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

BRIEF FOR PETITIONER

WILLIAM R. SIMPSON, JR.
SHARON KIEL
CLINT MILLER
SIXTH JUDICIAL DISTRICT (ARKANSAS) PUBLIC DEFENDERS OFFICE
201 S. Broadway, Ste. 210
Little Rock, AR 72201
(501) 340-6120

CLIFFORD M. SLOAN
Counsel of Record
GEOFFREY M. WYATT
DAVID W. FOSTER
MOSHE SPINOWITZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

QUESTION PRESENTED

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

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JURISDICTION

The Arkansas Supreme Court rendered judgment on January 20, 2011, and denied rehearing on February 24, 2011. Pet. App. 1a, 17a. A petition for certiorari was filed on April 25, 2011, and granted on October 11, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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

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

STATEMENT OF THE CASE

The state of Arkansas charged Alex Blueford with capital murder. It accused him of intentionally causing the death of Matthew McFadden, Jr., the 20-month-old son of his girlfriend Kimberly Tolbert. App. 42; Arkansas Supreme Court Record ("ASCR") at 115-119. At trial, the state also charged lesser-

included offenses of first-degree murder, manslaughter, and negligent homicide. [1]

1. **The trial.** Evidence at trial established that, on the morning of November 28, 2007, Blueford, his girlfriend Tolbert, and Tolbert's son McFadden awoke and prepared for the day. ASCR at 121-122. The three had been living together at the house of Stacy Clay, Blueford's friend, for two months. *Id.* at 119-120. It was Tolbert's day off from work, and she had agreed to take her son's aunt to a doctor's appointment. *Id.* at 121. As he often had done in the preceding two months without incident, Blueford remained at home to watch McFadden. *Id.* at 123, 140-142. Tolbert testified that she had no reason to worry about leaving her son with Blueford. *Id.* at 139. Clay also remained in the apartment. *Id.* at 157-159.

After Tolbert left, Clay observed Blueford caring for McFadden. McFadden had been crying that morning, *id.* at 154-155, and Blueford attempted to calm him down, *id.* at 158. A short while later, according to Clay, Blueford and Clay both told McFadden to stop jumping on a pair of small mattresses on the floor that served as McFadden's bed. *Ibid.* Clay went into her room for ten to fifteen minutes, and, when she came out, she noticed that McFadden seemed to be sleeping in the bedroom. Based on her experience with her own children, Clay found it odd that McFadden had fallen asleep so quickly after being active, and she asked Blueford, who was in the living room, to check on him. *Id.* at

[1] The state waived the death penalty on the capital murder charge. App. 19.

159-160. Blueford went into the bedroom and reported that McFadden was sleeping. *Id.* at 160. Clay asked Blueford to check on McFadden again. *Ibid.*

Blueford again went into the room, returned with McFadden in his arms, and reported that McFadden was not breathing. *Ibid.* Clay tried unsuccessfully to wake McFadden. At Blueford's request, Clay immediately called 911 and sought help for the child. *Id.* at 161. Medical personnel arrived and confirmed that McFadden was having difficulty breathing. *Id.* at 619. They rushed him to the hospital, and, two days later, he died. *Id.* at 132.

What happened to McFadden during the ten to fifteen minutes when Clay was in her room alone was hotly disputed at trial. The state theorized that Blueford viciously injured McFadden by slamming him into the mattresses on the floor. *Id.* at 276. The state's case regarding the cause of death rested entirely on circumstantial evidence—principally, the autopsy report by Dr. Adam Craig, a state medical examiner. The state did not offer any evidence of previous abuse of McFadden by Blueford.

Dr. Craig was the state's primary witness at trial. Dr. Craig admitted that he is not board certified in anatomical pathology, despite five attempts to pass the board exam. *Id.* at 281-281A, 285-286. Dr. Craig nevertheless performs autopsies as part of his job as a medical examiner for the Arkansas State Crime Lab, and he performed the autopsy on McFadden. *Id.* at 282, 302-303. Based on that autopsy, he concluded that the cause of death was a "closed head injury." *Id.* at 321-323. He further opined that the death was a homicide, based on the "severity of the injuries" visible from scalp bruises and seen in the two slides

made of McFadden's brain, and the absence of any other "reasonable explanation" in the information he received from law enforcement. *Id.* at 321-323, 373-378. Dr. Craig rejected the possibility that McFadden's injury could have been caused by an accident or fall, citing a dated medical position paper. *Id.* at 392-394, 414-415. He admitted that he was only "vaguely aware" of recent literature documenting the possibility that even very short falls can cause fatal head injuries in children. *Id.* at 390-392.

Blueford's counsel extensively cross-examined Dr. Craig. She elicited testimony that Dr. Craig had failed to follow certain protocols in performing the autopsy and that he had failed even to look at the entire medical file for McFadden, including x-rays that had been taken while he was still alive. *Id.* at 369. Blueford's counsel also established that Dr. Craig was unfamiliar with position papers of the American Pediatric Association regarding traumatic brain injury and leading medical articles. *Id.* at 390-394. She likewise established that Dr. Craig was not qualified in accident reconstruction and had never received even minimal training in it. *Id.* at 383.

