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 Supreme Court Of Arkansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is an informal exchange between a foreperson and the trial judge a final verdict that terminates jeopardy under the Fifth Amendment?

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The State of Arkansas, respondent, opposes the petition of Alex Blueford requesting a writ of certiorari to review the judgment of the Arkansas Supreme Court affirming the denial of his motion to dismiss based on double jeopardy. That Court's opinion was delivered on January 20, 2011, and is published as *Blueford v. State*, 2011 Ark. 8, ___ S.W.3d ___ and is reported in petitioner's Appendix A.

JURISDICTION

Respondent disputes jurisdiction because the state-court decision rested on an adequate and independent state-law ground that an informal exchange between the circuit court and the jury's foreperson was not a final verdict.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution prohibits placing persons in jeopardy of life or limb more than once and is applied to the states under the Due Process Clause of the Fourteenth Amendment.

Arkansas Code Annotated § 16-89-126(a) (Repl. 2005) states, in pertinent part, that when jurors have agreed upon their verdict, they must be conducted into the courtroom, their names called by the clerk, and their foreman must declare their verdict.

Arkansas Code Annotated § 16-89-128 (Repl. 2005) states, in pertinent part, that upon the rendition of a verdict, the jury may be polled at the instance of either party and, if one juror answers in the negative, the verdict cannot be received.

STATEMENT OF THE CASE

Respondent relies on the statement of the facts and proceedings in this case set forth in the opinion rendered by the Arkansas Supreme Court. Specifically, the Arkansas Supreme Court noted that neither the State nor petitioner objected to the declaration of a mistrial; that petitioner did not challenge, on appeal, that the hung jury in the first trial represented an overruling necessity that required the declaration of the mistrial; and that petitioner argued on appeal that the announcement by the foreperson in open court represented a verdict of acquittal. *Blueford* (App. A, 7a-9a).

REASONS FOR DENYING THE WRIT

Adequate State Grounds Support the Arkansas Supreme Court's Finding that an Informal Exchange between the Circuit Court and Jury Foreperson is Not a Verdict of Acquittal.

If there are adequate and independent state grounds to support a state-court judgment, there is no

jurisdiction under 28 U.S.C. § 1257. *E.g.*, *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *see also Florida v. Powell*, 130 S. Ct. 1195, 1202 (2010) (if the state-court decision indicates clearly and expressly that it is alternatively based on separate, adequate, and independent grounds, the decision will not be reviewed). It is well-settled that this Court will not render an advisory opinion, and if the same judgment would be rendered by a state court after its views of federal law are corrected, such review would amount to nothing more than an advisory opinion. *E.g.*, *Coleman*, 501 U.S. at 729; *see also Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). In short, if resolution of a federal question cannot affect the judgment, nothing need be done by this Court. *E.g.*, *Coleman*, 501 U.S. at 730.

Petitioner asserts that the Arkansas Supreme Court's opinion conflicts with established federal jurisprudence that the Fifth Amendment mandates an implied acquittal when a jury renders a verdict of guilty on a lesser-included offense. *See Green v. United States*, 355 U.S. 184, 189 (1957). The Arkansas Supreme Court has adhered to this principle for over 100 years: "the finding of a verdict of manslaughter upon an indictment for murder is equivalent to an acquittal of the charge of murder." *McPherson v. State*, 29 Ark. 225, 233 (1874). In *Green* and *McPherson*, the defendants had been convicted of lesser-included offenses by unanimous verdicts. That is not what happened in this case.

Despite petitioner's claim that he was acquitted of the greater offenses, there was no verdict on any of the charged offenses. The Arkansas Supreme Court rejected petitioner's double-jeopardy claim because the record did not disclose that a final verdict had been rendered. The Court stated: "the question at issue for this court is what effect, if any, the announcement in open court had on the State's ability to retry Appellant on [the greater charges]." *Blueford* (App. A, p. 9a). The Arkansas Supreme Court concluded that the "mere reading of the jury's verdict in open court does not constitute an acquittal." *Blueford* (App. A, p. 9a). That holding affirmed Arkansas's adherence to well-established procedures attendant to the rendition of verdicts that are grounded in the predominant common-law practices which have been codified by the Arkansas General Assembly. *See* Ark. Code Ann. § 16-89-126 (Repl. 2005) (stating, in pertinent part, that jurors must be conducted into the courtroom by a court officer, their names called by the clerk, and the verdict declared by the foreman); *see also State v. Mills*, 19 Ark. 476 (1858) (a verdict is not valid until it is delivered by the jury and formally announced in the presence of the court and the parties). The procedures required under Arkansas law are and have been prevalent in state and federal courts for years. *See Grant v. State*, 14 So. 757, 759 (Fla. 1894) (a final verdict must be pronounced in open court and affirmed when an officer of the court instructs jurors to hearken to their verdict); *Givens v. State*, 25 A. 689, 689-690 (Md. 1893) (when members of a jury reach a verdict, they return to court and

deliver it, the clerk then calls them over, by their names, and asks them whether they agree on their verdict); *Lewis v. United States*, 466 A.2d 1234, 1238 (D.C. 1983) (a final verdict must be announced in open court with no dissent registered, accepted by the trial court, and entered in the record).

