

No. 10-__

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**

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether, if a jury deadlocks on a lesser-included offense, the Double Jeopardy Clause bars re-prosecution of a greater offense after a jury announces that it has voted against guilt on the greater offense.

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U.S. Const. amend. V 1, 12

28 U.S.C. § 1257 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alex Blueford respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at 2011 Ark. 8. App. A, at 1a. The order of the district court is not reported. App. B, at 15a.

JURISDICTION

The Arkansas Supreme Court rejected Blueford's Double Jeopardy claim in a judgment rendered on January 20, 2011. The court denied a petition for rehearing on February 24, 2011. App. C, at 17a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(1). See, e.g., *Bullington v. Missouri*, 451 U.S. 430, 437 n.8 (1981) ("Although further proceedings are to take place in state court, the judgment rejecting petitioner's double jeopardy claim is 'final' within the meaning of the jurisdictional statute, 28 U.S.C. § 1257.>").

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb"

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law"

INTRODUCTION AND STATEMENT OF THE CASE

This case presents an important and recurring question regarding the constitutional prohibition against twice being put in jeopardy for the same offense.

The state of Arkansas charged petitioner Alex Blueford with capital murder. Record, *Blueford v. State*, No. CR 10-554 (Ark. filed May 28, 2010) (“Arkansas Supreme Court Record” or “ASCR”) at 1, 3.¹ The trial court instructed the jury to consider capital murder and three lesser included offenses: first-degree murder, manslaughter, and negligent homicide. *Id.* at 807. The court directed the jury that it should not consider a lesser-included offense unless it first unanimously agreed that Blueford was not guilty of a greater offense: it should consider first-degree murder only if it unanimously agreed that Blueford did not commit capital murder; it should consider manslaughter only if it unanimously agreed that he did not commit capital murder or first-degree murder; and it should consider negligent homicide only if it unanimously agreed that he did not commit capital murder, first-degree murder, or manslaughter. *Id.* at 808-10.

The jury forewoman announced in open court that the jury was “unanimous against” two charges – capital murder and first-degree murder. App. D, at 19a. She also explained that the jury deadlocked on the manslaughter charge and that, accordingly, it

¹ Although the charge was “capital murder,” this is not a death penalty case because the state waived the death penalty. ASCR at 1.

had not proceeded to decide the negligent homicide charge. *Id.* at 19a-20a.

Blueford moved the trial court to accept a partial verdict of acquittal on capital murder and first-degree murder, *id.* at 23a – a practice that five other states have held is required by the rule against Double Jeopardy. See page 15, *infra.* The trial court denied the motion and granted a mistrial. App. D, at 24a-26a.

At the initiation of the retrial on all charges, the trial court rejected Blueford’s motion to dismiss the capital murder and first-degree murder charges on Double Jeopardy grounds. App. B, at 15a-16a. Blueford filed an interlocutory appeal with the Arkansas Supreme Court.

The Arkansas Supreme Court affirmed. It rejected Blueford’s Double Jeopardy claim on capital murder and first-degree murder, and stated that it was “unpersuaded” by the contrary decisions of other state courts. App. A, at 13a.

1. **The trial.** The state of Arkansas accused Blueford of murdering Matthew McFadden, Jr., the 20-month-old son of Kimberly Tolbert, his live-in girlfriend. ASCR at 3, 115-19.

On the morning of November 28, 2007, Tolbert left the apartment she shared with Blueford to take a relative to a doctor’s appointment. *Id.* at 121. She left Blueford in charge of McFadden, as she had often done since moving in with Blueford two months before. *Id.* at 123, 140-42. Stacy Clay – a friend of Blueford’s who had allowed Blueford and then Tolbert and her son to stay in her apartment – also remained in the apartment. *Id.* at 157-59.

Approximately one hour after Tolbert's departure, at Blueford's request, Clay called 911 and urgently sought help for McFadden. *Id.* at 157-61. Medical personnel arrived and determined that McFadden was having difficulty breathing. *Id.* at 619. They rushed McFadden to the hospital, and, two days later, he died in the hospital. *Id.* at 132.