The state's evidence included testimony from police detectives. They testified that Blueford had given inconsistent explanations about the events leading to McFadden's death. See *id.* at 426-431. They also testified that Blueford had left the state after an arrest warrant was issued and that he was apprehended in Texas and taken into custody. *Id.* at 434.[2]

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[2] The state additionally presented testimony from medical professionals at the hospital where McFadden

At the end of the state's case, Blueford's counsel moved to dismiss the capital murder charge on the ground of insufficient evidence. She argued that "the State has failed to prove even the manner of death in this case was a homicide," and that "[t]he autopsy report * * * was woefully replete with professional errors." *Id.* at 609. In denying the motion, the trial judge observed that "certainly, the State's case is circumstantial at best and probably this may be a lesser included offense case. That's a jury question." *Id.* at 610. Blueford's counsel then moved for a finding of insufficient evidence on the lesser-included offense of first-degree murder, and again the trial judge denied the motion. *Id.* at 611. Blueford's counsel likewise moved for a finding of insufficient evidence on manslaughter on the ground that "[t]here's a complete vacuum of evidence," and that "the autopsy has not given us a firm foundation at all as to what the manner of death was and the cause of death." *Id.* at 613. Once again, the court ruled that "of course, it's circumstantial, but the Court feels that it is a question for the jury." *Ibid.*

As the trial moved to the defense case, Blueford took the stand and testified. He explained that McFadden's injuries resulted from a tragic accident. Blueford recounted the events of that morning. At one point, he went into the bedroom he shared with Tolbert and McFadden, sat on the bed, began talking

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was treated, as well as testimony from Tolbert that included descriptions of Blueford's lack of communication with her after the incident. ASCR at 134-135, 194-280, 538-605. Tolbert also testified that she and others called McFadden "Fat Man" as a nickname. *Id.* at 115.

on the phone to his cousin, and smoked a marijuana cigarette. *Id.* at 648-649. Continuing to talk on the phone, he lit a tobacco cigarette and placed it in an ashtray by the bed. *Ibid.* While Blueford's back was to him, McFadden grabbed the still-lit cigarette and playfully climbed on Blueford, bringing the cigarette near his face. *Id.* at 649. The heat from the cigarette surprised Blueford, causing him to jump and turn, striking McFadden's head in the process. *Id.* at 650, 691. McFadden crashed into a table and fell to the floor. *Id.* at 650-651. Although he initially thought that McFadden was unharmed, Blueford later realized something was wrong. *Id.* at 651-652. He tried to revive McFadden and asked Clay to call 911. *Id.* at 653. Blueford admitted that he lied to police about what had happened and that he had left the state after the arrest warrant was issued, explaining that he was a former convict who had previously been incarcerated and feared returning to prison. *Id.* at 644-647, 671-672.

Blueford's defense was supported by two expert medical witnesses. The first was Dr. Robert Bux, the head medical examiner for El Paso County, Colorado. *Id.* at 452. Dr. Bux is board certified in anatomical, clinical, and forensic pathology. *Ibid.* He has published in the *Journal of the American Medical Association*, among other places, and has worked on international matters, including service for the International War Crimes Tribunal for the former Yugoslavia. *Id.* at 454-456.

Dr. Bux was highly critical of Dr. Craig's methods and conclusions. He testified that, in his office, no one who "intend[ed] to work there for a long time" could turn in an autopsy like Dr. Craig's. *Id.* at 471.

In particular, Dr. Bux explained that ten to twenty slides of McFadden's brain should have been taken (rather than the two taken by Dr. Craig), and that even the slides that were taken were of diminished value because Dr. Craig had not identified the side of the brain from which they were taken. *Id.* at 465, 471-472, 489-492. He also testified that slides should have been made from McFadden's cervical spinal cord to help determine whether a fall contributed to the injury, *id.* at 477, and that blood-thinners administered to preserve McFadden's organs for donation could have produced some of the symptoms Dr. Craig attributed to McFadden's injuries, *id.* at 480-481. Dr. Bux testified that Blueford's account of the event, or any number of other scenarios, could explain McFadden's injury, *id.* at 481, 504-505. Because of the botched autopsy, "[t]here's no way as a forensic pathologist I can tell you which happened," *id.* at 482. Nor, in his professional opinion, could Dr. Craig. See *id.* at 491 ("He does not know the mechanism of death, period.").

Dr. John Galaznik, a board-certified pediatrician with thirty years of experience at the University of Alabama, also testified on Blueford's behalf. *Id.* at 694-695. Like Dr. Bux, Dr. Galaznik testified that the available medical evidence was entirely consistent with Blueford's account of the accident. He explained that the paper on which Dr. Craig relied had instructed pediatricians to presume abuse in brain injury cases when a child's guardians claimed the child had fallen based on the belief that short falls never cause brain injury. *Id.* at 726. But the last decade of research had conclusively rejected that view, demonstrating that children can suffer fatal head trauma from short falls. *Id.* at 725-735. He

also expressly rejected the state's theory that Blueford slammed McFadden into mattresses, emphasizing that the same scenario had been examined in literature on biomechanical effects, and that these studies, in his view, established that the mattress-slamming scenario "would not cause the injuries in this case." *Id.* at 765-766.

