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

BRIEF OF *AMICI CURIAE* CRIMINAL LAW PROFESSORS IN SUPPORT OF PETITIONER ALEX BLUEFORD (FULL LIST OF *AMICI* ON INSIDE FRONT COVER)

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors of criminal law and procedure who have studied, taught, written about, and litigated cases involving double jeopardy. *Amici* believe the Petition presents important and recurring issues of double jeopardy law over which state courts are in deep disarray. The forewoman in this case announced in open court, in response to the judge's inquiry, that the jury had voted "unanimous against" convicting Alex Blueford on the capital and first-degree murder charges. Pet. App. 19a. Jeopardy on those charges terminated at that point, and the Fifth Amendment's Double Jeopardy Clause (incorporated through the Fourteenth Amendment) bars a second prosecution of Blueford on the same charges. "For whatever else that constitutional guarantee may embrace, . . . it surely protects a man who has been acquitted from having to 'run the gantlet' a second time" on the identical charges. *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970) (internal citations omitted).

The lead *amicus*, George C. Thomas III, is a Board of Governors Professor of Law and Judge Alexander P. Waugh, Sr. Distinguished Scholar at Rutgers School of Law—Newark. He is the author of *Double Jeopardy: The History, the Law* (1998), and, with Joshua Dressler, of the casebook *Criminal Procedure: Principles, Policies and Perspectives*

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received notice at least ten days prior to the due date of *amici*'s intention to file this brief. The parties have consented to its filing; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

(4th ed. 2010). Professor Thomas co-authored this brief with the undersigned Counsel of Record.

A list of the other *amici* who reviewed and join in this brief is included in the attached Appendix. The views expressed herein are those of the individual *amici*, not of any institutions or groups with which they may be affiliated.

SUMMARY OF THE ARGUMENT

The decision of the Arkansas Supreme Court reflects a deep division among state courts over several fundamental and recurring issues of double jeopardy. *See Commonwealth v. Roth*, 776 N.E.2d 437, 447 n.10 (Mass. 2002) (state court decisions "express diametrically opposed views on the subject"). This division demonstrates the need for review on the merits by this Court. And on those merits, the Double Jeopardy Clause bars a second prosecution of Blueford on the capital and first-degree murder charges for at least three reasons:

First, the trial judge asked the jury forewoman what the jury's "count" was on capital and first-degree murder, and the forewoman responded that the jury was "unanimous against" guilt on both charges. Pet. App. 19a. This was a "ruling" in Blueford's favor "of some or all of the factual elements of the offense[s] charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Such a ruling is an acquittal, and this Court repeatedly has emphasized that substance governs over form and technicalities in determining when a defendant has been "acquitted." Whether the forewoman's announcement was a formal "acquittal" or an "acquittal equivalent," it was a substantive determination that the prosecution had failed to carry its burden of proof. Blueford thus may not be retried on the capital or first-degree murder charges, although he remains subject to retrial on the manslaughter and negligent homicide charges.

Second, even if the jury's "unanimous" rejection of the capital and first-degree murder charges did not constitute an "acquittal" or "acquittal equivalent," the State cannot establish the "manifest necessity" to justify a mistrial that will permit retrying Blueford on those same charges. One principle that emerges from the mistrial cases is that the State is not permitted to present a strengthened case at a later trial after having used a mistrial to avoid an acquittal—a practice this Court repeatedly has condemned as "'abhorrent,'" *Arizona v. Washington*, 434 U.S. 497, 508 (1978) (citation omitted), and that this brief will refer to as "acquittal avoidance." *Washington* also established that the trial judge is entitled to little if any deference when the mistrial results from the absence of evidence to convict, as was the case here. Indeed, one of the purposes of the Double Jeopardy Clause was to guard against the practice of English judges "exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict." *Id.* at 507. Here it not only "appeared" that the State's evidence was weak, the jury declared in open court that it was "unanimous against" conviction on the capital and first-degree murder charges.

Third, Blueford's jury found facts in his favor that are critical to his culpability for capital murder and first-degree murder. Under the doctrine of collateral estoppel "embodied" in the guarantee against double jeopardy, the State may not "hale [Blueford] before a new jury to litigate that issue again." *Ashe*, 397 U.S. at 442, 446; *see also Yeager v. United States*, 129 S. Ct. 2360, 2367-68 (2009) (facts "necessarily decided" by jury in voting to acquit on some counts were issue preclusive even though jury had deadlocked on other counts).