These general state and federal practices, with which Arkansas concurs, have established the essential components of a final verdict: (1) the deliberations are concluded; (2) the result is announced in open court; (3) the jury is polled and no dissent is registered. *See, e.g.*, *State v. Williams*, 794 N.E.2d 27, 38 (Ohio 2003). These procedures are essential for the creation of a bright line of finality. Thus, any actions taken by the jury before the final procedure is concluded are subject to change. Votes taken in the jury room prior to being returned in open court are merely preliminary because any juror is entitled to change his or her mind up until the time the verdict is accepted by the trial court. *E.g.*, *United States v. Chinchic*, 655 F.2d 547, 550 (4th Cir. 1981). Consistent with this precedent, Arkansas recognizes that a jury is free to amend its verdict until it is entered of record, each juror has been polled, and the jury is discharged. *Blueford* (App. A, p. 9a); *see also Barnum v. State*, 268 Ark. 141, 144, 594 S.W.2d 229, 231 (1980). Similarly, there is widespread consensus within other jurisdictions that a juror cannot repudiate his or her verdict after it has been formally rendered, a poll taken, and it has been accepted by the court. *E.g.*, *Williams*, 794 N.E.2d at 37; *Simpson v.*

State, 3 So.3d 1135, 1143 (Fla. 2009). In this case, the jury returned to deliberate after the foreperson revealed the contents of its preliminary findings. (App. D, pp. 22a-23a). Thus, each juror remained free to change his or her mind during this final period of deliberations.

The Arkansas Supreme Court found that a discussion between the court and the jury foreperson did not amount to an acquittal because a final verdict was not entered or filed of record. *Blueford* (App. A, pp. 9a, 12a). Furthermore, it noted that petitioner did not request that the circuit court poll the jury or otherwise attempt to obtain a verdict of record. *Blueford* (App. A, p. 12a). In fact, petitioner stood mute while the circuit court called the jury back into the courtroom, declared a mistrial, and discharged the jury. (App. D, pp. 25a-26a). Petitioner never raised a double-jeopardy issue to the circuit court, and, on appeal, never argued that the circuit court erred or abused its discretion.

In Arkansas, each party has a right to poll the jury after the verdict has been read by the foreman. *See* Ark. Code Ann. § 16-89-128 (Repl. 2005). In this case, there was no poll because none was requested. (App. A, p. 12a; App. D, pp. 23a-26a). Petitioner now asks this Court to recognize an informal statement made by the foreperson as a final verdict, confirming that petitioner was unanimously acquitted of capital murder and first-degree murder. Petitioner's assertion that he was acquitted of these two crimes may have been on firmer ground had the jury been polled

before it was discharged because the Arkansas Supreme Court previously had made clear that a jury poll which results in an answer by each individual juror is the best measure of a jury's intent. *Barnum*, 268 Ark. at 145, 594 S.W.2d at 231. Like Arkansas, other jurisdictions have made clear that the purpose of a jury poll is to establish with certainty that a unanimous verdict has been reached. *See, e.g.*, *Williams*, 794 N.W.2d at 38-39. The Arkansas Supreme Court's concern that no poll was taken in this case is consistent with the axiom that a verdict becomes immutable when it is confirmed by a poll which is the benchmark of finality because it signals the conclusive nature of the verdict. *Id.* The test for the validity of a verdict is whether it is certain, unqualified, and unambiguous in light of the circumstances surrounding its receipt. *E.g.*, *Thomas v. United States*, 544 A.2d 1260, 1262 (D.C. 1988). Uncertainty or contingency as to the finality of the jury's determination is equivalent to no verdict. *E.g.*, *id.* The concern that no poll was taken arose because it is not uncommon for a juror to express doubt while an individual poll is taking place and such expressions of uncertainty negate the verdict. *Rhodes v. State*, 290 Ark. 60, 62-64, 716 S.W.2d 758, 760 (1986) (reversing a conviction as a result of juror's response to poll); *see also* Ark. Code Ann. § 16-89-128 (Repl. 2005) (stating that one negative response during a poll negates the verdict). Indeed, a plethora of state and federal cases reveal the frequency of juror dissent once individuals are called upon by the trial court to affirm the verdict. *People v. Simms*, 921 N.E.2d 582, 584, 893 N.Y.S.2d

