No. 10-1320

In the Supreme Court of the United States

ALEX BLUEFORD, PETITIONER

v.

STATE OF ARKANSAS

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

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the National Association of Criminal Defense Lawyers (NACDL) is a non-profit association of lawyers who practice criminal law before virtually every state and federal bar in the country.[1] NACDL's more than 12,800 member attorneys and the 35,000 members of its state, local, and international affiliates represent defendants in a wide variety of criminal cases, including in cases that may involve the double-jeopardy issue raised in the petition.

[1] Counsel of record received timely notice under Rule 37.2(a) of NACDL's intent to file this brief, and all parties consented to its filing. No party's counsel authored any part of this brief, and no person other than NACDL and its counsel made any monetary contribution intended to fund its preparation or submission.

NACDL's members are interested in the resolution of this recurring question because it will affect the rights of their current and future clients.

SUMMARY OF ARGUMENT

This should have been a simple case. Petitioner said that the death of his girlfriend's son was an accident. The State tried to prove that it was intentional, but all twelve jurors disagreed, rejecting the charges of capital and first-degree murder. The jurors could not agree, however, on whether petitioner committed manslaughter, and the court declared a mistrial. As many other courts would have, the Arkansas courts should have applied the Double Jeopardy Clause to prevent a retrial on the murder charges, but they did not.

This Court's Double Jeopardy Clause cases—in particular, *Green* v. *United States*, 355 U. S. 184 (1957), and *Price* v. *Georgia*, 398 U. S. 323 (1970)—require the conclusion that because the jury voted unanimously against convicting petitioner on both of the intentional murder charges, petitioner cannot be retried on those charges. As the petition explains, a number of states would so hold under these circumstances, but the State of Arkansas and several others allow retrial on the same facts.

In this brief, NACDL argues the following. First, the problem addressed here is worthy of this Court's attention because the "acquittal first" instructions used below are commonplace, and are likely to remain in continued use in a large number of jurisdictions. That widespread and continuing use means that the question presented will arise again and again in the future, and so resolving it is important.

Second, this Court's review is warranted here not only because of the divided state court authority but further because the holding of the court below, and of the courts that share its view of the law, is inconsistent with the Court's decisions in *Green* and *Price*. The proper resolution of this issue should not have been a close call, so review is required to correct the approach of the court below and the courts that join its side of the divide on this issue.

Third, review is warranted in this procedural posture. The fact that this petition arises from a pretrial order is no impediment to granting the writ. The Double Jeopardy Clause protects an accused from standing trial twice on the same charges, so the Court has held that an order denying pretrial dismissal on former jeopardy grounds is a final order and is therefore ready for the Court's review.

REASONS THE WRIT SHOULD BE GRANTED

I. THE QUESTION PRESENTED IS IMPORTANT BECAUSE THE INSTRUCTIONS HERE ARE WIDELY USED

The question presented will recur because the situation the petitioner faced is common. The jury instructions used at the trial here are used in criminal trials in many jurisdictions, and in several states they are required to be used in every case involving lesser-included offenses.

The trial court here gave a "transition" instruction prescribing the method by which the jury was to proceed in evaluating petitioner's guilt on lesser-included offenses. The court required the jury to start its deliberations with the greatest offense—

here, capital murder—and come to a unanimous decision whether to convict. If it was unanimous for guilt the jury was to return a verdict; if it was unanimous for acquittal it was to move on to consider the next greatest included offense. And so on down the line of included offenses.

Because this method requires the jury to agree to acquit on a greater offense before it can consider a lesser offense, this method is known as "acquittal first." The instruction is also called a "hard" or "progressive" transition instruction. The ordinary alternative is a "reasonable efforts" instruction, under which the jury must try to reach agreement on a greater offense but may turn to a lesser offense if it cannot.

To provide context, there is considerable debate in the cases over how a jury should be instructed to proceed in considering lesser-included offenses. Instructions identical in substance to the acquittal-first instruction have long been in use. See, *e.g.*, *Dillon* v. *Wisconsin*, 119 N. W. 352, 357 (Wis. 1909). The first challenges to the propriety of those instructions that we are aware of came in the 1970s. Criminal defendants argued that mandating an agreement on a greater offense could coerce jurors into reaching a guilty verdict just to avoid a deadlock, and that the instructions improperly intruded on the province of the jury in structuring its own deliberations. They asked that the more permissive reasonable-efforts instruction be given instead.