REASONS FOR GRANTING THE WRIT

The decision below is emblematic of a sharp conflict among state courts over core double jeopardy issues, and it

presents those issues in stark and unambiguous terms. Blueford's jury was instructed that it could not even "consider" lesser-included charges unless and until it had determined that the State had failed to "sustain" the capital and first-degree murder charges—that is, only "if you have a reasonable doubt of the defendant's guilt" on those greater charges. Instructions 11-15, Arkansas Supreme Court Record ["ASCR"] at 806-08. The State relied heavily on these instructions, emphasizing in closing argument that "you must first, all 12, vote that this man is not guilty of capital murder before you can ever move on." ASCR at 818. According to the State, the jury could not consider any lesser-included offenses "until all 12 of you are able to vote that you do not believe this man is guilty of capital murder." *Id.* at 818-19; *see also id.* at 848 ("[U]nless 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.").

The jurors voted unanimously that they "d[id] not believe this man is guilty" of murder. *Id.* at 818-19. They voted to acquit Blueford on the capital and first-degree murder charges, but deadlocked 9-3 on the manslaughter charge. The court asked the forewoman to report the jury's "count" on each charge in open court. Pet. App. 19a. As for capital murder, the forewoman announced the jury "was unanimous against that. No." *Id.* As for first-degree murder, the forewoman announced that the jury "was unanimous against that" too. *Id.* The forewoman then reported the jury was deadlocked on manslaughter and had not yet considered negligent homicide. *See id.* at 19a-20a. She emphasized that the jury had not yet considered the latter count because "[w]e couldn't get past the manslaughter," and the jurors understood, pursuant to the judge's instructions, that they were not to consider lesser offenses until they had acquitted on the greater ones—they "were supposed to go one at a time." *Id.* at 20a.

The court ordered the jury to resume its deliberations. *Id.* at 21a-22a. Blueford's counsel moved "that the jury be given verdict forms and that they fill out verdict forms for those counts that they have reached a verdict on"—capital and first-degree murder. *Id.* at 23a. The court denied that motion and, after the jury was unable to resolve its impasse over the manslaughter count, declared a mistrial—not only as to the lesser offenses, but also on the capital and first-degree murder counts as well. *Id.* at 24a-26a.

The State of Arkansas is now seeking to retry Blueford for murder all over again, despite the first jury declaring in open court that it was "unanimous against" convicting him of that crime. On interlocutory appeal, the Arkansas Supreme Court held that the State could retry Blueford for capital and first-degree murder because "neither the giving of those instructions nor the forewoman's announcement in open court that the jury found Appellant not guilty on those two charges negates the bedrock principle of law that a judgment is not valid until entered of record." Pet. App. 10a. The court reasoned that the jurors' unanimous vote announced in open court was never reduced to a written verdict that was then "entered of record." *Id.* It was therefore "axiomatic" that the jurors' decision was a nullity and did not terminate Blueford's jeopardy. *Id.* at 9a.

The Arkansas Supreme Court acknowledged that "[j]urisdictions are split on the issue of partial verdicts," and that many state courts and legislatures have decided "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 California, Connecticut, New Hampshire, and Alaska decisions). But the court was "simply unpersuaded by the underlying rationale" of this position, and declined to depart from the "bedrock principle" requiring formal "entry of record" before jeopardy terminates. *Id.* at 10a, 13a. As the court discussed, other States agree with Arkansas that a jury's

substantive determination of innocence does not terminate jeopardy unless and until it is reduced to writing in a "final verdict" that is "entered of record." *Id.* at 12a-13a.[2]

Contrary to the Arkansas Supreme Court's decision, other state supreme courts have recognized that the Double Jeopardy Clause requires judges to give effect to final and unanimous jury decisions that the defendant is substantively innocent of certain charges. In those cases, the State may not reprosecute the defendant through the simple expedient of seeking a mistrial after the jury has declared its resolution of the charges in open court but before its judgment has been "entered of record."[3] Other states have adopted, either through legislation or rulemaking, procedures that allow for judgments of partial acquittal in cases like these.[4]

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[2] *See, e.g.*, *People v. Richardson*, 184 P.3d 755, 764 (Colo. 2008) (en banc); *People v. Hall*, 324 N.E.2d 50, 52 (Ill. App. Ct. 1975) (jeopardy only terminates upon jury's "formal return of its verdict to the court"); *State v. Bell*, 322 N.W.2d 93, 95-96 (Iowa 1982); *People v. Hickey*, 303 N.W.2d 19, 21 (Mich. Ct. App. 1981) ("the weight of final adjudication should not be given to any jury action that is not returned in a final verdict"); *State v. Booker*, 293 S.E.2d 78, 80 (N.C. 1982) (there must be "a *final verdict* before there can be an implied acquittal").

