No. 10-1320

In the Supreme Court of the United States

ALEX BLUEFORD,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Writ of Certiorari to the Arkansas Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Double Jeopardy Clause bars retrial of Alex Blueford for capital murder and first-degree murder.

The essential fact in this case is that, as stated by both the Arkansas trial court and the Arkansas Supreme Court, "the jury foreperson was explicit that the jury was unanimous in voting against finding Defendant Blueford guilty of capital murder and first degree murder." Pet. App. 6a, 15a-16a.

The State argues that the unanimous jury votes against guilt have no Double Jeopardy consequences. The State's theory is that, because (1) the trial court refused to allow the jury to give effect to its votes against guilt in verdict forms or by some other means and (2) the court ordered the jury to continue deliberating without that opportunity, the jury's votes against guilt have no Double Jeopardy effect.

The State's proposed rule of law conflicts with the language and core purpose of the Double Jeopardy Clause, as well as with decisions of this Court recognizing that allowing acquittal avoidance would eviscerate this fundamental constitutional right.

It is significant for Double Jeopardy purposes, moreover, that the jury had been instructed that it could reach a lesser offense only if it had a reasonable doubt on greater offenses—and that the jury reported, in addition to the unanimous votes against guilt on murder, a deadlock on manslaughter, a lesser included offense of the murder charges. Even if those sequenced instructions had not been given, it likewise is significant, under *Green* v. *United States*, 355 U.S. 184 (1957), and *Price* v. *Georgia*, 398 U.S. 323 (1970), that the jury reported its deadlock on the

lesser offense while refusing to convict on the greater offenses.

Nor is it irrelevant for Double Jeopardy purposes that the State, after successfully preventing the unanimous votes against guilt from being given effect, seeks a retrial of those very charges after a trial in which the State's circumstantial case on capital murder and first-degree murder was demolished by the defense. See Pet. Br. 3-8. *Blueford* presents a paradigmatic case of a specter that, this Court has emphasized, the Double Jeopardy Clause prevents—allowing the government to evade the acquittal consequences of a weak case and refine its efforts in a retrial with knowledge of the weaknesses of the government's case.

As explained in Petitioner's opening brief, permitting the retrial of Alex Blueford for capital murder and first-degree murder violates the Double Jeopardy Clause for three separate reasons: (1) the jury announced that it had unanimously voted to acquit him; (2) the structure of the instructions required the jury to find him not guilty on greater offenses before proceeding to lesser offenses; and (3) under *Green* and *Price*, the jury's explicit deadlock on a lesser-included offense and failure to convict on greater offenses bar re-prosecution on the greater offenses. In addition to disputing these points, the State defends the manifest necessity for a mistrial on the murder charges by asserting waiver and perceived necessity. Both arguments are unavailing.[1]

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[1] Petitioner does not dispute that he may be retried on manslaughter and negligent homicide.

I. The Jury Explicitly Declared Its Vote of Not Guilty on Capital Murder and First-Degree Murder.

The jury's explicit statement of its unanimous votes against guilt is not subject to dispute:

- In open court, on the record, the trial court asked the jury foreperson ("Juror Number One") for the jury's "numbers * * * on capital murder." App. 64.
- The foreperson replied, "That was unanimous against that." *Ibid.*
- The trial court asked the foreperson about the jury's vote regarding "murder in the first degree." *Id.* at 65.
- The foreperson again replied, "That was unanimous against that." *Ibid.*
- The trial court then asked for the count on "[m]anslaughter." *Ibid.*
- The foreperson replied, "Nine for, three against." *Ibid.*

The State maintains that the foreperson's reports lacked sufficient clarity, formality, and finality to have Double Jeopardy consequences. The State is mistaken.

Clarity — The State's suggestion that the foreperson's statement was not sufficiently clear is not tenable. The State asserts that "there is no confirmation in the record that [the foreperson's] report accurately reflected each juror's vote or reasons for it." State Br. 18. The State also maintains that "the foreperson's report that the jury was unanimously

against the murder charges is inconsistent with the written message sent by the jury that it 'cannot agree on any one charge.'" *Ibid.* (quoting App. 64). Neither contention undermines the clarity of the foreperson's statement.

