No. 10-1320

In the Supreme Court of the United States

ALEX BLUEFORD,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MISCELLANEOUS

THE WRIT SHOULD BE GRANTED

The state does not deny the existence or the importance of a square and deep split over the question whether federal Double Jeopardy principles compel recognition of a partial verdict when a jury deadlocks on a lesser-included offense. The state similarly does not offer any reason why this Court should not resolve the split and clarify the fundamental Double Jeopardy principles it implicates.

The state instead seeks to insulate the decision below from review by claiming, without basis in either fact or law, that the decision rests on an adequate and independent state-law ground. The state contends that the jury forewoman's announcement in open court that the jury was "unanimous against" two murder charges "was not a final verdict" as a matter of Arkansas law. (Br. in Opp'n ("BIO") 1.) Thus, says the state, "[e]ven 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." (*Id.* 10.)

The state is wrong for four simple reasons. First, the state's argument conflicts with numerous decisions from this Court holding that federal law treats state-court proceedings like Blueford's as federal acquittal equivalents for Double Jeopardy purposes, even if state law holds to the contrary. Second, the decision below cannot reasonably be read to rest on state law grounds because it explicitly invoked and relied on federal Double Jeopardy cases and principles. Third, the decision below squarely decided the Double Jeopardy issue Blueford raises here; and, in

any event, Blueford plainly preserved the issue by promptly moving for a partial verdict on the murder charges in the first trial and squarely raising his Double Jeopardy claims in the retrial proceedings both in the trial court and on appeal. Fourth, the state's arguments, on their own terms, do not even apply to two of the three federal Double Jeopardy bases Blueford has offered for relief.

This Court therefore undoubtedly has jurisdiction to review Blueford's Double Jeopardy claims. The extensive split among state courts and the fundamental importance of this core Double Jeopardy issue – both of which are highlighted by the three amicus briefs supporting the petition – provide compelling reasons for this Court to grant certiorari.

1. The question whether there was a final verdict on the two murder charges for Double Jeopardy purposes is, itself, a federal constitutional question – not simply a matter of state law. Thus, no state-law ruling below could be an "adequate" basis to support the decision by itself.

This Court has repeatedly held that, where a state court declines to recognize a verdict for which federal constitutional principles compel recognition, the state law must yield. That is the clear lesson, for example, of *Price v. Georgia*, in which this Court reversed the Georgia Supreme Court's holding that conviction on a lesser-included offense did not imply an acquittal on the greater offense. 398 U.S. 323, 325 (1970). Had state-law notions of finality been sufficient to supply an adequate ground for permitting the second trial in that case, this Court would have been without jurisdiction to decide it. See generally Br. of *Amici Curiae* Crim. L. Profs., *Blueford v.*

Arkansas, No. 10-1320 at 12-15 (U.S. filed June 21, 2011) (describing numerous cases in which this Court found decisions lacking the traditional formality of a final verdict form nevertheless to be "acquittal equivalents" as a matter of federal constitutional law).

Similarly, in *Turner v. Arkansas*, 407 U.S. 366 (1972), this Court considered whether the Double Jeopardy Clause barred trial of a defendant for robbery after the defendant had been acquitted of a charge of murder arising out of the same set of facts. The Arkansas Supreme Court had rejected the Double Jeopardy argument because murder and robbery are different offenses; it also had determined, purportedly as a matter of state law, that "it is at once apparent that *res judicata* is not applicable," in part because Arkansas state law provided that "[m]urder and robbery cannot be joined together in one indictment." *Turner v. State*, 452 S.W.2d 317, 320 (Ark. 1970). This Court rejected the latter determination as a bar to its review, explaining that the *res judicata* issue was itself a federal Double Jeopardy question: "Collateral estoppel is part of the Fifth Amendment's double jeopardy guarantee, . . . and it is a matter of constitutional fact [this Court] must decide . . . . Thus, the rejection of petitioner's claim by the Arkansas Supreme Court on procedural grounds does not foreclose our inquiry on this issue." 407 U.S. at 368 (citation and internal quotation marks omitted).