[3] *See, e.g.*, *Whiteaker v. State*, 808 P.2d 270, 273-78 (Alaska Ct. App. 1991); *Stone v. Superior Court*, 646 P.2d 809, 816-17 (Cal. 1982); *State v. Tate*, 773 A.2d 308, 319-25 (Conn. 2001); *State v. Pugliese*, 422 A.2d 1319, 1320-22 (N.H. 1980) (per curiam); *State v. Castrillo*, 566 P.2d 1146, 1151-52 (N.M. 1977); *see also Richardson*, 184 P.3d at 766 (Martinez, J., dissenting) (discussing caselaw in fourteen states requiring acceptance of partial verdicts).

[4] *See, e.g.*, *Richardson*, 184 P.3d at 763 n.6 (discussing states with "rules of criminal procedure that expressly require trial courts to poll deadlocked juries and accept partial verdicts"); *id.* at 766 (Martinez, J., dissenting) (discussing states that have

This Court should grant *certiorari* to resolve this split on the issue of partial verdicts. On the merits, the judgment of the Arkansas Supreme Court conflicts with this Court's double jeopardy decisions in at least three fundamental respects: it conflicts with this Court's acquittal decisions, its mistrial decisions, and its collateral estoppel decisions. We examine each conflict in turn.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ACQUITTAL DECISIONS.

"[T]he law attaches particular significance to an acquittal." *United States v. Scott*, 437 U.S. 82, 91 (1978). It is a "deeply entrenched principle of our criminal law that once a person has been acquitted of an offense he cannot be prosecuted again on the same charge." *Green v. United States*, 355 U.S. 184, 192 (1957). Although a defendant may be retried in many instances after avoiding a conviction or obtaining a reversal on appeal, that is not the case after an "acquittal," which "terminates" jeopardy and bars any further jeopardy on the same criminal charges. *Id.*

This Court has long held that what constitutes an "acquittal" is a matter of substance, not form:

> "[W]e have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571 (internal citations omitted).

"incorporated" this safeguard "into their rules, statutes, and jury instructions"); *see also* Note, *Acceptance of Partial Verdicts as a Safeguard Against Double Jeopardy*, 53 Fordham L. Rev. 889, 890 n.6 (1985).

Though *Martin Linen* involved a ruling by a judge, a jury acquittal is equally final. Thus, regardless of "nomenclature" or whether other counts remain pending, a defendant is "acquitted" on a count whenever there has been "a *substantive determination* that the prosecution has failed to carry its burden," whether through "an acquittal by jury verdict" or "a court-decreed acquittal." *Smith v. Massachusetts*, 543 U.S. 462, 467-69 (2005) (emphasis added). Jeopardy terminates in these circumstances whether or not there has been a "formal" verdict or entry of judgment. What matters is whether there has been an "acquittal equivalent"—a *substantive determination* "that resolves the blameworthiness issue in favor of the defendant."[5]

The Blueford jury's pronouncement in open court, in response to the judge's request for its "count" on each charge, that it was "unanimous against" capital and first-degree murder was an acquittal or acquittal equivalent. It represented "a substantive determination" by the jury "that the prosecution ha[d] failed to carry its burden" on these charges. *Smith*, 543 U.S. at 468. The jury forewoman's response—"That was unanimous against that. No."—resolved in Blueford's favor "some or all of the factual elements of the offense[s] charged." *Martin Linen*, 430 U.S. at 571. The judge's instructions, prosecutor's closing argument, and judge's colloquy with the forewoman all made clear that the jury understood that it had to decide unanimously to acquit Blueford of the greater-included offenses before considering the lesser-included ones. *See* p.