In his testimony, Blueford adamantly denied any intent to injure McFadden, but he nonetheless accepted responsibility. He testified that he wished he had "been more attentive," *id.* at 691, and his counsel asked the jury to convict him of negligent homicide, *id.* at 837-839.

2. **The jury deliberation.** After the close of evidence, the trial court instructed the jury to consider four charges: capital murder and the lesser-included offenses of first-degree murder, manslaughter, and negligent homicide. App. 51.

The court made clear that the jury was to consider the charges against Blueford one at time, beginning with the greatest offense and proceeding to the next greatest offense only if the jury found the defendant not guilty of the greater offense. Thus, only if the jury had "a reasonable doubt of the defendant's guilt on the charge of capital murder" would it "consider the charge of murder in the first degree," and so on with each lesser-included offense. *Id.* at 51-52.

The state repeatedly emphasized this instruction in closing. The state told the jury that it was "important for you to understand" that, "before you can consider a lesser included of capital murder, you must first, all 12, vote that this man is not guilty of capital murder before you can ever move on." *Id.* at

55; see also *ibid.* ("[L]ike I said before, you don't even get to this [first-degree murder] instruction until all 12 of you are able to vote that you do not believe this man is guilty of capital murder * * * .").

Blueford's counsel referred to the same instruction in her closing and stated that "the State is correct that you must vote first on capital murder." *Id.* at 57. She also suggested that the jury could "consider all of the charges." *Ibid.* In rebuttal, the state strongly objected to any suggestion that the jury could "just lay everything out here and say, well, we have four choices. Which one does it fit the most?" *Id.* at 59. Instead, the state emphasized, "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." *Ibid.*

After retiring and deliberating for four hours, the jury sent the court a note asking "what happens if we cannot agree on a charge at all." *Id.* at 62. The judge summoned the jury. Upon questioning by the court, the forewoman reported that she did not believe the jury would be able to reach an agreement, and the court gave an *Allen* charge.[3] The jury resumed its deliberations for half an hour. *Id.* at 63. It then sent another note stating that it "cannot agree on any one charge in this case." *Id.* at 64. The court again summoned the jury, and, in response to the forewoman's statement that the jury remained deadlocked, the court asked for the jury's vote on each charge:

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

> THE COURT: All right. If you have your numbers together, and I don't want names, but if you have your numbers I would like to know what your count was on capital murder.
>
> JUROR NUMBER ONE: That was unanimous against that. No.
>
> THE COURT: Okay, on murder in the first degree?
>
> JUROR NUMBER ONE: That was unanimous against that.
>
> THE COURT: Okay. Manslaughter?
>
> JUROR NUMBER ONE: Nine for, three against.
>
> THE COURT: Okay. And negligent homicide?
>
> JUROR NUMBER ONE: We did not vote on that, sir.
>
> THE COURT: Did not vote on that.
>
> JUROR NUMBER ONE: No, sir. We couldn't get past the manslaughter. Were we supposed to go past that? I thought we were supposed to go one at a time.

Id. at 64-65. The court thought that the jury should continue deliberating. Blueford's counsel supported continued deliberations and requested a re-reading of the "Dynamite Charge." *Id.* at 65. The court agreed and gave the charge, and the jury resumed deliberations. *Id.* at 66-67.

When the jury left, Blueford's counsel asked for verdicts on the offenses for which the jury had reached a decision. She requested 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, so be it. * * * [We] have an obligation to move forward where we can. * * * And if the jury is decisive about the capital murder and the murder one, we would want those verdict forms submitted to them. That is our request." *Id.* at 67-68. The state objected to accepting the jury's statement of acquittal on capital murder and first-degree murder, contending that "they are still deliberating at this point" and that the verdict must be "all or nothing." The court denied Blueford's request. *Id.* at 68.[4]

The state then suggested that it would join a request for a mistrial on all charges. *Ibid.* Blueford's counsel opposed, making clear that "[w]e are not asking for a mistrial at this point." *Id.* at 69. The court stated its inclination to agree with the government and grant a mistrial: "the Court is going to declare one if the jury doesn't make a decision. I mean, they have been out hours and hours and hours now. And they have indicated twice that they're hopelessly deadlocked." *Ibid.* When the jury returned half an hour later, the court immediately discharged the jury:

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[4] At the beginning of deliberations, the court had provided the jury with five verdict forms. On four of the forms, the jury could return a verdict of "guilty" on one of the offenses (*e.g.*, "We, the Jury, find Alex Blueford guilty of capital murder"; "We, the Jury, find Alex Blueford guilty of first degree murder"; and so on). App. 60. On the fifth form, the jury could return a verdict of acquittal that would apply to all four offenses: "We, the jury, find Alex Blueford not guilty of a homicide offense." *Ibid.*

> THE COURT: Madam Foreman, has the jury reached a verdict?
>
> JUROR NUMBER ONE: No, it has not, sir.
>
> THE COURT: Madam Foreman, there seems to be a lot of confusion on the part of the * * * jury about some of the instructions. And because of the confusion and because of the timeliness and the amount of hours that has gone by without being able to reach a verdict, the Court is going to declare a mistrial.