The record provides no reason to doubt the foreperson's explicit report. The State's apparent suggestion that additional "confirmation in the record" is necessary is supported neither by the law nor by the transcript. Indeed, the State did not challenge the clarity or accuracy of the foreperson's report.[2] The State's objection that the foreperson's report lacked the "reasons for" the jury's unanimous votes (State Br. 18) is bizarre: a jury has no obligation to explain the "reasons for" its votes.

The State's further suggestion that the foreperson's statement was not sufficiently clear because the jury previously had sent a note about its inability to agree similarly is unavailing. *After* receiving that note from the jury, the trial judge asked for the jury's votes on each charge and received the requested information. Again, moreover, both the trial court and the Arkansas Supreme Court recognized that there was no lack of clarity in the foreperson's report (Pet.

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[2] None of the other jurors present during the foreperson's report of their "unanimous" vote against guilt on the murder charges disputed it. In contrast, in open court during deliberations, jurors freely interjected on other points. See, *e.g.*, Arkansas Supreme Court Record ("ASCR") 861 (Juror Four asks about review of evidence); *id.* at 866 (Juror Five comments on cell phone availability). The State never asked to poll the jury about the foreperson's report.

App. 6a, 15a-16a), and neither suggested that the jury's previous note undermined that clarity.

Formality — Four points refute the State's second contention—that the foreperson's statement lacked formality (because it was merely a "colloquy," State Br. 16, or a "report," *ibid.*).

First, this Court has been clear that a lack of formality does not prevent a determination of innocence from having Double Jeopardy effect—whether by a jury, as in *United States* v. *Ball*, 163 U.S. 662, 671 (1896) (the fact that a jury verdict was not embodied in a judgment does not weaken its Double Jeopardy consequences), or by the court, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571-572 (1977) ("label" does not determine whether ruling is acquittal in substance). Putting the *timing* of the foreperson's statement temporarily to one side (see *infra*, 8-11), there can be no doubt that the explicit account of the jury's unanimous vote against guilt may not be disregarded simply because it lacked additional indicia of formality. "[F]orm is not to be exalted over substance" in considering Double Jeopardy consequences. *Sanabria* v. *United States*, 437 U.S. 54, 66 (1978) (citation omitted).

Second, the announcement of the unanimous jury votes was far from casual. It represented the foreperson's formal response to the court's explicit inquiry regarding the jury's votes on capital murder and first-degree murder. App. 64-65. This formal response was in open court and on the record. *Ibid.*

Third, the State is particularly ill-positioned to argue that the report of the jury's vote lacked sufficient formality because the State played a major role

in preventing additional formality. Petitioner requested greater formality through the submission of verdict forms that would have allowed the jury to record the votes it had expressed. App. 67-68. The State immediately "argue[d] against that," *id.* at 68, and it thus rings hollow for the State now to demand additional formality.

Fourth, the State's formality objection raises precisely the dangers of acquittal avoidance that this Court repeatedly has refused to countenance. See generally *Arizona* v. *Washington*, 434 U.S. 497, 507 (1978) ("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.") (footnote omitted).

In light of the Double Jeopardy Clause's protection against the "abhorrent" practice of acquittal avoidance, the flimsiness of the State's case on the murder charges is particularly noteworthy. As explained in Petitioner's opening brief (at 3-5), the State's principal witness on causation (and on the corresponding inference about Petitioner's mental state and intent) was the state medical examiner who performed the autopsy, Dr. Adam Craig. Cross-examination and medical experts established that Dr. Craig, who had failed his board exams in anatomical pathology five times and had never passed them, badly botched the autopsy; he also had failed to consider leading articles establishing that Matthew McFadden's tragic injuries were entirely consistent with the accident described by Petitioner. *Id.* at 4-8.