What happened between Tolbert's departure and Clay's 911 call was hotly disputed at trial. The state's theory was that Blueford viciously injured McFadden by slamming him into a pair of mattresses on the floor. *Id.* at 276. The state relied entirely on circumstantial medical evidence, and emphasized an autopsy report by a state medical examiner. *Id.* at 534. There was no evidence of any history of abuse by Blueford.

The state's principal witness was Dr. Adam Craig, a medical examiner at the Arkansas State Crime Lab, who conducted the autopsy and testified about its meaning. Dr. Craig testified that he is not board certified in anatomical pathology despite five attempts to pass the board exam. *Id.* at 281-281A, 285. He concluded that the cause of death was a "closed head injury." *Id.* at 321-23. Dr. Craig opined that the death was a homicide based on the "severity of the injuries" and the absence of any other "reasonable explanation" in the information given to him by law enforcement. *Id.* He rejected the possibility that the injury could have been caused by an accident or a fall, citing one dated medical position paper, and he admitted that he was unfamiliar with recent medical literature documenting that very possibility. *Id.* at 392-94, 404-05, 414-15, 478-79.

Blueford testified in his defense, explaining that McFadden's injuries were the result of a tragic accident. He recounted the events of that morning – admitting that he had smoked a marijuana cigarette and then a tobacco cigarette while playing with McFadden. *Id.* at 648-49. While Blueford was talking on the phone, his back to McFadden, the child grabbed the still-lit tobacco cigarette from an ashtray and climbed on Blueford. *Id.* at 649. Surprised by the heat of the cigarette near his arm, Blueford jerked reflexively, striking McFadden. *Id.* McFadden crashed into a table and fell to the floor. *Id.* at 650-51. Blueford acknowledged that he initially lied to police about what happened, explaining that he was a former convict who previously had been incarcerated and feared returning to prison. *Id.* at 645-47.

Blueford's defense was supported by two expert medical witnesses. The first was Dr. Robert Bux, the head medical examiner for El Paso County, Colorado. *Id.* at 452. Dr. Bux is board certified in anatomical, clinical, and forensic pathology. *Id.* He has worked on international matters, including service for the International War Crimes Tribunal in former Yugoslavia, and he has published in the *Journal of the American Medical Association*, among other publications. *Id.* at 454-56. Dr. Bux testified that Dr. Craig's autopsy was so poorly performed as to be useless, *id.* at 465-66, 471-72, 477, 480-81, 489-92, and suggested that, as a supervisor, he would not continue to employ an examiner who turned in an autopsy like Dr. Craig's, *id.* at 415. He also explained that the position paper on which Dr. Craig relied had long been understood to be "inaccurate and not scientifically valid," *id.* at 479. In light of the botched autopsy, Dr. Bux explained, either the

State's version of events or Blueford's could be accurate, and "[t]here's no way as a forensic pathologist I can tell you which happened." *Id.* at 482.

Dr. John Galaznik, a board-certified pediatrician with thirty years of experience at the University of Alabama, also testified on Blueford's behalf. *Id.* at 695. Like Dr. Bux, Dr. Galaznik testified that the available medical evidence was entirely consistent with Blueford's account of the accident. He explained that the last decade of research had conclusively shown that children can suffer fatal head trauma from short falls. *Id.* at 725-35. He also expressly rejected the state's theory that Blueford slammed McFadden into mattresses, emphasizing that the same scenario had been examined by the biomechanical literature, which, in his view, concluded that the mattress-slammings scenario "would not cause the injuries in this case." *Id.* at 765-66.

Blueford adamantly denied any intent to injure McFadden, but he nonetheless accepted responsibility. He testified that he wished he had "been more attentive," *id.* at 691, and his counsel asked the jury to convict him of negligent homicide, *id.* at 837-39.

2. **Jury instructions and deliberations.** The trial court instructed the jury to consider four charges: capital murder and three lesser-included offenses of first-degree murder, manslaughter, and negligent homicide. *Id.* at 807. The court also instructed the jury to consider the charges one at a time, starting with the capital-murder charge. Thus, for example, the jury was to "consider the charge of murder in the first degree" only if it had "a reasonable doubt of the defendant's guilt on the charge of capital murder." *Id.* at 808.