Judge Friendly's opinion in *United States* v. *Tsanas*, 572 F. 2d 340 (CA2 1978), gave early consideration to these arguments. As Judge Friendly observed, the doctrine of lesser-included offenses presents the

problem that jurors may convict on a middle ground as a compromise among jurors who believe the defendant is guilty of a greater offense and jurors who believe he is not guilty. *Id.*, at 345. The acquittal-first transition instruction has the advantage, "from the Government's standpoint, of tending to avoid the danger that the jury will not adequately discharge its duties with respect to the greater offense, and instead will move too quickly to the lesser one." *Id.*, at 346. From the defendant's standpoint, the charge has the advantage that "it may prevent any conviction at all" because the jury may not reach unanimity on a charge and so may not be able to proceed to a lesser offense. *Ibid.*

By the same token, the charge has the disadvantage for the government that it may prevent a conviction on a lesser charge that "would otherwise have been forthcoming," and presents the danger to defendants that jurors who might otherwise have held out for conviction on a lesser charge might "throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all." *Ibid.*

Examining these advantages and disadvantages to both sides from the instruction—and the mirror-image disadvantages and advantages presented by a "reasonable efforts" instruction—the Second Circuit held that neither was erroneous as a matter of law but that it would be left to criminal defendants to elect which instruction they preferred in each case. *Ibid.*

In light of the potential advantages the acquittal-first instruction offers to parties, many courts endorse its use in some or all cases. In the federal system, the Second Circuit's approach has been adopted

by the Eighth and Ninth Circuits.[2] Unpublished decisions in the Sixth and Tenth Circuits evidence that acquittal-first instructions are in use in those circuits as well, as do the current pattern jury instructions in the Third and Eleventh Circuits.[3] And the Seventh Circuit has held that such instructions are consistent with due process.[4] We are aware of no federal court of appeals that has forbidden their use. In short, acquittal-first instructions are available for use in federal criminal trials in most, if not all, federal circuits.

These instructions are also in wide use in the states. The high courts of at least a dozen states have expressly either required or approved the use of acquittal-first instructions.[5] They are also obviously

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[2] *Catches* v. *United States*, 582 F. 2d 453 (CA8 1978); *United States* v. *Jackson*, 726 F. 2d 1466 (CA9 1984) (per curiam).

[3] See *United States* v. *Carter*, 172 F. App'x 883 (CA10 2006); *United States* v. *Amey*, No. 94-6325, 1995 WL 696680, at *5 (CA6 1995) (unpublished); Mod. Crim. Jury Instr. 3rd Cir. § 3.11 (2010); Pattern Crim. Jury Instr. 11th Cir. SI §§ 10.1 & 10.2 (2010).

[4] *Pharr* v. *Israel*, 629 F. 2d 1278 (CA7 1980).

[5] See *Tennessee* v. *Davis*, 266 S. W. 3d 896, 908 (Tenn. 2008); *New Hampshire* v. *Taylor*, 677 A. 2d 1093, 1097 (N. H. 1996); *Walker* v. *Mississippi*, 671 So. 2d 581, 607–608 (Miss. 1995); *North Dakota* v. *Daulton*, 518 N. W. 2d 719, 720 (N. D. 1994); *Connecticut* v. *Sawyer*, 630 A. 2d 1064, 1073 (Conn. 1993); *Idaho* v. *Raudebaugh*, 864 P. 2d 596, 598–601 (Idaho 1993); *Wright* v. *United States*, 588 A. 2d 260, 262 (D. C. 1991); *Montana* v. *Van Dyken*, 791 P. 2d 1350, 1361 (Mont. 1990); *Jones* v. *Georgia*, 385 S. E. 2d 400, 402 (Ga. 1989); *Stone* v. *Superior Ct.*, 646 P. 2d 809, 820 (Cal. 1982); *New York* v. *Boettcher*, 505 N. E. 2d 594, 597 (N. Y. 1987); *Dresnek* v. *Alaska*, 718 P. 2d 156, 157 (Alaska 1986); *Lindsey* v. *Alabama*, 456 So. 2d 383, 387 (Ala. Crim. App. 1983); *Ballinger* v. *Wyoming*, 437 P. 2d 305, 310 (Wyo. 1968).

in use in Arkansas. Pet. App. 7a. While several states forbid such instructions (see *Davis*, 266 S. W. 3d, at 906 (collecting cases)), their expressly approved use in at least Alabama, Alaska, Arkansas, California, Connecticut, the District of Columbia, Idaho, Mississippi, Montana, New Hampshire, New York, North Dakota, and Tennessee, as well federal jurisdictions, means that the question presented here is going to come up again and again. It will arise in every case in these jurisdictions in which a jury receives these acquittal-first instructions and then deadlocks while considering a lesser-included offense.[6]