The State says almost nothing about Dr. Craig's testimony. Instead, the State emphasizes Petitioner's changing accounts about what happened. But Petitioner testified at length about his conflicting stories, and the State vigorously cross-examined him. ASCR 644, 671-678. The jury heard his testimony (even, during deliberations, asking for and receiving an opportunity to listen again to the tape of Petitioner's final police interview, *id.* at 866) and voted against guilt on the murder charges.

The State also seeks to invoke the testimony of hospital physicians. State Br. 3-4. There can be no dispute, however, that the State's causation argument—its theory that the injuries were inflicted by Petitioner slamming McFadden to the ground—relied principally on Dr. Craig's autopsy and testimony. See, *e.g.*, ASCR 534 (Detective Hudson: "fair to say" that "what got the wheels in motion in this case was driven by the autopsy").[3] Nor was the jury alone in doubting that the State had proven capital murder: when the State rested, the trial judge observed that "certainly the State's case is circumstantial at best and probably this may be a lesser included offense case." *Id.* at 610.[4]

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[3] The State's selective recounting of evidence ignores testimony by hospital physicians consistent with Petitioner's explanation of the accident. See, *e.g.*, ASCR 273-274, 571.

[4] The State notes (at 2) that Petitioner did not contact McFadden's mother after an initial encounter, but it does not mention Petitioner's testimony that the woman's mother—McFadden's grandmother—asked him not to contact the mother. ASCR 666.

It thus may be no surprise that the State flatly opposed any effort to allow the jury to express again its unanimous votes on the murder charges and that the State instead requested a mistrial on all charges. App. 68. But the Constitution prohibits such acquittal avoidance, despite a claim of inadequate formality.[5]

Finality — The State's third justification for ignoring the foreperson's announcement of the jury's unanimous votes—finality—also cannot carry the day. The State's suggestion (at 18) that the foreperson's report was "anything but final" regarding murder is incorrect. The foreperson's statement was the last word from the jury, on this record, regarding the capital murder and first-degree murder charges; accordingly, it was the final statement on those charges that the jury was allowed to render in this case. Again, moreover, it was the State that objected—successfully—to enabling the jury to provide any further information on the capital murder and first-degree murder charges. The jury's final word on the murder charges was the foreperson's announcement of the unanimous votes "against guilt."[6]

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[5] See, *e.g.*, *United States* v. *DiFrancesco*, 449 U.S. 117, 128 (1980); *Burks* v. *United States*, 437 U.S. 1, 11 (1978); *Ashe* v. *Swenson*, 397 U.S. 436, 447 (1970).

[6] The State concedes that "[t]his might be a more difficult case if the jury reported at the *end of deliberations* that it had voted unanimously against guilty on the murder offenses but was hung on the manslaughter offense." State Br. 19-20. As the case comes to the Court, however, that is exactly how it should be viewed: the jury's report of its unanimous votes was the jury's last word on this subject.

The State claims that the jury might have changed its mind and (notwithstanding the glaring weaknesses in the State's case) gone on to abandon its unanimous votes against guilt on the murder charges. Nothing in the record provides a shred of evidence to support this speculation. The State points to the jury's general statement after further deliberation that it was deadlocked. State Br. 21; see also App. 69. But the jury was prevented by the court (at the State's behest, *id.* at 68) from saying anything further about the murder charges. In the jury's view, moreover, it clearly was consistent to report a deadlock and to have unanimous votes against guilt on capital murder and first-degree murder. That is exactly what had happened when the judge made his formal inquiry about the votes. *Id.* at 64-65. The record provides no reason to indulge the State's speculation that the jury might have changed its previously expressed unanimous votes against guilt on the murder charges—which were reported to the court only thirty-one minutes before the judge declared a mistrial and dismissed the jury. See *id.* at 67 (jury sent back after its report of unanimous votes against guilt at 9:28 p.m.); *id.* at 69 (court declares mistrial at 9:59 p.m.).