The state stressed this instruction repeatedly. The state told the jury in its principal closing argument that it was “important for you to understand” that “before you can consider a lesser included of capital murder, you must first, all 12, vote that this man is not guilty of capital murder before you can ever move on.” *Id.* at 818; see also *id.* at 818-19 (“[L]ike I said before, you don’t even get to this [first-degree murder] instruction until all 12 of you are able to vote that you do not believe this man is guilty of capital murder . . .”). Blueford’s counsel acknowledged the same instruction in her closing, suggesting that the jury could “consider all the charges” but agreeing with the state that “you must vote first on capital murder.” *Id.* at 821. Apparently unsatisfied by this qualified concession, the state on rebuttal rejected the idea that the jury was free to “just lay everything out here and say, well, we have four choices. Which one does it fit the most?” *Id.* at 848. Instead, the state insisted, “unless all 12 of you agree that this man’s actions were not consistent with capital murder, then and only then would you go down to murder in the first degree.” *Id.*

After closing arguments, the jury retired to deliberate. *Id.* at 855. Four hours later, the trial court received a note from the jury asking “what happens if we cannot agree on a charge at all.” *Id.* at 867. Upon questioning by the court, the forewoman reported that she did not believe the jury would be able to reach an agreement, and the court gave an *Allen* charge.² *Id.* at 867-69. The jury resumed its deliberations for half an hour. App. D, at 18a. Then it

² See *Allen v. United States*, 164 U.S. 492, 501-502 (1896).

sent out another note stating that the “jury cannot agree on any one charge in this case.” *Id.* The court called the jury out and addressed the forewoman. After the forewoman again stated that the jury was hopelessly deadlocked, the court asked for the jury’s votes on each charge:

THE COURT: All right. If you have your numbers together, and I don’t want names, but if you have your numbers I would like to know what your count was on capital murder.

JUROR NUMBER ONE: That was unanimous against that. No.

THE COURT: Okay, on murder in the first degree?

JUROR NUMBER ONE: That was unanimous against that.

THE COURT: Okay. Manslaughter?

JUROR NUMBER ONE: Nine for, three against.

THE COURT: Okay. And negligent homicide?

JUROR NUMBER ONE: We did not vote on that, sir.

THE COURT: Did not vote on that.

JUROR NUMBER ONE: No, sir. We couldn’t get past the manslaughter. Were we supposed to go past that? I thought we were supposed to go one at a time.

Id. at 19a-20a.

The judge advised counsel that he thought the jury should continue deliberating. The government’s

counsel said that he would defer to the court, and Blueford's counsel supported continued deliberations. In light of the jury's statement that it was deadlocked on the manslaughter charge, Blueford's counsel also requested a re-reading of the "Dynamite Charge." *Id.* at 20a. The court agreed and re-read the charge, and the jury resumed deliberations. *Id.* at 20a-22a.

While the jury was out, Blueford's counsel asked the court to accept a partial verdict of acquittal on capital murder and first-degree murder through amended jury forms, arguing that the court and the parties had "an obligation to move forward where we can." *Id.* at 23a. The state objected, contending that the verdict must be "all or nothing." The court agreed with the state and denied Blueford's request. *Id.* at 23a-24a. The state then offered to join a request for a mistrial on all charges. *Id.* at 24a. Blueford's counsel opposed, making clear that "[w]e are not asking for a mistrial at this point." *Id.* But the court again sided with the state: "the Court is going to declare one if the jury doesn't make a decision. I mean, they have been out hours and hours and hours now. And they have indicated twice that they're hopelessly deadlocked." *Id.* at 24a-25a. And when the jury returned half an hour later, still deadlocked at 10 p.m., the court immediately discharged the jury:

THE COURT: Madam Foreman, has the jury reached a verdict?

JUROR NUMBER ONE: No, it has not, sir.

THE COURT: Madam Foreman, there seems to be a lot of confusion on the part of the . . . jury about some of the instructions. And because of

the confusion and because of the timeliness and the amount of hours that has gone by without being able to reach a verdict, the Court is going to declare a mistrial.