The same is true here (with the exception that, as explained below, in this case, unlike *Turner,* the Arkansas Supreme Court itself did not rest its decision on any procedural ground). Blueford contends that the right to a partial verdict "is part of the Fifth

Amendment's double jeopardy guarantee." Thus, the question whether the Double Jeopardy Clause compels recognition of the jury forewoman's statement in open court that the jury was "unanimous against" the murder charges either as a final verdict in itself or, at the very least, the basis for a partial-verdict inquiry, is a matter of constitutional magnitude. Indeed, the very basis other courts have cited for recognizing rights to a Double Jeopardy bar in cases like this one is that those "substantive rights . . . should not turn on . . . formalit[ies]." *State v. Tate*, 773 A.2d 308, 322 n.13 (Conn. 2001) (citing *Green v. United States*, 355 U.S. 184 (1957)); *Commonwealth v. Roth*, 776 N.E.2d 437, 450-51 (Mass. 2002).[1]

2. Nor did the Arkansas Supreme Court's opinion purport to give an "independent" state-law basis for the decision. As this Court has made clear, there is a "presumption" that a state-law ground is not independent, *Ohio v. Robinette*, 519 U.S. 33, 37 & n.* (1996), such that any ambiguity is resolved in favor of this Court's jurisdiction. A state court that wishes to clarify that its decision rests on state grounds should do so by way of "plain statement" to that effect. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

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[1] The state describes at length the virtues of formal final verdicts (BIO 5, 7-10), but these are arguments on the merits, echoing the opinions of other jurisdictions on Arkansas's side of the split as to why *federal* Double Jeopardy principles should not bar retrial of greater offenses when juries deadlock on lesser-included offenses (see Pet. 14). They are not proof of an adequate or independent state ground for the decision below; if anything, they serve to elaborate the federal issue presented to this Court.

Here the court below did just the opposite. It recognized that the question of finality turned, at least in part, on the resolution of federal questions. (Pet. App. A, 9a (citing this Court's precedent for its view that the jury forewoman's "announcement in open court" of unanimity on the capital murder and first-degree murder charges was not an acquittal).) Similarly, the court clearly understood the partial-verdict question to be a Double Jeopardy issue, acknowledging that other jurisdictions have "held that double jeopardy requires a partial verdict of acquittal as to the greater offenses if the jury is deadlocked only as to the lesser offenses." (*Id.* 13a.) Indeed, the court rested its holding on its agreement with some courts regarding this "double jeopardy" question, and its disagreement with other courts. (*Id.* 12a-14a). Not surprisingly, Arkansas's intermediate appellate court straightforwardly understands the decision in this case to be a federal Double Jeopardy holding, explaining in a recent opinion that the "*Blueford* court discussed the issue of double jeopardy arising when the jury is deadlocked and a mistrial is declared." *Basham v. State*, 2011 Ark. App. 384, at 3. In short, only the state appears to read it otherwise.

3. To the extent the state means to argue that the Arkansas Supreme Court *should not have* addressed the federal Double Jeopardy claim asserted below because it was "never raised" (BIO 6), that argument is both irrelevant and wrong.

Such a waiver argument is irrelevant because "[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it," *Raley v. Ohio*, 360 U.S. 423, 436 (1959), as happened here. Moreover, speculation about how

a state court "might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 630-31 (1973).

In any event, the state's argument is wrong. As set forth in the petition, Blueford's counsel requested a partial verdict immediately after the jury forewoman announced that the jury was "unanimous against" the murder charges. (Pet. 8.) That request was opposed by the state and refused by the court. The request for the partial verdict was, in itself, clearly sufficient to assert and preserve Blueford's double jeopardy rights. See, *e.g.*, *Stone v. Superior Court*, 646 P.2d 809, 812-13, 817 (Cal. 1982) (noting request for partial verdict but not mentioning any objection to mistrial, and explaining that the issue was "whether the double jeopardy clause requires that trial courts . . . receive a partial verdict when the jury clearly favors acquittal on a charged offense"). Unlike the state, the Arkansas Supreme Court recognized that Blueford requested a partial verdict based on the announcement of jury unanimity against the murder charges. (See Pet. App. 12a ("In essence, what [Blueford] sought was a partial verdict.").)

Just as clearly, Blueford's counsel opposed the state's counteroffer to join a mistrial, stating that she was "not asking for a mistrial at this point." (Pet. 9.) But the trial court ruled – immediately – that it would grant a mistrial if the jury came back deadlocked again, which is precisely what happened. (*Id.* 9-10.) Thereafter, Blueford timely presented Double

Jeopardy-based objections to retrial and appealed the adverse ruling on those motions to the Arkansas Supreme Court. (*Id.* 10-11.) None of this Court's precedents support the notion that Blueford was required to do more to preserve the issue.[2] The Arkansas Supreme Court's decision to address the partial-verdict and Double Jeopardy issues without any suggestion of procedural default establishes that it rejected that notion as well.