In support of its finality point, the State suggests that the jury simply deadlocked—that its process must be treated as a traditional black box, and that a retrial on all charges thus is appropriate. See, *e.g.*, State Br. 19. The State overlooks the important point, however, that the trial court's inquiry about the jury's votes compelled disclosure of the jury's votes on the murder charges. That on-the-record inquiry cannot now be stuffed back into the black box and ignored. When, as in this case, there is nothing

to undermine or supersede the clarity or accuracy of such a jury report, and no reason on the record to think that it changed, the jury report must be given effect.

It may well be that a judge has no duty to undertake an inquiry of the kind undertaken here. Cf. *Renico* v. *Lett*, 130 S. Ct. 1855, 1861 (2010) (trial judge told jury: "I don't want to know what your verdict might be, or how the split is"). But, when a judge asks a jury for its vote on particular charges and receives a jury's answer of unanimous votes of not guilty, and when nothing subsequently undermines or supersedes the jury's explicit response, the colloquy has Double Jeopardy consequences and may not be ignored under the banner of the jury's black box.[7]

For similar reasons, the State's justification for the refusal to give the jury verdict forms is flawed. Like the trial court, the State suggests that the submission of such forms would have been "changing horses in the middle of the stream" and would have led to "a mistrial." App. 68; State Br. 7, 39-40. But when the court formally asked the foreperson for the jury's votes—and when the foreperson announced

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[7] See generally *Smith* v. *Massachusetts*, 543 U.S. 462, 474-75 (2005) (although state has discretion to structure method for acquittal motions, state's choice has Double Jeopardy consequences); *Sanabria*, 437 U.S. at 66 (although district court's ruling was erroneous, erroneous ruling has Double Jeopardy consequences); *Commonwealth* v. *Roth*, 776 N.E.2d 437, 450 (Mass. 2002) (although judge should not have asked jury about vote on greater and lesser offenses, jury's response to erroneous inquiry has Double Jeopardy consequences).

that the jury had voted unanimously against guilt on the murder charges—the "stream" of the trial fundamentally changed. The foreperson, in open court, had made an announcement of considerable constitutional significance.[8]

In sum, the report of the jury's unanimous votes on capital murder and first-degree murder did not lack clarity or requisite formality; and it was the jury's last word on the subject on this record. The core principle of the Double Jeopardy Clause—that a defendant cannot be forced to run the gantlet a second time on charges for which a jury has found the defendant not guilty—protects Alex Blueford from a second trial on murder charges.[9]

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[8] The statement that a "mistrial" would have resulted from granting the defendant's request to allow the jury to record its expressed vote in a verdict form likewise is not tenable. Granting *the defendant's* request could not plausibly have led to a successful motion for a mistrial *by the defendant* on the ground that his request had been granted. The State also notes (at 39) that Petitioner did not initially object to the verdict forms submitted to the jury (although the State does not explicitly claim waiver on this point). That observation also is unavailing. Whether through verdict forms or some other means, once the court had received the jury's reports of unanimous votes against guilt on murder, it was obligated either to take some action in response or to accord Double Jeopardy consequences when the State sought retrial on those charges.

[9] Amici erroneously suggest that giving Double Jeopardy significance to the jury's explicit report would conflict with federal procedure. State Amici Br., 3-7. The cited cases are inapposite. They involve either violations of Fed. R. Crim. P. 31 (which includes a permissive provision on

II. The Acquittal-First Instructions Bar Retrial on the Murder Charges.

The jury's announcement that it was deadlocked on manslaughter has Double Jeopardy consequences for a separate reason: the jury instructions prevented the jury from reaching manslaughter unless it acquitted on capital murder and first-degree murder. See Pet. Br. 24-30.

The State makes two arguments. First, it contends that Arkansas's jury instructions are not truly "acquittal first" instructions. Second, it contends that, in any event, the Arkansas instructions permit the jury to "step back" and reconsider a determination of not guilty on greater offenses.