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[5] George C. Thomas III, *Double Jeopardy: The History, the Law* 230-31 (1998); *see id.* at 229-250 (discussing "acquittal equivalence" and "acquittal avoidance"); *see also Stone*, 646 P.2d at 814 ("It is plain . . . that if we recognize the jury's actions to be the equivalent of an acquittal of murder, defendant cannot be retried for either degree of that offense.").

4 *supra.* The jury's substantive determination of Blueford's innocence on the murder charges was, at the very least, an acquittal equivalent.[6]

Consider several variations on the *Blueford* facts that underscore why the jury's action in this case must be construed as operating to terminate jeopardy on the capital and first-degree murder counts. Suppose the jury forewoman stands and announces that the jury is "unanimous against" all four counts, and the judge angrily orders that the jurors be held in confinement until they change their minds. Or, to pose a less extreme variation, suppose the jurors forget to fill out the verdict form, or fail to complete the form because it is confusingly worded. But the forewoman announces in open court that the jury is "unanimous against" conviction on *any* of the charges. At this point the judge engages in "acquittal avoidance"—she declares a mistrial because she is convinced the defendant is guilty and that the prosecution should have another shot at conviction, having learned from its mistakes in the first trial. Or, to offer one more variation, suppose the jury properly fills in the verdict form and delivers it to the judge, who, appalled by the outcome, promptly throws the verdict form away rather than having it "entered of record" and instead declares a mistrial.

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[6] This Court has applied acquittal equivalence in determining that certain kinds of case outcomes are not the equivalent of an "acquittal" and thus not a jeopardy bar to further proceedings. *See, e.g., Sattazahn v. Pennsylvania*, 537 U.S. 101, 106-07, 109 (2003) ("the touchstone for double jeopardy protection . . . is whether there has been an 'acquittal'"—a resolution of "guilt or innocence"; life sentence for capital murder did *not* constitute an "acquittal" barring subsequent resentencing to death for the convicted offense); *United States v. Scott*, 437 U.S. at 94-101 (defense-requested dismissal on the ground of pre-indictment delay is *not* equivalent to an "acquittal" and thus not a jeopardy bar to a new indictment).

We cannot imagine a persuasive argument that any of these scenarios would be anything other than a "ruling" by the jury in the defendant's favor "of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571. Can it be true that the lack of a fully completed verdict form, or the apparent refusal of the judge to accept the jury's acquittals, would render any of these jury actions any less a "ruling" on the substantive merits in the defendant's favor? The jury's substantive ruling in Blueford's case is not different in any material way from these variations.

A. History Demonstrates the Dangers of "Acquittal Avoidance."

History supports the argument that the judge cannot engage in "acquittal avoidance," but must accept an acquittal with which he does not agree. In *William Penn's Case* in 1670, the judge refused to accept the jury's not guilty verdict and even threatened to cut the throat of the jury foreman. The judge also had Penn chained to the floor when he argued that the refusal to accept the jury verdict denied him "Justice." The judge ordered the jury locked up for two days "without Meat, Drink, Fire, and Tobacco," but the jury clung to its not guilty verdict. The judge ultimately accepted the acquittal but ordered the jurors imprisoned until they paid a harsh fine. See William Penn, *The Peoples Liberties Asssrted in the Tryal of William Penn and William Mead, 1670*.

The jury foreman, Bushell, petitioned for a writ of habeas corpus. In *Bushell's Case*, 6 How. St. Tr. 999 (Common Pleas 1670), the ten judges on the Court of Common Pleas unanimously held that a trial court lacked the authority to punish the jury on account of its verdict. Today, *Bushell's Case* is regarded as a watershed case that established the jury's independence from the court and thus elevated jury trial to a fundamental right. While this is true

enough, it misses the deeper point, which is *why* a jury verdict of acquittal cannot be impeached. Chief Justice Vaughan's opinion noted that if judges could tell the jury how to decide a case, there would be no point in having juries at all. Vaughan could have stopped there but he made another, more fundamental, point: a jury finding that the evidence is not "full and manifest" is unimpeachable *because it is true*. *Id*. at 1006. Just as two barristers could "deduce contrary and opposite conclusions out of the same case in law . . . two men [could] infer distinct conclusions from the same testimony," and thus no reason exists to prefer the court's view over the jury's. *Id*.