Id. at 69-70.

3. **The motion to dismiss the murder charges on retrial.** On retrial, the state sought to pursue the capital murder charge despite the first jury's declaration that it was "unanimous against" capital murder and "unanimous against" first-degree murder. ASCR at 57. Blueford's counsel moved to dismiss the murder charges on Double Jeopardy grounds. See App. 29-30. His motion cited the jury forewoman's statement that "the jury had unanimously found Defendant Blueford not guilty of capital murder and not guilty of first degree murder," as well as the jury instructions that required the jury to acquit on greater charges before it reached the manslaughter charge. ASCR at 87; see also *id.* at 90 (emphasizing that the jury was given "step-down" instructions that barred it from considering lesser-included offenses until it had definitively resolved the greater offenses).

The trial court denied the motion. Pet. App. 15a-16a. It agreed that the jury foreperson had been clear about the jury's vote to acquit on capital murder and first-degree murder: "The Court finds, after review of the transcript of Defendant Blueford's first

trial, that the jury foreperson was explicit that the jury was unanimous in voting against finding Defendant Blueford guilty of capital murder and first degree murder." *Ibid.* But the Court nevertheless denied Blueford's Double Jeopardy motion on those two charges for which the jury had been "explicit" in their unanimous vote: "[T]here were no 'findings' or 'verdicts' as intended by the law. The jury was unable to complete its deliberations and this Court had to declare a mistrial." *Ibid.*

4. **The appeal**. Blueford took an interlocutory appeal to the Arkansas Supreme Court. The court affirmed. It stated that neither the forewoman's explicit announcement of unanimous votes of not guilty on the two murder charges nor the structured jury instructions produced an acquittal on those charges because "a judgment is not valid until entered of record." *Id.* at 10a.

The Arkansas Supreme Court also recognized that Blueford had requested verdict forms on capital murder and first-degree murder. The court noted that some states, which it viewed as a minority, have held that "double jeopardy requires a partial verdict of acquittal as to the greater offenses if the jury is deadlocked only as to the lesser offenses." *Id.* at 13a. But the Arkansas Supreme Court disagreed with these states, stating that it was "simply unpersuaded by the underlying rationale" of the other states because, in its view, a hung jury "'produce[s] no verdict at all.'" *Id.* at 13a-14a (quoting *Walker* v. *State*, 825 S.W.2d 822 (Ark. 1992)).

This Court granted a writ of certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Double Jeopardy Clause is a cornerstone of the Bill of Rights' protection of personal liberty against government abuse. Arkansas's attempt to retry Blueford on capital murder and first-degree murder conflicts with the core principle of the Double Jeopardy Clause—that a man who has been acquitted cannot be made "to 'run the gantlet' a second time." *Green* v. *United States*, 355 U.S. 184, 190 (1957); *Abney* v. *United States*, 431 U.S. 651, 662 (1977).

The jury's acquittals on capital murder and first-degree murder are clear and unequivocal. Blueford is entitled to Double Jeopardy protection on the murder charges for three separate and independent reasons.

First, the jury's pronouncement of a unanimous verdict on the murder charges in open court is an acquittal on those charges as a matter of federal Double Jeopardy principles. This Court has squarely—and repeatedly—rejected the arguments on which the state courts relied, expressly holding that "what constitutes an 'acquittal' is not to be controlled by the form of the * * * action." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Instead, what matters is whether the jury's announcement "actually represents a resolution * * * of some or all of the factual elements of the offense charged." *Ibid.* On this record, it clearly does. The forewoman's announcement was plain and unmistakable; nothing in the record casts any doubt on its accuracy or finality; and the state court's refusal to formally enter the verdict on the record does not permit the state to re-

try Blueford for the offenses on which the jury has already returned a verdict of acquittal. See *Arizona* v. *Washington*, 434 U.S. 497, 507-508 (1978).

Second, the jury instructions establish acquittals on the greater offenses by virtue of the jury's deadlock on the lesser-included offense. This Court repeatedly has concluded that a jury has reached a verdict based on what is necessarily implied by its actions—for example, when the jury returns a guilty verdict on one of two charges but is silent on the other, *Green* v. *United States*, 355 U.S. 184; *Price* v. *Georgia*, 398 U.S. 323 (1970), or where the jury instructions give clear meaning to an ambiguous verdict, *Abney* v. *United States*, 431 U.S. 651. The record in this case makes the jury's determination of Blueford's innocence on the two greater offenses pellucidly clear: under the trial court's instructions, the jury could not reach the manslaughter charge unless and until it had resolved the murder charges in Blueford's favor. The instructions in this case reflect "acquittal-first" or "hard-transition" instructions. When a jury deadlocks on a lesser-included offense after receiving acquittal-first instructions, it has acquitted on the greater offense.