The State is incorrect that the Arkansas instructions are not "acquittal first" or "hard transition" instructions. They require acquittal on a greater offense before the jury may consider a lesser offense. According to the State, the acquittal-first characterization "elevates jargon that does not appear in Arkansas law over the actual instructions given." State Br. 21. The Arkansas Supreme Court, however, has described the jury instructions at issue in precisely those terms:

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jury polling) or problems that emerged when the jury was polled or the verdict read (or, in one instance, a decision of this Court in a civil case, to which the Double Jeopardy Clause is not applicable). None addresses the Double Jeopardy consequences of a clearly expressed jury announcement in open court of unanimous votes against guilt. Given the prominence of this federal argument by state amici, moreover, it is notable that the United States has not filed a brief supporting the judgment.

> "Before it may consider any lesser-included offense, the jury must first determine that the proof is insufficient to convict on the greater offense. *Thus, the jury must, in essence, acquit the defendant of the greater offense before considering his or her guilt on the lesser-included offense*." *Hughes* v. *State,* 66 S.W.3d 645, 651 (Ark. 2002) (emphasis added).[10]

The Arkansas Supreme Court also has explained that the instruction given to Blueford's jury "allows the jury to consider the lesser-included offense *only if* the jury has a reasonable doubt of the defendant's guilt on the charge of capital murder." *Porter* v. *State*, 191 S.W.3d 531, 534 (Ark. 2004) (emphasis added).

This characterization accords with the plain language of the instructions. In four separate pattern instructions, the court instructed the jury that the jury's determination of a reasonable doubt on the greater offense was a predicate to its proceeding to a lesser offense. The court instructed the jury that, *if* it had a reasonable doubt on the greater offense, then it could proceed to the lesser offense.[11] The State emphasized precisely that point—the requirement of a unanimous acquittal on a greater offense before consideration of the lesser offense—four times in its

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[10] The Arkansas Supreme Court cited *Hughes* below. Pet. App. 8a.

[11] See App. 51 ("*If* you have a reasonable doubt of the defendant's guilt on the charge of capital murder, you will consider the charge of murder in the first degree") (emphasis added); *id*. at 51-52.

closing arguments.[12] To the extent that the State suggests that the language does not require "acquittal first" because the instructions use the term "reasonable doubt" rather than "acquittal" (see State Br. 25), this Court's decisions reject the argument: as a matter of constitutional command, a reasonable doubt equates to acquittal. *Jackson* v. *Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970).

In addition, the jury in this case clearly understood the instructions with the meaning revealed by their plain language and confirmed by the Arkansas Supreme Court. See App. 65 (Foreperson: "We couldn't get past the manslaughter. * * * I thought we were supposed to go one at a time."). Juries are presumed to follow instructions, *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000), and this one plainly did so.

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[12] See App. 55 ("[B]efore you can consider a lesser included offense of capital murder, you must first, all 12, vote that this man is not guilty of capital murder before you can even move on to the lesser included offenses"); *ibid.* ("[Y]ou don't even get to this instruction [regarding first-degree murder] until all 12 of you are able to vote that you do not believe this man is guilty of capital murder"); *ibid.* ("if you all 12 vote that he is not guilty of murder in the first degree, then there is manslaughter"); *id*. at 59 ("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."); see also *ibid.* ("You never need to consider murder in the first degree. You never need to consider manslaughter. You never need to consider negligent homicide.").

Accordingly, despite the State's protestations, the jury instructions here fit comfortably in the category of "acquittal first" or "hard transition" instructions.[13]

The State's second contention fares no better. The sequenced structure of the instructions has no Double Jeopardy consequences because, the State speculates, the jury in this case might have reconsidered its not-guilty determinations on capital murder and first-degree murder. State Br. 25-26. But there is nothing in the record to indicate that the jury, in fact, did step back and reconsider in the thirty-one minutes between its expression of unanimous votes against guilt and the court's declaration of a mistrial.