Id. at 25a-26a.

3. **The motion to dismiss the murder charges on retrial.** The state sought to retry Blueford on capital murder and the three lesser-included offenses it had charged in the first trial. Blueford's counsel filed a motion asking the court to dismiss the capital murder and first-degree murder charges on Double Jeopardy grounds. ASCR at 87-88. The motion cited the fact that the forewoman "stated that the jury had unanimously found Defendant Blueford not guilty of capital murder and not guilty of first degree murder." *Id.* at 87; see also *id.* at 90 (noting that the jury was given "step-down" instructions that barred it from considering lesser-included offenses until it had definitively resolved the greater offenses).

The trial court denied the motion. App. B, at 15a-16a. The court wrote that it

"finds, after review of the transcript . . . , that the jury foreperson was explicit that the jury was unanimous in voting against finding Defendant Blueford guilty of capital murder and first degree murder. However, there were no 'findings' or 'verdicts' as intended by law." *Id.*

Accordingly, the trial court denied Blueford's Double Jeopardy motion.

4. **The appeal.** Blueford took an interlocutory appeal to the Arkansas Supreme Court. The court affirmed. It first agreed with the trial court that the

forewoman's announcement of unanimous votes of not guilty on the two murder charges was not tantamount to an acquittal on those charges. App. A, at 9a-12a. Addressing the mistrial, it acknowledged that a subsequent prosecution is permitted only where the mistrial is declared as a matter of "overruling necessity." *Id.* at 8a. But it concluded that this condition was satisfied in Blueford's case because the jury had deadlocked. *Id.* at 8a-9a.

The court also held that the trial court did not err in denying Blueford's request for a partial verdict reflecting the acquittal on capital murder and first-degree murder. *Id.* at 12a-14a. It explicitly recognized that "[j]urisdictions are split on the issue of partial verdicts" and acknowledged that some states hold "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.* at 12a-13a (citing decisions from Alaska, California, Connecticut, and New Hampshire). The court explained that these states have concluded that "there can be no 'manifest necessity' warranting the declaration of a mistrial where the circuit court makes no inquiry into the jury's deliberations as to the greater offenses." *Id.* at 13a. But the Arkansas Supreme Court squarely rejected these decisions: it stated that it was "simply unpersuaded by the underlying rationale" of the Double Jeopardy decisions from other states, and instead reasoned that a hung jury "produce[s] no verdict at all." *Id.* at 13a-14a (quoting *Walker v. State*, 825 S.W.2d 822 (Ark. 1992)). It followed what it viewed as the "majority of jurisdictions," which "have held that if a single charge includes multiple degrees of offenses, the trial court may not conduct a partial-verdict inquiry." *Id.* at 12a.

Blueford petitioned for rehearing, and the court denied the petition. See App. C, at 17a.

This petition for a writ of certiorari timely follows.

REASONS FOR GRANTING THE WRIT

The Double Jeopardy Clause provides 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. A jury announced in open court that it voted to acquit Alex Blueford of capital murder and first-degree murder. Permitting the state to try Blueford again on the charges of capital murder and first-degree murder will impermissibly subject him “for the same offence to be twice put in jeopardy of life or limb.”

The Court should grant a writ of certiorari to resolve a recurring question of national importance, over which state courts have divided: whether the Double Jeopardy Clause prevents retrying a defendant on greater offenses if the jury has deadlocked on lesser-included offenses.

This case presents an ideal vehicle to resolve the split. Some courts previously had rationalized the existing conflict by concluding that the acceptance of acquittals on greater offenses is required only in “acquittal first” or “hard-transition” states, like Arkansas, in which the nature of the deliberations provides assurance that the jury actually reached a decision on greater-included offenses before it considers (and deadlocks on) lesser-included offenses. Now, however, such a rationalization is no longer possible. Unlike other acquittal-first states, Arkansas has squarely rejected the rule that Double Jeopardy prin-

ciples compel the acceptance of a jury's unanimous finding of no guilt on greater offenses. Accordingly, the split now is square, and the time for its resolution is ripe and compelling.