When the forewoman of Blueford's jury declared in open court, in response to the judge's call for the "count," that the jury was "unanimous against" the capital and first-degree murder charges, those words represented the *truth* about Blueford's substantive innocence on those charges. It did not matter that the verdict form was not filled in or "entered of record." And the trial judge lacked the authority at that point to ignore the jury's acquittals by declaring a mistrial on those counts before the jury was allowed to return a partial verdict of acquittal. *See* Part II *infra*.[7]

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[7] For other lessons from history, consider *Ireland's Case*, 7 How. St. Tr. 79 (1678). Five defendants were tried for conspiring to murder Charles II. At the close of the evidence, the judge advised the jury that the Crown had presented insufficient evidence to sustain the charges against two of the defendants. But instead of allowing these two defendants to go free, the judge returned them to prison "until more proof may come in." *Id.* at 120. They were later retried, convicted, and executed; their plea of double jeopardy was rejected "because there was no condemnation or acquittal" of them in the first trial. *Id.* at 316-17.

B. This Court Repeatedly Has Held That "Acquittal Equivalents" Must Be Given Effect Under the Double Jeopardy Clause.

This Court's double jeopardy jurisprudence embodies the lessons of history. The Court repeatedly has emphasized that a ruling that amounts to an acquittal must be treated as such even though no verdict form (let alone one that had been "entered of record") showed the words "not guilty." In *Burks v. United States*, 437 U.S. 1 (1978), for example, the jury convicted, the judge refused to grant a new trial on the ground of insufficient evidence, and Burks appealed. The Court of Appeals agreed with Burks that the evidence was insufficient to convict and remanded to the district court to determine whether to order a new trial or enter an acquittal.

In a unanimous opinion by Chief Justice Burger (Justice Blackmun not participating), this Court held that the Double Jeopardy Clause precluded a new trial. Relying in part on *Martin Linen*, the Court held that the Court of Appeals' judgment was "a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 10. This Court emphasized that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials." *Id.* at 11. Even though no jury form stated "not guilty," the Court looked to the *substance* of what had happened and refused to let the State have another bite at the apple.

Burks also relied, in part, on *Green v. United States*, 355 U.S. 184 (1957), another case in which there existed no completed jury form with a "not guilty" verdict on it. Green was charged with arson and first-degree murder. The judge instructed the jury that it could find Green guilty of second-degree murder as a necessarily included offense of first-degree murder. The jury returned a guilty verdict of second-

degree murder and arson, but "[i]ts verdict was silent" on the first-degree murder charge. *Id.* at 186. After Green's convictions were reversed on appeal, the government sought to try him again for first-degree murder. This Court held that another trial on that charge would violate the Double Jeopardy Clause:

> "Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter." *Id.* at 190.

This Court re-affirmed and strengthened *Green* in *Price v. Georgia*, 398 U.S. 323 (1970), which unanimously held that a conviction of a lesser-included offense, manslaughter, barred a second trial for the greater offense, murder. As in *Green*, the jury verdict was silent on the greater offense. *Price* made plain that the silence on the greater charge was meaningless: "[T]his Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, *whether that acquittal is express or implied* by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge." *Id.* at 329 (emphasis added).

Blueford's case is even more compelling than *Green* or *Price*. Rather than "implied" innocence through jury silence on the greater charge, here the jury forewoman announced that the jury "was unanimous against" both capital and first-degree murder. But if that declaration is ignored, Blueford's case is indistinguishable from *Green* and *Price*. The Blueford jury, like the jury in *Price*, had a "full opportunity to return a verdict on the greater charge," *id.*, and determined, in the words of the jury instructions, that the State had failed to "sustain" those charges and that

"reasonable doubt" remained, ASCR at 806-08 (quoting jury instructions). Because a jury already has "refused to convict" on these charges, *Green*, 355 U.S. at 190, the Double Jeopardy Clause bars a retrial on either capital or first-degree murder.

Smith v. Massachusetts, 543 U.S. 462 (2005), further supports treating the jury's actions here as an "acquittal." After the prosecution rested, the defense moved for acquittal on the firearm-possession count of a multi-count indictment. The trial judge orally "granted the motion. . . . [and] marked petitioner's motion with the handwritten endorsement 'Filed and after hearing, Allowed,' and the allowance of the motion was entered on the docket." *Id*. at 465. At the close of the trial, the prosecutor asked the judge to reverse her ruling on the motion for acquittal. The judge "agreed" to reverse her ruling and announced that she was "allowing the firearm-possession count to go to the jury." *Id*.