Third, Double Jeopardy principles bar retrial on the capital murder and first-degree murder charges because the jury "was given a full opportunity to return a verdict" on those charges, and "no extraordinary circumstances appeared which prevented" it from doing so. *Green*, 355 U.S. at 191. The jury deliberations did not result in a deadlock or a conviction on the capital murder and the first-degree murder charges; nothing in the jury's consideration of the murder charges satisfies the narrow exception

of "manifest necessity" that permits a retrial for the same offense. *United States* v. *Perez*, 9 Wheat. 579, 580 (1824).

This case presents a danger at the heart of the Double Jeopardy Clause. "The prohibition against double jeopardy unquestionably forbids the prosecutor to use the first proceeding as a trial run of his case." *Arizona* v. *Washington*, 434 U.S. at 508 (citation and internal quotation marks omitted). The 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." *Burks* v. *United States*, 437 U.S. 1, 11 (1978) (footnote omitted).

This case is a classic example of that paradigmatic problem. The state's murder charges against Blueford were in a shambles. The government's theory relied extensively on the medical examiner's conclusions about what, in his view, must have happened. The medical examiner's reliability and credibility were destroyed, however, both by cross-examination and by renowned medical experts who lambasted the examiner's methodology and conclusions. At a second trial against Blueford on the murder charges, the state would have the opportunity to try again and revamp its presentation (perhaps, for example, by declining to use the now-discredited medical examiner and substituting a different witness in his place).

The Double Jeopardy Clause prohibits giving the state the second chance that it seeks on its failed murder charges. The Double Jeopardy Clause pro-

tects a defendant from being "subject for the same offence to be twice put in jeopardy." Amdt. V.

ARGUMENT

I. The Jury Explicitly Acquitted Blueford of Murder.

The Fifth Amendment—as incorporated against the states by the Fourteenth Amendment, see *Benton* v. *Maryland*, 395 U.S. 784 (1969)—bars the state from twice putting a person in jeopardy for the same offense. Whatever the outer limits of the Double Jeopardy Clause's protections, at its very core it places one clear limit on the state's power: the state may not retry a defendant for an offense after a jury has acquitted the defendant for that same offense. See *United States* v. *Scott*, 437 U.S. 82, 91 (1978). As this Court has explained, "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal * * * could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." *United States* v. *Martin Linen*, 430 U.S. at 571 (citation and internal quotation marks omitted) (second and third alterations in original). Yet that is precisely what the State of Arkansas proposes to do in retrying Blueford for capital murder and first-degree murder after the jury in his first trial unanimously concluded, and declared in open court, that Blueford was not guilty of those offenses.

The jury's resolution of the charges of capital and first-degree murder could not have been clearer. After the jury was called back into court following extended deliberations, the judge said to the jury, "I

would like to know what your count was on capital murder." App. 64. The forewoman replied: "[t]hat was unanimous against that." *Ibid.* In response to the same question from the judge about the jury's vote on first-degree murder, the forewoman stated: "That was unanimous against that." *Id.* at 65. The record is clear: the judge asked point blank what the jury's count was on capital and first-degree murder and the jury answered, in both instances, "unanimous against." The jury's statements "represent[ed] a resolution * * * of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571. The jury did not express any uncertainty as to its determination on the murder charges, nor did it ever indicate a desire to reconsider its expressed conclusion. Once a jury has offered its clear, express, and final determination of a defendant's innocence on certain charges, and the jury has been discharged, the state's opportunity to try the defendant for those offenses has terminated. Accordingly, the state cannot now subject Blueford a second time to jeopardy for offenses on which the jury's determination of his innocence was clear, express, and final.[5]

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[5] With regard to the possibility of an error, prior to formal entry of a judgment, a court can "immediate[ly] repair * * * a genuine error in the announcement of an acquittal, even one rendered by a jury," without violating the Double Jeopardy Clause. *Smith* v. *Massachusetts*, 543 U.S. 462, 474 (2005). This case presents no such issue of "immediate repair" because there is no indication that the jury ever doubted or wished to reconsider its verdict on the murder charges at any time prior to the judge's discharge of the jury.

Arkansas's attempt to retry Blueford for the murder offenses notwithstanding the jury's unambiguous acquittal flies in the face of the language, history, and purpose of the Double Jeopardy Clause. Historically, the Double Jeopardy Clause has its roots "in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon." *Scott*, 437 U.S. at 87. See also 5 William Blackstone, Commentaries 335-336 (1803 ed.). A defendant, having previously been acquitted or convicted of a crime, could raise such a plea as a bar to retrial. These longstanding protections against retrial following a jury's verdict "can be traced to Greek and Roman times, and [they] became established in the common law of England long before this Nation's independence." *Benton*, 395 U.S. at 795. In this country, Double Jeopardy protections quickly emerged as "fundamental to the American scheme of justice." *Id*. at 796.