The Court also should grant review because the ruling of the Arkansas Supreme Court is manifestly erroneous. The Double Jeopardy Clause protects a defendant's valued right not to be tried twice on the same charges. Although a retrial after a jury deadlocks generally is permissible for those charges that the jury could not decide, there is no justification for a retrial on charges for which it is clear that the jury has unanimously voted that the defendant is not guilty. Under those circumstances, the Double Jeopardy Clause compels a court to accept a unanimous vote to acquit on the charges for which the jury has announced its unanimous determination that the defendant is not guilty (even while declaring a mistrial on the charges where the jury deadlocked or did not reach a conclusion). The Court should grant review to clarify this important area of the law, which concerns a core constitutional guarantee.

I. State Courts Are Divided Over Whether The Double Jeopardy Clause Prevents Retrial On A Greater Offense When A Jury Deadlocks On A Lesser-Included Offense.

This case presents an important federal question of constitutional significance regarding a recurring problem: in a case in which a jury deadlocks on a lesser-included, does the Double Jeopardy Clause bar a second prosecution of the greater offense? The question is particularly significant in this case because (1) the jury foreperson explicitly stated in open court, before the jury completed its deliberation, that

the jury had unanimously voted to find the defendant not guilty on two greater offenses, and (2) Arkansas law prohibits jurors from proceeding to lesser-included offenses unless they first have reached a not-guilty verdict on the greater offenses.

Appellate courts in at least thirteen states have addressed the question of the Double Jeopardy consequences of a deadlock on lesser-included offenses, with varying conclusions. Arkansas and seven other states have held that the Double Jeopardy Clause does not bar retrial of the greater offenses or require the trial court to grant a defendant's request to accept a partial verdict of acquittal. See App. A, at 12a-14a; *People v. Richardson*, 184 P.3d 755 (Colo. 2008); *State v. Booker*, 293 S.E.2d 78 (N.C. 1982); *State v. Bell*, 322 N.W.2d 93 (Iowa 1982); *People v. Hickey*, 303 N.W.2d 19 (Mich. Ct. App. 1981); *State v. McKay*, 535 P.2d 945 (Kan. 1975); *People v. Hall*, 324 N.E.2d 50 (Ill. App. Ct. 1975). These courts generally have justified their conclusions by a concern that a partial verdict is too "intrusive" – that it poses a risk either of coercing the jury to reach a verdict; or of accepting as final a verdict that was tentative or intended only as a temporary compromise; or both. See, e.g., *Richardson* 184 P.2d at 763 (setting forth both concerns). Still another state high court agreed with the general principle announced in these decisions, but held that, in the case before the court, Double Jeopardy consequences attached to the greater offenses because the jury had explicitly announced that it found the defendant not guilty on greater offenses and deadlocked on the lesser-included offenses. *Commonwealth v. Roth*, 776 N.E.2d 437, 450-51 (Mass. 2002).

In contrast, appellate courts in five states have squarely 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.” App. A, at 13a. See *State v. Tate*, 773 A.2d 308 (Conn. 2001); *Whiteaker v. State*, 808 P.2d 270 (Alaska Ct. App. 1991); *Stone v. Superior Court*, 646 P.2d 809, 816-17 (Cal. 1982); *State v. Pugliese*, 422 A.2d 1319 (N.H. 1980);³ *State v. Fielder*, 118 P.3d 752 (N.M. Ct. App. 2005). These courts have recognized the “overriding importance of the prohibition against multiple prosecutions” in holding that the Double Jeopardy Clause requires a trial court to accept a partial verdict of acquittal where there is “clear and uncontradicted evidence . . . that the jury was prepared to render” such a partial verdict. *Stone*, 646 P.2d at 817. They have rejected the “intrusiveness” theory trumpeted in their sister states, reasoning that acceptance of partial verdicts on greater offenses is “logically indistinguishable” from the widely followed practice of accepting partial verdicts on offenses that are charged in separate counts. *Id.* at 819.