4. Even if everything the state says in its opposition is correct – and it clearly is not – its arguments apply to only one of the three grounds cited by Blueford in his petition for relief on federal Double Jeopardy grounds: the jury forewoman's announcement in open court. As Blueford set forth in the petition, two other reasons exist for barring his retrial on murder charges: (1) "the Double Jeopardy Clause bars retrial on the greater offenses because the structure of 'acquittal-first' adjudication means that the jury voted to acquit on the greater offenses before deadlocking on the lesser-included offenses"; and (2) "the Double Jeopardy Clause would bar retrial on greater offenses when [a] jury convicts on a lesser-included offense, [b] the jury is silent on the greater offense, and [c] the conviction on the lesser-included offense is overturned on appeal," and "the

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[2] The state faults Blueford for "st[anding] mute" when the mistrial was declared (BIO 6), but this ignores the preceding exchange when his request for a partial verdict was denied. In any event, "[m]ere silence is a far cry from consent or waiver," especially when a defendant has previously "provided the court with [an] alternative to mistrial." 6 Wayne R. LaFave et al., *Criminal Procedure* § 25.2(a) & n.9 (3d ed. 2007) (citation omitted).

situation when a jury deadlocks on a lesser-included offense and is silent on a greater offense" is "not distinguishable." (Pet. 20-21.)

By their very nature, these arguments presuppose the lack of a formal verdict in a traditional jury form on the greater offenses. See, *e.g.*, *Tate*, 773 A.2d at 323 (Double Jeopardy principles compel the conclusion, in a hard-transition or acquittal-first state, that "it is a valid verdict for the jury to acquit the accused of a greater offense and only thereafter to reach a deadlock on a lesser offense" and that "such a valid verdict must be accepted.").

The state's only apparent response to these separate grounds appears in a footnote at the end of its brief. It argues the cases are distinguishable because each involved an objection to a mistrial; a request for a jury poll; affidavits from jurors evidencing their intent; or a partial verdict entered of record. (BIO 10 n.2) These attempted distinctions lack merit. As to the presence of an objection, other courts have held that a request for a partial verdict – as happened here – is sufficient to establish that a formal verdict should be entered on greater charges. See *Stone*, 646 P.2d at 812-13, 817; *Tate*, 773 A.2d at 315-16 (treating defendant's request for partial verdict as having preserved his objection to mistrial).

The state's other suggested distinctions – which are presumably intended to show that other cases involved stronger evidence of juror intent – are similarly unavailing. In *Stone*, for example, there was neither a poll, nor affidavits, nor a partial verdict entered of record. 646 P.2d at 508-09. The state argues that the trial court in *Stone* made a "ruling that there is a clear expression" of not-guilty verdicts

on murder charges (BIO 8 n.1), but that ruling was based solely on the report of the foreman, 646 P.2d at 508 – and there is a substantively *identical* ruling in this case. (Pet. 10; Pet. App. B, 15a (trial court on retrial entered order in which it found "that the jury foreperson was explicit that the jury was unanimous in voting against" the murder charges).) Moreover, contrary to the state's suggestion, the cases involving affidavits uniformly rejected those statements as bases for their opinions. *Tate*, 773 A.2d at 325 n.17 (affidavits "can play no role at this level in helping to determine the crimes of which the defendant was acquitted"); *Whiteaker v. State*, 808 P.2d 270, 273 n.4 (Alaska Ct. App. 1991) (evidentiary rule "precludes consideration of the affidavits"). Instead, the cases in hard-transition or acquittal-first states have made clear that the very structure of jury deliberations establishes that a deadlock on lesser-included offenses reflects acquittal of the greater offenses. See, *e.g.*, *Tate*, 773 A.2d at 321 (instructions "prohibited [the jury] from actually considering the lesser included offenses unless and until it had arrived at a unanimous verdict of acquittal" on greater offense).[3] The

[3] Indeed, contrary to the state's suggestion, in *Tate*, the trial court did not ask the jury to disclose the charge on which it was deadlocked. 773 A.2d at 324. Instead, deadlock on manslaughter was presumed from the jury's request for a clarification of the meaning of "recklessness." *Id.* This ambiguity – created by the trial court's refusal to make a partial-verdict inquiry – was construed in the defendant's favor, *not* against him: because "'[t]he record is not clear as to which of the included offenses the jury was considering at the time of its discharge,'" the court ruled that the new trial must be "limited to the last lesser in-

same is true based on the deliberations in this case, and the state offers no argument to the contrary.

CONCLUSION

For the foregoing reasons and for those set forth in the opening brief, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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cluded offense." *Id.* at 325 (quoting *State v. Castrillo*, 566 P.2d 1146, 1151 (N.M. 1977)).