815, 817 (N.Y. 2009); *People v. Beasley*, 893 N.E.2d 1032, 1040 (Ill. App. 2008); *State v. Milton*, 840 A.2d 835, 841 (N.J. 2004); *People v. Barnard*, 12 P.3d 290, 295 (Colo. App. 2000); *State v. Pyatt*, 1 P.3d 953, 956 (Mont. 2000); *Humbert v. Commonwealth*, 514 S.E.2d 804, 809-10 (Va. App. 1999); *State v. Bell*, 537 A.2d 496, 501 (Conn. App. 1988); *State v. Cartagena*, 409 N.W.2d 386, 388 (Wis. App. 1987); *State v. Panker*, 532 P.2d 1073, 1075-76 (Kan. 1975) (citing to multiple federal cases involving juror dissent); *United States v. McCoy*, 429 F.2d 739, 741 (D.C. Cir. 1970). The aforementioned cases clearly demonstrate that the procedures surrounding the rendition of verdicts are not simply empty formalities, but are in place to ensure that, in all cases, the verdicts of a jury reflect the correct, unanimous, and final conclusions of the jury. The record submitted to the Arkansas Supreme Court did not support the rendition of a certain and unambiguous verdict of acquittal.[1]

Rather than demonstrating that the jury had rendered a final verdict, the record revealed that a

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[1] This stands in stark contrast to the facts confronting the California Supreme Court in *Stone v. Superior Court of San Diego County*, 646 P.2d 809 (Cal. 1982), upon which petitioner relies. There, the defendant asked that the trial court provide a clear expression from the jury as to its findings on first- and second-degree murder and the court stated on the record: "I am ruling that there is a clear expression that . . . there is not one juror who believes that the evidence is sufficient to support a finding of first degree murder beyond a reasonable doubt." *Id.*, 646 P.2d at 813.

discussion transpired between the trial judge and the jury foreperson without any attendant formalities and before the jury had concluded its deliberations. Such informal exchanges are not recognized in Arkansas as verdicts on which jeopardy has terminated. *See Walters v. State*, 255 Ark. 904, 907, 503 S.W.2d 895, 896 (1974) (statements between a trial court and the foreperson will not be considered a verdict for double-jeopardy purposes). This does not conflict with this Court's holding that jeopardy terminates following a verdict of acquittal that is "duly returned and received[.]" *Ball v. United States*, 163 U.S. 662, 671 (1896). What constitutes a "duly returned" verdict is a question of state law in the first instance and not resolved by the Double Jeopardy Clause. Petitioner argued that the foreperson's remarks were made in open court and, therefore, constituted a final verdict on the greater offenses and her statements represented a clear acquittal because Arkansas law prohibited these jurors from considering lesser-included offenses unless they had first reached a not-guilty verdict on the greater offenses. The Arkansas Supreme Court rejected these arguments and found that a "duly returned" verdict is one that comports with the well-established common-law practice that requires a formal announcement and entry upon the record. *Blueford* (App. A, p. 11a); *see also United States v. Rastelli*, 870 F.2d 822, 834 (2d Cir.) (rejecting the argument that a verdict is final when announced by the foreman), *cert. denied*, 493 U.S. 982 (1989); *State v. Rodriguez*, 603 A.2d 536, 541 (N.J. Super. 1992) (no double jeopardy because the

initial verdict was not accepted by the court and jury was not polled); 6 Wayne LaFave, *et al. Criminal Procedure* § 25.3(b) (3d ed. 2009) (not every jury determination in favor of a defendant qualifies as a verdict).[2]

In sum, the Arkansas Supreme Court found that no verdict was entered and, therefore, jeopardy had not terminated. *Blueford* (App. A, p. 10a). This finding has nothing to do with the efficacy of partial verdicts, but speaks to the well-established requirement that any final verdict must be presented and received in such manner that each juror appreciates the finality and gravity of the verdict and unanimously affirms it. Even assuming that this Court concludes that double jeopardy requires the acceptance of partial verdicts, it would not change the outcome of this case, because under Arkansas law, no verdict, not even a partial verdict, was entered.

[2] Petitioner argues that the Arkansas Supreme Court's finding of no formal acquittal does not diminish his double-jeopardy claim because other states have barred retrial of greater offenses solely based on inferences drawn from "hard transition" jury instructions. Petitioner is mistaken that verdicts were inferred from the jury instructions and fails to note that, in each case cited in his brief, the defendants either objected to the mistrial on the basis of double jeopardy, requested that the jury be polled, obtained affidavits from jurors establishing their intent, or obtained a partial verdict that was entered of record. *See State v. Tate*, 773 A.2d 308, 315, 317 n. 11 (Conn. 2001); *Whiteaker v. State*, 808 P.2d 270, 272-73 (Alaska 1991); *Commonwealth v. Roth*, 776 N.E.2d 437, 443-44 (Mass. 2002).

CONCLUSION

The petition for a writ of certiorari to the Arkansas Supreme Court should be denied.

Respectfully submitted,

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