Despite these divergent views, three decisions over the last decade held out hope that any disagreement might be more apparent than real. In

³ In *Pugliese*, the New Hampshire Supreme Court, stated that it decided the case “under the constitution of New Hampshire,” 422 A.2d at 729, and noted that its constitutional analysis “draw[s] upon decisions of the Supreme Court of the United States.” *Id.* All of the other decisions with which the Arkansas Supreme Court disagree rely on federal Double Jeopardy precedents and principles.

Tate, the Connecticut Supreme Court noted that states like Connecticut employ an “acquittal first” or “hard transition” rule, under which a jury is “prohibited . . . from actually considering the lesser included offenses unless and until it had arrived at a unanimous verdict of acquittal on the” greater offense. 773 A.2d at 321. The “acquittal first” or “hard transition” rule thus “requires the jury to reach a partial verdict” on a greater offense before deliberating on a lesser-included offense. *Id.* For that reason, there is a compelling reason in the structure of the deliberations to infer a partial verdict of acquittal when a jury deadlocks on a lesser-included offense. In contrast, “[j]urisdictions that have adopted the ‘soft transition’ approach” allow the jury “to move from consideration of the greater offense to the lesser offense as a means of seeking compromise and without actually having acquitted the accused of the greater offense.” *Id.* at 322. Thus, at least absent additional information, the fact of a jury deadlock on a lesser-included offense would not necessarily imply anything about its vote on greater offenses. In subsequent decisions, the Colorado Supreme Court and the Massachusetts Supreme Judicial Court similarly observed that the cases making up the split could be “distinguishable on that basis.” *Richardson*, 184 P.3d at 764 n.7; see also *Roth*, 776 N.E.2d at 449 n.14.

That is no longer the case. By holding that the Double Jeopardy Clause does not require acceptance of a partial verdict even in an acquittal-first or hard-transition state, the Arkansas Supreme Court’s decision in this case clarified that the long-percolating split in the lower courts now is an irreconcilable disagreement. And it did so on the clearest record

imaginable – an open-court statement by the jury forewoman that the jury had voted on, and was “unanimous against,” a guilty verdict on the capital and first-degree murder charges. App. D, at 19a. The trial court in Blueford’s retrial likewise explicitly found that the jury had so voted. App. B, at 15a-16a. At the same time, the Arkansas Supreme Court – apparently satisfied that the legal issues underlying the question presented had been adequately explored by the numerous other state courts that have considered it – provided little analysis to support its judgment; it merely stated that it was “simply unpersuaded” by what it saw as the “minority” view. App. A, at 13a.⁴

The Court should grant review to bring clarity to this important matter of federal constitutional rights. The split is inescapable; the underlying legal issues have been extensively explored by lower courts. The issue was squarely decided in this case on a clear re-

⁴ The Arkansas Supreme Court’s suggestion that the Double Jeopardy Clause would not be violated because “no formal acquittal was entered of record,” App. A, at 10a, does not diminish the split. Other “acquittal-first” or “hard-transition” states have found that Double Jeopardy barred retrial on greater offenses because of the very structure of acquittal-first deliberations (even when there was not, as here, an explicit statement by the jury that it found the defendant not guilty on greater offenses). See, e.g., *Tate*, 773 A.2d at 315-16, 324; *Whiteaker*, 808 P.2d at 272-73, 279. See also *Roth*, 776 N.E.2d at 450-51 (state’s argument that no jeopardy attached to jury’s announcement of not-guilty finding on greater offenses because it was not in a formal jury verdict “would elevate form over substance” regarding the Double Jeopardy violation and could not be accepted).

cord, and it is outcome-determinative of the question whether Blueford will face a second trial on charges of capital murder and first-degree murder. And the issue is bound to recur – as it has repeatedly over the years – with no hope of consistent application absent this Court’s intervention. For all these reasons, the Court should grant the writ.

II. The Court Should Grant Review To Clarify That The Double Jeopardy Clause Does Not Permit Retrial On A Greater Offense Simply Because A Jury Has Deadlocked On A Lesser-Included Offense.

This Court’s review also is needed because the decision below erroneously sanctions a serious and harmful violation of constitutional rights, and establishes a rule of law that eviscerates a core guarantee of the Bill of Rights.