The State emphasizes that the instructions do not explicitly prohibit a jury from stepping back and reconsidering after it has reached a determination of reasonable doubt on greater offenses. But the more pertinent linguistic point is that nothing in the instructions advises the jury that it may or should engage in such reconsideration. Instead, the instructions contemplate, as the Arkansas Court has authoritatively construed, that "the jury must, in essence, acquit the defendant of the greater offense before considering his or her guilt on the lesser-included offense." *Hughes,* 66 S.W.3d at 651. The

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[13] State courts often refer to hard-transition instructions as "acquittal first" instructions. See, *e.g.*, *People* v. *Richardson*, 184 P.3d 755, 764 n.7 (Colo. 2008). Federal courts similarly have understood instructions like those here to require not-guilty determinations before consideration of lesser offenses. See *United States* v. *Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978) (Friendly, J.); *United States* v. *Moccia*, 681 F.2d 61, 64 (1st Cir. 1982) (Breyer, J.).

State is asking this Court to read into the instructions a gloss never adopted by the Arkansas courts and not given to the jury in this case.[14]

The court instructed the jury that it could proceed to a lesser offense only if it found against guilt on a greater offense. Accordingly, when the jury reported that it had proceeded to a lesser offense and deadlocked on that lesser offense (and when nothing superseded that report), the Double Jeopardy Clause barred retrial on the greater offenses.

III. Double Jeopardy Bars Retrial on the Murder Charges Because the Jury Had a Full Opportunity to Convict on the Murder Charges.

Green and *Price* held that a retrial could not proceed on a greater offense after a conviction on a lesser-included offense and a failure to convict on greater offenses (even though the conviction on the lesser offense subsequently was reversed). Here, Double Jeopardy likewise prohibits retrial after the jury's deadlock on a lesser-included offense and failure to convict on greater offenses.

The State maintains that *Green* and *Price* are inapplicable for two reasons. First, the State again

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[14] As pointed out in our opening brief (at 18 n.5), the jury could have corrected or changed its announcement, but it did not do so. In suggesting that Petitioner's position depends on the proposition that subsequent convictions would have been impermissible (if they had occurred), the amici States are incorrect. See State Amici Br. 11. Amici also conflate two different propositions—what the instructions provide (*i.e.*, whether they include a "step-back" procedure) and what a jury may do.

argues that the foreperson's announcement must be disregarded. Second, the State argues that, even if that announcement is considered, the principles of *Green* and *Price* permit retrial. Both contentions are unavailing.

The State first contends yet again that the foreperson's announcement should be disregarded, but that argument falls short for the reasons previously discussed. See pages 3-11, *supra*.

The State next makes much of the difference between a deadlock and a conviction, and says that, in light of a deadlock's indefinite character, *Green* and *Price* are not applicable. State Br. 30-32. The State overlooks the fact, however, that this Court explicitly held in *Green* that its Double Jeopardy conclusion rested, not on the conviction on the lesser offense, but rather on *the failure to convict on the greater offense*: "Green's claim of former jeopardy is not based on his previous conviction for second degree murder but instead on the original jury's refusal to convict him of first degree murder." 355 U.S. at 190 n.11.

The State also emphasizes that "a charged offense and its lesser-included offenses are one charge" (State Br. 31), with the apparent suggestion that Double Jeopardy principles are different from what they would be in a context of separate counts. But the State ignores the Court's admonition that "[i]n substance the situation was the same as though Green had been charged with these different offenses in separate but alternative counts of the indictment. The constitutional issues at stake here should not turn on the fact that both offenses were charged to

the jury under one count." *Green*, 355 U.S. at 190 n.10.[15]

Furthermore, Blueford should not be put in a *less favorable* Double Jeopardy position because the State could not secure his conviction on manslaughter than if the State had been successful in securing that conviction. See Pet. Br. 32. The case for Double Jeopardy here is, if anything, stronger than in *Green* and *Price*, where the jury convicted on the lesser offense. Here, unlike in *Green* and *Price*, the government could not convince all jurors to convict even on the lesser offense. The State's position is that Blueford should be in a worse position as a result of the deadlock. Such a result makes no sense in light of the language and purpose of the Double Jeopardy Clause.[16]

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[15] See generally *Whiteaker* v. *State*, 808 P.2d 270, 274 (Alaska Ct. App. 1991) ("[W]hether the prosecutor charges the accused in multiple count indictment or single-count indictment for an offense involving lesser-included offenses, the defendant's double jeopardy rights are the same."); *State* v. *Tate*, 773 A.2d 308, 322 n.13 (Conn. 2001) (same).