The historical limits on the states' power to retry defendants serve to protect what the Court has described as "two vitally important interests." See *Yeager* v. *United States*, 129 S. Ct. 2360, 2365 (2009). First, the Double Jeopardy Clause serves a simple interest in "the preservation of 'the finality of judgments.'" *Id*. at 2366 (quoting *Crist* v. *Bretz*, 437 U.S. 28, 33 (1978)). Second, as the Court has explained time and again:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby

> subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U.S. at 187-188.

See also *Yeager*, 129 S. Ct. at 2365-2366 (same); *Scott*, 437 U.S. at 87 (same); *Martin Linen*, 430 U.S. at 569 (same); *Benton*, 395 U.S. at 795-796 (same).

The State of Arkansas proposes to retry Blueford for capital and first-degree murder in disregard of both of these interests. Despite the fact that the jury reached a unanimous conclusion on both of those offenses, the state wishes to give no effect to those verdicts. Despite Blueford having already faced the "expense and ordeal" of a first trial on murder charges, and despite a jury of his peers having unanimously found him not guilty of the crimes of capital and first-degree murder, the state wishes to make him "run the gantlet" yet again on those charges. The Double Jeopardy Clause is designed to prevent just such a spectacle.

The Arkansas Supreme Court concluded that the state could retry Blueford for capital and first-degree murder because "no formal acquittal was entered of record in this case," and because, "for an acquittal to be final[,] it must be entered of record." Pet. App. 10a. In fact, however, this Court has rejected that position, and has consistently held that the Double Jeopardy Clause may bar retrial regardless whether a formal judgment of acquittal has been entered.

As the Court first explained over a century ago in *United States* v. *Ball*, 163 U.S. 662 (1896), "the reception of the verdict and discharge of the jury is but a ministerial act, involving no judicial discretion[.] * * * However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence." *Id.* at 671. See also *United States* v. *Wilson*, 420 U.S. 332, 346-347 (1975). *Ball* thus made clear that a potential procedural defect in the return of a jury's verdict—and any resulting defect in the judgment—does not affect the finality of the jury's verdict under the Double Jeopardy Clause.[6]

Indeed, this Court has recognized that, in light of the interests protected by the Double Jeopardy Clause, "the law attaches particular significance to an acquittal," *Scott*, 437 U.S. at 91. As a result, what qualifies as an acquittal for Double Jeopardy purposes is to be assessed based on the substance, and not the form, of the acquittal. "[W]hat constitutes an 'acquittal' is not to be controlled by the form of the [fact finder's] action. Rather we must determine whether the ruling of the [fact finder], whatever its label, actually represents a resolution * * * of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571.

The Court has applied this principle repeatedly. For example, where it was "plain that the District

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[6] The Court likewise held in *Ball* that a verdict of acquittal returned on a faulty indictment was final and barred retrial on the offense charged notwithstanding the procedural defect infecting the proceeding. *United States* v. *Ball*, 163 U.S. at 669-670.

Court * * * [had] evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction," this Court has concluded that further proceedings were barred under the Double Jeopardy Clause. *Id.* at 572 (prohibiting a government appeal). See also *Smith* v. *Massachusetts*, 543 U.S. at 468-469 ("Massachusetts' characterization of the required finding of not guilty as a legal rather than factual determination is, 'as a matter of double jeopardy law, * * * not binding on us.'" (quoting *Smalis* v. *Pennsylvania*, 476 U.S 140, 144 n.5 (1986))).

Even the complete absence of a state-law mechanism for entering a judgment of acquittal will not prevent a verdict of acquittal from having final effect for double jeopardy purposes. In *Hudson* v. *Louisiana*, 450 U.S. 40 (1981), the trial judge had entered a judgment for a *new trial* upon determining that the prosecution's evidence was legally insufficient to convict the defendant. Under Louisiana state law, the trial judge was "not authorize[d] * * * to enter judgments of acquittal in jury trials." *Id.* at 41 n.1. Nonetheless, the Court concluded that retrial was barred where the trial court's ruling and the opinion of the Louisiana Supreme Court both made clear that the ruling was based on the judge's determination that the prosecution's evidence was legally insufficient. *Id.* at 44. The application of the Double Jeopardy Clause thus turned entirely on the substance of the fact finder's decision, and not the state-law form it assumed.[7]

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[7] While a number of the cases presenting this issue have arisen in the context of judicial resolution of the de-

Nor can the state's refusal to formally memorialize the jury's verdict of acquittal prevent the Double Jeopardy Clause from barring retrial on those same offenses. To do so would be to open the door to one of the precise historical evils at which the protections of the Double Jeopardy Clause were aimed. In the case of *The Queen* v. *Charlesworth*, (1861) 121 Eng. Rep. 786, 801 (Q.B.), the court rehearsed the history of the "tyrannical practice"—committed most famously in the treason cases of Whitebread and Fenwick, *Ireland's Case*, 7 How. St. Tr. 79 (1678); *Whitebread's Case*, 7 How. St. Tr. 311 (1679)—of discharging a jury in the face of an impending acquittal in order to provide the prosecution with an opportunity to gather additional evidence and retry the defendant. As the Court explained, "[T]he prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice" of "discharg[ing] a jury whenever it appeared that the Crown's evidence would be insufficient to convict." *Arizona* v. *Washington*, 434 U.S. at 507-508. See also David S. Rudstein, Double Jeopardy: A Reference Guide to the United States Constitution, 10 (2004). For that reason, "it has long been settled under the Fifth Amendment that a verdict of acquittal is final * * * and even when 'not followed by any judgment, is