This Court held that the mid-trial ruling was an "acquittal" even though trial continued on other counts. "It is of no moment that jeopardy continued on the two assault charges, for which the jury remained empaneled. Double-jeopardy analysis focuses on the individual 'offence' charged, and our cases establish that *jeopardy may terminate on some counts even as it continues on others*." *Id*. at 469 n.3 (emphasis added, citations omitted).

In *Smith*, substance triumphed over form once again, as it should in Blueford's case. What happened here was a unanimous pronouncement by the jury in open court that Blueford is substantively innocent of capital and first-degree murder. That judgment should be respected as the acquittal it is.

Unlike the practice in Arkansas, juries in some states are instructed that they may move back and forth between the issues and varying degrees of guilt until they have agreed upon an outcome. The issues in "soft transition" states like

these may be different and more difficult than in "hard transition" states like Arkansas, where the jury is required to find the defendant not guilty of the greater offenses before being allowed to consider lesser-included charges. *See, e.g.*, *State v. Tate*, 773 A.2d 308, 321-22 (Conn. 2001) (concerns about "tentative nature" of jury's decisions in "soft transition" states "do not surface" in hard-transition states, which "require[] the jury to reach a partial verdict" on the greater charges before turning to the lesser-included offenses). Nor does this case present a situation in which the trial court in the first case took pains to prevent the jury from disclosing any of its deliberations or votes on the various charges—another relevant (though not dispositive) factor.[8]

Where a jury has expressly been instructed that it may only consider lesser-included offenses if it has first determined that the State has failed to "sustain" its burden of proof on the greater offenses, *see* ASCR at 806-08, the very fact of jury deliberation on a lesser-included offense makes the case equivalent to a conviction of a lesser-included offense as in *Green* and *Price* and is, without more, a substantive acquittal on the greater charges. Where that has occurred, jeopardy has terminated on those charges.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S MISTRIAL DECISIONS.

Green relied on a second rationale for holding that a retrial for first-degree murder was barred by the Double Jeopardy Clause after conviction of a lesser-included

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[8] Compare *Renico v. Lett*, 130 S. Ct. 1855 (2010), allowing a retrial after a mistrial where the trial court had told the deadlocked jury that "I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict, or not?" *Id.* at 1861. When the foreperson answered in the negative, the judge declared a mistrial. *Id.*

offense—that "the jury was dismissed without returning any express verdict on that charge and without Green's consent." 355 U.S. at 191. To be sure, mistrials based on hung juries are a long-established exception permitting the State to re-prosecute when the first jury has had a chance to convict and failed to do so. *See United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). Blueford does not dispute that the mistrial on the lesser charges permits retrial on them.

Justice Story's opinion in *Perez* coined the term "manifest necessity" to explain why a retrial is often permissible after a hung jury. *Id.* In *Arizona v. Washington*, 434 U.S. 497 (1978), this Court interpreted its "manifest necessity" precedents as establishing "that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Id*. at 506. The "degrees of necessity" are on a spectrum:

> "At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence. Although there was a time when English judges served the Stuart monarchs by exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict, the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice." *Id*. at 507-08 (citation omitted).

This Court repeatedly has condemned the practice of acquittal avoidance, emphasizing that this strategy cannot provide the "manifest necessity" needed to end the first trial and justify a new trial on the same charges. *See, e.g.*, *Illinois v. Somerville*, 410 U.S. 458, 469 (1973) (Double Jeopardy Clause forbids use of mistrial "as a post-jeopardy continuance to allow the prosecution an opportunity to

strengthen its case"); *United States v. Jorn*, 400 U.S. 470, 486 (1971) (plurality op. of Harlan, J.) ("lack of preparedness by the Government to continue the trial directly implicates policies underpinning . . . the double jeopardy provision"); *Downum v. United States*, 372 U.S. 734, 737 (1963) ("The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy.") (citation and internal quotation marks omitted).