The Double Jeopardy Clause protects defendants against multiple punishments and against “being twice put to trial for the same offense.” *Abney v. United States*, 431 U.S. 651, 661 (1977).⁵ As this Court has explained, the “underlying idea” 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 offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecu-

⁵ The protections of the Double Jeopardy Clause apply to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

rity, 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).

In short, the Double Jeopardy Clause is a cornerstone of the Bill of Rights’ protection of personal liberty and an important safeguard against government abuse.

On at least three grounds, the Double Jeopardy Clause bars Blueford’s retrial on capital murder and first-degree murder.

First, the Double Jeopardy Clause bars retrial on the greater offenses because a jury announced in open court that it unanimously found Alex Blueford not guilty of capital murder and first-degree murder. The state of Arkansas now seeks to retry him on the very same charges. The language and purpose of the Double Jeopardy Clause require that Blueford not be retried on the charges for which he has been found not guilty. Such a retrial presents a paradigmatic violation of the Double Jeopardy Clause. Other courts faced with similar situations have readily found such a violation. See, *e.g.*, *Roth*, 776 N.E.2d at 450-51; *Stone*, 646 P.2d at 509-517. See generally *United States v. Ball*, 163 U.S. 662, 671 (1896) (the Double Jeopardy Clause bars retrial of a defendant who has been expressly acquitted by a jury of the same offense).

Second, 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 a lesser-included offense. Thus, even if the jury had not explicitly announced its finding of not-guilty

on capital murder and first-degree murder, the jury's deadlock on manslaughter unequivocally established that the jury had voted to find him not guilty on the greater offenses. Here again, other courts faced with similar situations in acquittal-first jurisdictions have straightforwardly enforced the Double Jeopardy Clause and barred a retrial on the greater offense, see, e.g., *Tate*, 773 A.2d at 323; *Whiteaker*, 808 P.2d at 274.

Third, even if Arkansas were not an acquittal-first or hard-transition state, the Double Jeopardy Clause would bar retrial on the greater offenses because the jury deadlocked on a lesser-included offense. Under this Court's longstanding precedent, the Double Jeopardy Clause bars retrial of greater offenses when (1) a jury convicts on a lesser-included offense, (2) the jury is silent on the greater offense, and (3) the conviction on the lesser-included offense is overturned on appeal. *Green*, 355 U.S. 184; see also *Price v. Georgia*, 398 U.S. 323 (1970) (applying *Green* and holding that Double Jeopardy Clause was violated by retrial on greater offense when jury returned conviction on lesser-included offense and was silent on greater offense, and conviction on lesser-included offense was overturned on appeal). "In substance," the Court explained in *Green*, this "situation [is] the same as though [the defendant] had been charged with these different offenses in separate but alternative counts of the indictment." 355 U.S. at 190 n.10. This is so even though the jury is silent on the greater offenses – not only because the conviction on the lower charge is "an implicit acquittal on the" greater charge, *id.* at 190, but also because the jury's silence on the greater charge does not rise to the level of manifest necessity required to justify retrial of the

greater charge, *id.* at 191. See *United States v. Perez*, 9 Wheat. 579, 580 (1824) (Story, J.) (a retrial on the same offense may proceed only if there is a “manifest necessity”). With regard to greater offenses, the situation in *Green* – conviction on a lesser-included offense and silence on a greater offense – is not distinguishable in any constitutionally significant manner from the situation when a jury deadlocks on a lesser-included offense and is silent on a greater offense. This Court’s settled understanding of the Double Jeopardy Clause bars retrial of the greater offense in the former situation. It likewise should bar retrial of the greater offense in the latter situation.

In this case, of course, the jury was far from silent. The jury explicitly announced in open court that it “was unanimous against” a finding of guilt on capital murder and first-degree murder; the required structure of its deliberations also announced loudly and unmistakably that it had voted to acquit on capital murder and first-degree murder. A rule of law that allows a retrial to proceed on those acquitted charges squarely conflicts with the Double Jeopardy Clause and with decisions of other courts.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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