[16] See *Stone* v. *Superior Court*, 646 P.2d 809, 815 n.5 (Cal. 1982) ("[P]rior to this case a criminal defendant who was actually convicted of * * * [a] lesser included offense was given greater double jeopardy protection than the arguably less culpable defendant who * * * was not convicted of anything. The convicted defendant clearly could not be retried on the greater charge; ironically, it is here contended that the defendant whose jury deadlocked only on the lesser offense could be retried even on the greater charged offense.").

Here, the jury explicitly deadlocked on the lesser offense (manslaughter) and, as in *Green* and *Price*, refused to convict on the greater offenses (the murder charges); here, as in *Green* and *Price,* the jury "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Green*, 355 U.S. at 190-91. As in *Green* and *Price,* the Double Jeopardy Clause bars retrial on the greater offenses.

IV. No Manifest Necessity Exists for a Mistrial on the Murder Charges.

In light of the foreperson's explicit statement of a deadlock on a lesser offense and the refusal to convict on capital murder and first-degree murder, this case presented no "manifest necessity" for a retrial on the murder charges. See Pet. Br. 28-30, 32-33; see generally *United States* v. *Perez*, 9 Wheat. 579 (1824). The State maintains that this argument was waived and that it is erroneous. The State is incorrect on both.

First, regarding waiver, the State suggests (at 34) that Petitioner "consented to the mistrial on the entire case." The record is clear, however, that Petitioner's position was that a mistrial was appropriate *only if the jury was given an opportunity to proceed with its unanimous acquittal votes through verdict forms*:

> "[Petitioner's counsel]: Your Honor, we would ask that the jury be given verdict forms and that they fill out verdict forms for those counts that they have reached a verdict on. *And if there remains a hung jury on the remaining*

> *counts, then so be it.*" App. 67 (emphasis added).

The straightforward reading of Petitioner's contemporaneous request is that Petitioner agreed to a mistrial on the lesser offenses so long as the jury was permitted to express its votes on the murder charges in a verdict form.[17] The fact that Petitioner did not renew this request, after the trial court had flatly rejected it, when the trial court dismissed the jury thirty-one minutes later does not in any way undermine the validity, force, or effect of Petitioner's expressed position.[18] The Arkansas Supreme Court, moreover, did not rely on any finding of waiver, and did not hold that waiver prevented its discussion and analysis of the merits. See Pet. App. 12a-14a. Petitioner did not waive an objection to retrial on the murder charges.

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[17] See also App. 69 (Petitioner's Counsel: "We are not asking for a mistrial at this point * * *.").

[18] Even if Petitioner's counsel had been silent regarding the mistrial—which she was not, App. 67—silence, in the context of a mistrial, is not consent. See 6 Wayne R. LaFave et al., *Criminal Procedure* § 25.2(a) & n.9 (3d ed. 2007) ("Mere silence is a far cry from consent or waiver," especially when a defendant has previously "provided the court with [an] alternative to mistrial.") (citation omitted); see also *United States* v. *Jorn*, 400 U.S. 470, 486-487 (1971) (Harlan, J., plurality) (Double Jeopardy barred retrial after *sua sponte* mistrial despite defendant's lack of objection) *id*. at 488-489 (concurrence in judgment). The State erroneously relies (at 33) on *Oregon* v. *Kennedy*, 456 U.S. 667 (1982), in which the defendant *requested* a mistrial, a context in which "quite different principles" apply. *Id*. at 672.