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fendant's guilt, the Court "ha[s] long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict." *Smith*, 543 U.S. at 467; see also *Tibbs* v. *Florida*, 457 U.S. 31, 41 (1982) ("A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial.").

a bar to a subsequent prosecution for the same offence.'" *Green*, 355 U.S. at 188 (quoting *United States* v. *Ball*, 163 U.S. at 671).

The Double Jeopardy Clause does not permit the State of Arkansas to avoid the Fifth Amendment consequences of the jury's announcement of its verdict as to the charges of capital and first-degree murder. The state's refusal, as a matter of state law, to accept that verdict does not alter the constitutional status of that verdict. The question for Double Jeopardy purposes is whether the jury "actually * * * resol[ved] * * * some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571. The jury here plainly resolved the question of the murder offenses. The jury's determination must be given final effect, and Arkansas may not again put Blueford through the "expense and ordeal," *Benton*, 395 U.S. at 795-796 (citation and internal quotation marks omitted), of defending himself against the charges of capital and first-degree murder that have already been resolved—in his favor—by a jury of his peers.

II. The Acquittal-First Instructions Establish that the Jury Acquitted Blueford of Murder.

A second prosecution of Blueford on capital and first-degree murder charges also would violate his Double Jeopardy rights because, under the acquittal-first instructions, the jury acquitted him of those charges.

The trial court instructed the jury to consider the offenses one at a time, beginning with the greatest offense and proceeding to a lesser offense only if it acquitted the defendant on the greater offense. App. 51-52. The state repeatedly emphasized this instruc-

tion to the jury in its closing arguments. See, *e.g.*, *id.* at 59 ("[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."). Accordingly, if the jury followed its instructions, it could not reach the manslaughter charge unless and until it had unanimously agreed on acquittal of the greater charges (*i.e.*, capital murder and first-degree murder).

In considering the Double Jeopardy implications of this instruction, it is helpful to distinguish between different types of instructions. The trial court's instruction reflects an "acquittal-first" or "hard-transition" instruction, in which the jury must acquit on a greater offense before it moves to a lesser offense. In contrast, some jurisdictions use a "soft-transition" instruction, in which the jury is allowed to consider the offenses in any order it chooses. In an opinion reviewing both types of instructions, Judge Henry Friendly explained that both types of instructions have possible advantages and disadvantages for the government and defendants. *United States* v. *Tsanas*, 572 F.2d 340, 345-346 (2d Cir. 1978). Judge Friendly concluded that "[n]either form of instruction is wrong as a matter of law," *id.* at 346, and determined that, as a matter of federal practice, the defendant's choice of instruction should be honored if the defendant makes such an election, *ibid.*

In this case, consistent with Arkansas law, the court gave the jury the acquittal-first instruction. It is, of course, well-settled that juries are presumed to follow instructions. See, *e.g.*, *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000). Indeed, the presumption is especially strong where, as in this case, the jury has

received "clear and unambiguous instructions." *Abney* v. *United States*, 431 U.S. at 665. Thus, the jury in Blueford's case must be presumed to have followed the court's instruction that it could reach the first-degree murder count only if it had determined unanimously that it had "a reasonable doubt" about his guilt on capital murder. Likewise, the jury must be presumed to have followed the court's instruction that it could reach the manslaughter count only if it had determined unanimously that it had a "reasonable doubt" about his guilt on first-degree murder. When the jury reported that it was deadlocked on manslaughter, it necessarily was reporting that it had acquitted on the murder charges: the acquittal-first instructions dictated that sequence.

Here, moreover, Blueford's acquittal by the acquittal-first instructions is established not only by the settled presumption that juries follow instructions (which would itself be sufficient). In this case, the record also reflects explicit confirmation that the jury understood and followed the acquittal-first sequence. The forewoman explained that the jury had not considered the lesser-included offense of negligent homicide because it was deadlocked on the greater offense of manslaughter. See App. 65 ("We did not vote on [negligent homicide] * * * We couldn't get past the manslaughter. Were we supposed to go past that? I thought we were supposed to go one at a time."). The jury forewoman thus confirmed that the jury carefully followed the acquittal-first instructions, moving to lesser offenses only after it had acquitted on greater offenses. See *Weeks*, 528 U.S. at 234 (observing under the facts of the case that "the presumption [that the jury follows instructions]

gain[ed] additional support from several empirical factors").

