal of that sentence and, under the Double Jeopardy Clause, precludes the government from seeking the death penalty in a new sentencing proceeding. Indeed, history shows that, at the time of the framing of the double-jeopardy guarantee, "'*the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.* Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations . . . . By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned.'" *Ring v. Arizona*, 536 U.S. 584, 599 (2002) (quoting *Walton v. Arizona*, 497 U.S. 639, 710-11 (1990) (Stevens, J., dissenting) (emphasis in original)).

Thus, in capital sentencing proceedings, as in the guilt phase of trial, "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) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). Declaring a mistrial and discharging the jury threatens this "valued right." Accordingly, the trial court may discharge the jury, frustrating the defendant's "right to have his trial completed by a particular tribunal," only when there is "manifest necessity." *Arizona v. Washington*, 434 U.S. 497, 505 (1978). Even when there exists "manifest necessity" to declare a mistrial, the history of the Double Jeopardy Clause suggests

that a defendant should be entitled to ascertain prior to the jury's discharge whether the jury has reached a decision against a capital sentence when the jury has indicated that it has ruled out the death penalty but is deadlocked between two non-capital sentences.

The record demonstrates that Petitioner Harrison's sentencing jury "was deadlocked between life with and life without" parole. Pet. App. 4a, 230a. As the trial court noted, based on notes from several jurors, the jury was no longer "considering the death penalty." *Id.* at 6a, 233a. Nonetheless, when Harrison requested that the trial court conduct a poll of the jury before declaring a mistrial to ascertain whether the jury had rejected the State's case and ruled out a death sentence, the court refused to do so. This violated Harrison's right under the Double Jeopardy Clause to obtain a capital sentencing result from the particular jury that sat in his judgment.

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—or at least hold it pending disposition of *Blueford v. Arkansas*, No. 10-1320, a petition filed in April 2011, which raises questions regarding the scope of the Double Jeopardy Clause in the context of greater and lesser-included offenses. Review is warranted 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 CLARIFY THE SCOPE OF THE DOUBLE JEOPARDY CLAUSE'S PROTECTION OF JURY "ACQUITTALS" IN CAPITAL SENTENCING PROCEEDINGS.

Amicus urges this Court to grant *certiorari* to clarify the scope of the Double Jeopardy Clause's protection of jury acquittals during the capital-sentencing phase of a criminal proceeding. By blessing the trial court's failure to ascertain the jury's decision on the capital sentence and giving prosecutors a second chance to secure the death penalty for Harrison when the initial jury had clearly rejected the State's case for such a sentence, the Ninth Circuit's ruling conflicts with the Constitution's text and history and 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").

A. The Text and History of the Fifth Amendment's Double Jeopardy Clause Prohibit Retrial After Jury Acquittal, Whether During the Guilt or Sentencing Phase of Trial.

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 is 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 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,[2] the framers repeatedly affirmed the finality of a jury's acquittal, barring a second trial or prosecution. Rep. Roger Sherman observed that "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

[2] 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).

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).

The "values that underlie this [double-jeopardy] principle . . . are equally applicable when a jury has rejected the State's claim that the defendant deserves to die." *Bullington v. Missouri*, 451 U.S. 430, 445 (1981). As the Court has explained, "[t]he 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,' thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment." *Id.* (quoting *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980)).

In determining punishment and crime, the jury in criminal cases was considered by our Nation's Founders to be an invaluable bulwark of liberty against the threat of "arbitrary punishments upon arbitrary convictions." THE FEDERALIST No. 83, 498-99 (Clinton Rossiter ed. 1961) (Alexander Hamilton). Whether they stem from double-jeopardy violations or elsewhere, from

English common law to the U.S. Constitution, "inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution." 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *343-44.

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

A court's wide discretion to call a mistrial when "there is a manifest necessity for the act, or the ends of public justice would be defeated," *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824), ends when 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). It is well-settled that the same holds true in the capital sentencing context. *E.g.*, *Arizona v. Rumsey*, 467 U.S. 203, 209-12 (1984); *Bullington*, 451 U.S. at 446. *See Sattazahn v. Pennsylvania*, 537 U.S. 101, 112 (2003) ("If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances [necessary to imposing the death penalty], double-jeopardy protections attach to that 'acquittal'. . . .").

In this case, the record demonstrates that Harrison's sentencing jury "was deadlocked between life with and life without" parole. Pet. App. 4a, 230a. As the trial court itself observed,

based on notes from several jurors, the jury was no longer "considering the death penalty." *Id.* at 6a, 233a. Yet when Harrison's counsel suggested that the trial court ask each juror if he or she had determined that the mitigating factors outweighed the aggravating factors, thus precluding a capital sentence, the State objected and the court declined a poll. *See* Pet App. 5a, 231a. As the Petition asserts, "in light of the jury's notes and the trial court's understanding of those notes, [Harrison] was entitled to have the jury asked whether it *had* reached a final decision against a sentence of death." Pet. at 21-22 (emphasis in original). At the very least, declaring a mistrial without conducting a poll of the jurors to ascertain whether they had ruled out the death penalty was not manifestly necessary.

While bifurcating the sentencing proceedings between a death-eligibility-phase and a sentence-selection phase—which the trial court declined to do after Harrison so requested—would have allowed the jury to enter a formal, separate determination against a capital sentence, Pet. at 22, it is of no constitutional moment that there was no clear vehicle for the jury in this case to distinctly reject the death penalty. The Double Jeopardy Clause applies even when the jury enters no formal verdict or judgment of acquittal for the more serious charge or penalty. *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"). The Fifth

Amendment's prohibition on double jeopardy protects the jury's judgment that the government has not demonstrated that the death penalty is an appropriate punishment for the defendant, not the ministerial act of reducing their vote to a verdict. 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 criminal defendant's fate in a very real sense, not just as a formalism. *See generally Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) ("[T]he right of jury trial . . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.")

Under the text and history of the Constitution and this Court's precedents, it was error for the trial court to deny Harrison's request to poll the jury on the death penalty before declaring a mistrial and dismissing the jury. The line drawn around where there truly exists "manifest necessity" to dismiss a jury without determining whether that jury has resolved more serious charges or penalties should be bright, particularly in the capital sentencing context. This Court has acknowledged that its "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). In light of the multiple notes sent by jurors to the trial court indicating that the jury was no longer considering the death penalty and was instead deadlocked between life in prison with or without parole, the

State should not be allowed to re-seek the death penalty in this case. Harrison has already run that gantlet.

As this Court has recognized, it is of critical importance that a jury impose any sentence of death because a lay jury is understood to "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968); s*ee Spaziano v. Florida*, 468 U.S. 447, 467-490 (1984) (Stevens, J., concurring in part and dissenting in part). *See also Ring v. Arizona*, 536 U.S. 584, 599 (2002) (quoting *Walton v. Arizona*, 497 U.S. 639, 710-11 (1990) (Stevens, J., dissenting) (emphasis in original)) (explaining that history shows that, at the time of the framing of the double-jeopardy guarantee, "'*the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established . . . .* By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned.'") The Double Jeopardy Clause does not permit the State to shop around for a different jury, one with a conscience better suited to the prosecution's desired punishment. The jury's rejection of the capital sentence here should be respected and given its due protection under the Constitution.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for Writ of Certiorari, or at least hold the Petition pending resolution of *Blueford v. Arkansas*, No. 10-1320.

Respectfully submitted,

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