II. THE HOLDING BELOW WARRANTS REVIEW BECAUSE IT IS INCONSISTENT WITH *GREEN* AND *PRICE*

The decision below also warrants review because it and the similar decisions cited in the petition (at 7) have decided an important federal question in a way that conflicts with this Court's cases. There is no way to reconcile the decision of the Arkansas Supreme Court in this case with *Green* and *Price*. Instead, the court below should have recognized—as a number of the cases on the other side of the divide have recog-

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[6] Recent examples of this or related issues arising just in the federal courts of appeals include *Harrison* v. *Gillespie*, --- F. 3d ----, 2011 WL 1758657 (CA9 2011) *(en banc)* (court need not inquire about juror's votes on various punishments when jury deadlocks during penalty deliberations in capital case); *Tomlin* v. *McKune*, 300 F. App'x 592 (CA10 2008) (addressing the issue here); and *Diaz* v. *Secretary for Department of Corrections*, 285 F. App'x 589 (CA11 2008) (no implied acquittal based on lesser-offense deadlock when jury may have returned to deliberations).

nized—that the question presented is controlled by *Green* and *Price*.

In *Green*, as here, the jury was instructed to consider a greater murder charge as well as a lesser-included homicide charge. *Green*, 355 U. S., at 185–186. There, the jury convicted on a lesser count, and that conviction was held to be an implicit acquittal on the greater charge that prevented retrial after a successful appeal. *Id.*, at 186. Here, the jurors were unanimous against petitioner's guilt on the murder charges, but deadlocked on manslaughter.

Green's language and logic apply directly in the situation contemplated by the question presented. The Double Jeopardy Clause "protect[s] an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Id.*, at 187. A verdict of acquittal bars retrial "even when 'not followed by any judgment.'" *Id.*, at 188 (quoting *United States* v. *Ball*, 163 U. S. 662, 671 (1896)). And critically, "it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial." *Ibid.* That is precisely what happened here; no formal judgment was entered and no verdict was returned, but the jury deliberated on the murder charges and all jurors agreed that petitioner was not guilty. The proviso of *Wade* v. *Hunter*, 336 U. S. 684, 688–689 (1949), which allows retrial after a mistrial based on a jury's "failure * * * to agree on a verdict," does not apply here, because the jury did "agree" on a verdict as to murder even though the court declined to receive it. The was no "manifest" need for a mistrial on the murder charges (*United States* v. *Perez*, 9 Wheat. (22 U. S.) 579, 580 (1824)),

since the record indicates that the jury was prepared to return a verdict on those counts.

As in *Green*, here "the jury was authorized to find" petitioner guilty of either murder or a lesser offense. *Id.*, at 189–190. Petitioner "was in direct peril of being convicted and punished for * * * murder at his first trial," and though he "was forced to run the gantlet once on [the murder] charge[s]," the "jury refused to convict him." *Id.*, at 190. In *Green*, "[w]hen given the choice between finding [the defendant] guilty of either first or second degree murder it chose the latter." *Ibid.* Here, when "given the choice," the jury chose not to convict on the greater charge and could not agree whether to convict on the lesser. In *Green,* the jury's choice not to convict on the greater charge meant that the defendant's jeopardy on the greater charge had ended, because "the jury was dismissed without returning any express verdict on [the greater] charge" even though "it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Id.*, at 191. The same is true here, and so the same result is required.

Price, which reaffirmed *Green*, also requires that same result. As *Price* explained, the Court "has consistently refused to rule that jeopardy for an offense continues after an acquittal." *Price*, 398 U. S., at 329. The Court there recognized no distinction between an "express" acquittal and one that was "implied by a conviction on a lesser included offense," as long as in the latter circumstance the jury had "a full opportunity to return a verdict on the greater charge." *Ibid.* Applying the same logic, the court below should have held that *Price*, like *Green*, barred a second murder

trial here because the jury had the same "full opportunity" to convict on the murder charges, but did not do so. While here the record establishes that the jury voted unanimously to acquit on the murder charges (Pet. App. 4a), that is not necessary to the conclusion that *Green* and *Price* barred retrial. Under the acquittal-first instruction the jury received, the jury's deadlock on manslaughter demonstrated an acquittal on both murder charges just as much as the guilty verdicts on lesser-included offenses in those two cases "implied" an acquittal on the greater offenses in those cases. The jury's implicit acquittal terminated jeopardy in *Green* and *Price*, and the court below should have recognized that it terminated jeopardy here for identical reasons.