On the merits, the State proceeds from a flawed premise. The State argues that "[p]etitioner is essentially arguing that the Constitution mandates partial verdicts" by contending that "the trial judge lacked the authority to order a mistrial of the entire case" because there was no manifest necessity on the murder charges. State Br. 34. In the State's view, it follows from Petitioner's argument that the Double Jeopardy Clause "always requires obtaining partial verdicts" in cases with lesser-included offenses. *Id.* at 38-39. This characterization is incorrect.

As Petitioner explained in the opening brief, his position rests, not on a right to a "partial verdict" in all circumstances, but rather on the fact that the record revealed no manifest necessity for a mistrial on the murder charges (even if the acquittal and acquittal avoidance consequences of the jury's announcement of unanimous votes against guilt were not dispositive). See Pet. Br. 28-30, 32-33. Here, the jury explicitly announced its deadlock on a single lesser offense (manslaughter) and refused to convict on the greater offenses (the murder charges). In the circumstances presented here, in which the trial court's inquiry elicited a jury announcement of deadlock only on manslaughter, the trial court simply was not faced with the situation of a reported deadlock on the murder charges. The trial court thus was not presented with the "'classic example'" for a mistrial on the murder charges (*Renico*, 130 S. Ct. at 1863 (quoting *Downum* v. *United States*, 372 U.S. 734, 736 (1963)))—a deadlock on those charges. With regard to the murder charges, the record thus does not provide an adequate basis for denying a defendant his "valued right to have his trial completed by a particu-

lar tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949).

The State erroneously says that a conclusion of no manifest necessity in this case would require a right to jury inquiries on "partial verdicts," even in contexts beyond an on-the-record inquiry of a kind like that which occurred here. State Br. 34-35. But this case does not require the Court to resolve the issue of manifest necessity—or, in the State's parlance, "partial verdicts"—in contexts lacking such an on-the-record inquiry. A conclusion of no manifest necessity on the murder charges requires only application of the settled principle that there must be a "high degree of necessity," *Renico*, 130 S. Ct. at 1858, before the determination that a mistrial and retrial are appropriate: the usual predicate for that determination—a deadlock on the charges in question—is not presented by the jury's announcement of a deadlock only on the manslaughter charge.[19]

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[19] Even if the general issue of a duty of judicial inquiry on greater and lesser offenses were considered, the State and its amici misapprehend the nature of such an inquiry. First, contrary to their suggestion (*e.g.*, State Br. 36-37), state courts in hard-transition jurisdictions that mandate such an inquiry do so, not as a matter of state discretion, but rather pursuant to the Double Jeopardy Clause. See, *e.g.*, *Tate*, *supra*; *Stone*, *supra*; *Whiteaker*, *supra*; *State* v. *Fielder*, 118 P.3d 752, 758 (N.M. Ct. App. 2005). Second, inquiring about a jury's vote regarding greater and lesser offenses is an inquiry into a jury's votes, not its reasons, and thus is neither an impermissible intrusion into the jury's domain, *Tate*, 773 A.2d at 324 n.15, nor a disfavored "special verdict" (State Br. 34-36). Third, this Court has emphasized that Double Jeopardy principles are the same

CONCLUSION

"A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the constitution establishes for the conduct of a criminal trial." *Jorn*, 400 U.S. at 479 (Harlan, J.). The Constitution protects Alex Blueford from a second prosecution on the charges for which a jury already has openly and unanimously declared him not guilty. The judgment should be reversed.

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in the contexts of greater-and-lesser offenses and separate counts. See *Green*, 355 U.S. at 190 n.10 (same Double Jeopardy principles apply to multiple counts and to greater and lesser offenses). It is, of course, common and routine to inquire about a jury's votes on different counts. See, *e.g.*, *Selvester* v. *United States*, 170 U.S. 262, 267 (1898) ("Each count is, in fact and theory, a separate indictment," and subject to separate votes and consequences) (internal quotation marks omitted). Asking about votes on greater and lesser offenses is no more intrusive than asking about votes on separate counts.

Respectfully submitted,

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