The mistrial on the capital and first-degree murder counts in Blueford's case presents an even *more* "extreme" and "abhorrent" situation than envisioned in *Washington* and the other cases cited above. Those cases addressed situations in which judges and prosecutors were simply *predicting* that the jury might acquit and acted to avoid the *risk* of such an outcome. Here the jury openly announced that it was "unanimous against" guilt on the murder charges—that it "refused to convict" on those charges. *Green*, 355 U.S. at 190. The prosecutor then sought and obtained a mistrial that will allow him to "buttress weaknesses in his evidence" and "strengthen [his] case" before a new jury on these identical charges. *Washington*, 434 U.S. at 507; *Somerville*, 410 U.S. at 469.

The Arkansas Supreme Court in effect held that it was manifestly necessary for the trial judge to grant a mistrial on all counts. But it was not necessary in any meaning of that term. The jury was not hung on all counts. It was "unanimous against" guilt on capital and first-degree murder.

Where a State like Arkansas requires a unanimous jury decision to acquit on a greater-included count before the jury can even consider lesser-included counts, the State's failure to accept partial verdicts in appropriate cases cannot constitute the "manifest necessity" for a mistrial that permits

retrial on the identical charges on which the jury voted to acquit. Following *Washington*, no retrial should be permitted on those charges. We do not want to return to English law under the Stuart monarchs.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S COLLATERAL ESTOPPEL DECISIONS.

Arkansas also is collaterally estopped from retrying Blueford on the capital and first-degree murder issues. "[C]ollateral estoppel in criminal trials is an integral part of the protection against double jeopardy . . . ." *Harris v. Washington*, 404 U.S. 55, 56 (1971). In *Ashe v. Swenson*, 397 U.S. 436 (1970), several masked men robbed six poker players. Ashe was charged with robbing one player, and the jury acquitted him. This Court held that this acquittal barred a trial for the robbery of another poker player. The Court conceded that the robbery of each player was a different offense, but Ashe had argued in the first trial that he had no connection to the robbery. Thus, when the jury acquitted, it necessarily found that Ashe had not been part of the robbery—a fact critical to culpability that the State would try to prove again in a second trial. The question, this Court said, was "whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." *Id*. at 446. The answer was "no."

Blueford makes an equally compelling collateral estoppel argument. Notice that Ashe, like Blueford, lacked a formal verdict of not guilty on the pending charge. What Ashe had was a *finding* by a jury that he was not one of the robbers. What Blueford has here is a *finding* by the jury that the State did not prove the facts critical to conviction on capital and first-degree murder. The State may not "hale him before a new jury to litigate that issue again." *Id.*; *see also Turner v. Arkansas*, 407 U.S. 366, 369 (1972) (jury's general

acquittal of murder implicitly but "logical[ly]" determined that defendant had not been "present at the scene of the murder and robbery"; collateral estoppel prevented subsequent prosecution on any charge dependent on defendant's presence at the scene).

That the State properly got a mistrial on the lesser counts changes nothing in the *Ashe* calculus, as *Yeager v. United States*, 129 S. Ct. 2360 (2009), makes plain. *Yeager*, unlike *Ashe*, "involve[d] an acquittal on some counts and a mistrial declared on others," but "[t]he reasoning in *Ashe* is nevertheless controlling because, for double jeopardy purposes, the jury's inability to reach a verdict on [some] counts was a nonevent and the acquittals on [other] counts are entitled to the same effect as Ashe's acquittal." *Id*. at 2367; *see also id.* at 2368-69 ("the consideration of hung counts has no place in the issue-preclusion analysis" of the effects of the *acquitted* counts; "a jury verdict that necessarily decided [a particular] issue in [defendant's] favor protects him from reprosecution for any charge for which that is an essential element").

Although the dissenting Justices in *Yeager* disagreed with the Court that the acquittals necessarily resolved the hung counts in the defendant's favor, *see id.* at 2374-75 (Alito, J., dissenting), no one suggested that Yeager could be retried on the *acquitted* counts. Yet that is what is happening to Blueford. Under *Yeager*, the mistrial on the manslaughter count in Blueford's case is irrelevant to the collateral estoppel effects of the jury's unanimous determination of his innocence on the more serious charges. The Arkansas courts treated the mistrial as the event that determines whether the acquittals are valid, precisely the opposite of what *Yeager* requires. The facts underlying capital and first-degree murder have been "necessarily decided" in Blueford's favor, *id.* at 2366, and the Double Jeopardy Clause forbids re-litigating them.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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