This conclusion follows from the logic of the decisions themselves, but it is also worth noting that the decisions rejecting the approach of the court below are rooted in *Green* and *Price*. *Stone* v. *Superior Court*, 646 P. 2d 809, 819 (Cal. 1982), relied heavily on *Green* and *Price*. *Whiteaker* v. *Alaska*, 808 P. 2d 270 (Alaska Ct. App. 1991), relied on *Stone*. *New Mexico* v. *Fielder*, 118 P. 3d 752 (N. M. Ct. App. 2005), relied on *New Mexico* v. *Castrillo*, 566 P. 2d 1146 (N. M. 1977), which in turn relied on *Green*. And *Connecticut* v. *Tate*, 773 A. 2d 308, 323–325 (Conn. 2001), relied on *Stone*, *Whiteaker*, and *Castrillo*. By contrast, the court below did not address those two decisions. Its omission and resulting erroneous decision, which now binds every Arkansas court, requires this Court's review to correct it.

III. THIS PETITION IS THE RIGHT VEHICLE BECAUSE THE DECISION FINALLY DETERMINES THAT PETITIONER MUST STAND TRIAL ON A CHARGE A JURY UNANIMOUSLY REJECTED

This case is a proper vehicle for deciding the question presented for the reasons explained in the petition. This is true notwithstanding that the Arkansas Supreme Court described petitioner's appeal as "interlocutory." Pet. App. 2a. The order here is "final" within the meaning of this Court's cases, so the considerations counseling against the Court's review of some interlocutory orders do not apply. See *American Const. Co.* v. *Jacksonville, Tampa & Key W. Ry. Co.*, 148 U. S. 372, 384 (1893).

A decision rejecting a double jeopardy claim is a final decision that the government may put the accused on trial. The Double Jeopardy Clause protects a defendant not only from conviction after a second trial but from the trial itself. The Clause prevents the state from "mak[ing] 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 insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Yeager* v. *United States*, 129 S. Ct. 2360, 2365–2366 (2009) (quoting *Green*, 355 U. S., at 187).

This Court's "jurisdiction is properly invoked under 28 U. S. C. §1257" by a petition from a state high court decision denying a pretrial plea of former jeopardy. *Harris* v. *Washington*, 404 U. S. 55, 56 (1971) *(per curiam)*. And similarly, in *Abney* v. *United States*, 431 U. S. 651 (1977), this Court held that the

denial of a double jeopardy claim "constitute[s] a complete, formal, and, in the trial court, final rejection" of such a claim because "[t]here are simply no further steps that can be taken" in the trial court "to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee." *Id.*, at 659. As *Abney* held, "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence" because the Clause protects a defendant "against being twice put to trial for the same offense." *Id.*, at 660–661.

The reasons for deeming the type of order at issue here "final" for jurisdictional purposes similarly support deeming the order final for purposes of this Court's discretionary decision whether to grant certiorari. And indeed this Court has granted certiorari in a similar posture on several occasions precisely because "the right" protected by the Double Jeopardy Clause "would be significantly impaired if review were deferred until after the trial." *Richardson* v. *United States*, 468 U. S. 317, 320 (1984); see also, *e.g.*, *Yeager*, 129 S. Ct., at 2635; *Bullington* v. *Missouri*, 451 U. S. 430, 437 & n.8 (1981).

Furthermore, certiorari is no less appropriate in this case even though a favorable ruling from the Court will leave petitioner subject to retrial on the lesser counts. First, a retrial on the lesser charges is not inevitable. The State may choose not to proceed to trial on the lesser charges if the greater are barred, or may accept a plea to the negligent homicide charge or the manslaughter charge if it knows the murder charges cannot be prosecuted.

Second, petitioner's right is to avoid the "ordeal" and "embarrassment," and consequent "anxiety and insecurity" of a second trial on the murder charges that the State has once failed to prove. "The Double Jeopardy Clause * * * is cast in terms of the risk or hazard of trial and conviction," and "to be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly." *Price*, 398 U. S., at 331. "There is a significant difference to an accused whether he is being tried for murder or manslaughter." *Id.*, at 331 n.10. And the Clause furthermore must protect petitioner from the possibility of being found guilty on those charges and then incurring the "expense" and additional "ordeal" of any appeal on double jeopardy grounds. For all of these reasons, this is an appeal from a final order and there is no obstacle to this Court's taking review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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