Accordingly, the jury's announcement that it was deadlocked on the manslaughter charge necessarily establishes that it acquitted Blueford of the murder charges (even if the forewoman had not stated expressly that the jury was "unanimous against" the murder charges). Under this Court's precedents, these acquittals are entitled to full Double Jeopardy protection. The Court previously has looked to a jury's compliance with jury instructions to give meaning to a potentially ambiguous verdict, see *Abney*, 431 U.S. at 664-665, and it likewise has recognized "implicit" acquittals on greater offenses as a necessary implication of a jury's resolution of a lesser-included offense, see, *e.g.*, *Green* v. *United States*, 355 U.S. at 190; *Price* v. *Georgia*, 398 U.S. at 329.[8]

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[8] Before the decision below, state high court decisions in both acquittal-first and soft-transition jurisdictions had carefully distinguished between the possible Double Jeopardy consequences of jury deadlocks under acquittal-first and soft-transition instructions. See *State* v. *Tate*, 773 A.2d 308, 323 (Conn. 2001) (in acquittal-first context, Double Jeopardy bars retrial of greater offenses after deadlock on lesser offenses; "[i]n jurisdictions with an acquittal first requirement, * * * jeopardy attaches to those greater offenses upon which the jury has unanimously agreed to acquit, even if the jury is unable to reach a final verdict as to any of the lesser included offenses") (internal quotation marks, citations, and brackets omitted); *People* v. *Richardson*, 184 P.3d 755, 764 n.7 (Colo. 2008) (in soft-transition context, Double Jeopardy does not bar retrial of greater offenses after deadlock on lesser offense; the Double Jeopardy rule advocated by defendant "has developed

The same principles that bar retrial of the murder charges after the jury's explicit statement of acquittal bar retrial of the murder charges after the acquittal-first instruction and deadlock on the lesser-included offense. The lack of a formal verdict form does not vitiate the acquittal: this Court long ago announced that "a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence," *United States* v. *Ball*, 163 U.S. at 671, and it has expressly rejected the requirement of a "verdict of acquittal formally returned by the jury" for an acquittal rendered in another form to be afforded protection under the Double Jeopardy Clause, *Martin Linen*, 430 U.S. at 572. Rather, the pertinent question is "whether the ruling * * *, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 571. Here, the jury's deadlock on manslaughter—when considered in light of the acquittal-first jury instructions—conclusively demonstrates that the jury had reached "a resolution" on "some * * * of the factual elements" of the offense charged.

Double Jeopardy principles, furthermore, bar retrial on the murder charges because the use of acquittal-first instructions establishes that there was no "manifest necessity" to discharge the jury and retry Blueford on murder charges. The protections of the Double Jeopardy Clause attached at his first trial when the jury was empanelled. See *Crist*, 437 U.S.

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almost exclusively in 'hard transition' states. * * * We therefore find the cases * * * distinguishable on that basis.").

at 35; *Downum* v. *United States*, 372 U.S. 734, 737-738 (1963). At that point, Blueford could be retried on the charges at issue after a mistrial only if the state could demonstrate "a manifest necessity for the act, or [that] the ends of public justice would otherwise be defeated." *United States* v. *Perez*, 9 Wheat. at 580.

The "manifest necessity" requirement prevents courts from ordering a mistrial and thereby subjecting a defendant to the ordeal of retrial unless there is a compelling reason to do so. See *Arizona* v. *Washington*, 434 U.S. at 505 ("[T]he prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant."). "The policy of avoiding multiple trials has been regarded as so important that exceptions to the principle have been only grudgingly allowed." *United States* v. *Wilson*, 420 U.S. at 343; see also *id.* at 344 n.12 ("In *Perez*, the Court emphasized the limited scope of this exception."); *Renico* v. *Lett*, 130 S. Ct. 1855, 1862-1863 (2010) (noting that retrial is permitted only where there is a "'high degree' of necessity" for a mistrial (quoting *Arizona* v. *Washington*, 434 U.S. at 506) (some internal quotation marks omitted)).

Traditionally, a jury's inability to reach a verdict offers "the classic basis for a proper mistrial." *Arizona* v. *Washington,* 434 U.S at 509. That rule "accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Ibid.*

But here, there was no "manifest necessity" for the judge to declare a mistrial with respect to the charges of capital and first-degree murder: the acquittal-first instructions establish that the jury reached a verdict on those charges. Thus, refusal to accept the jury's votes to acquit on the murder charges does not establish the "manifest necessity" that would permit a second trial on the murder charges.

In light of the acquittal-first instructions (which the jury carefully followed) and the lack of manifest necessity for a retrial on the murder charges, the Court should reverse the judgment of the Arkansas Supreme Court.

III. No Murder Retrial Is Permitted Because the First Jury Had a Full Opportunity to Return a Verdict on Those Charges.

In addition to the jury forewoman's explicit statements and the necessary implications of the jury's deadlock on a lesser-included offense following an acquittal-first instruction, the state cannot retry Blueford on the murder charges because the jury here "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Green* v. *United States*, 355 U.S. at 191; see also *Price* v. *Georgia*, 398 U.S. at 329. Because the jury deliberations in this case on the murder charges did not result in a conviction or a deadlock, Double Jeopardy principles prevent retrial of Mr. Blueford on those charges.

As in *Green* and *Price*, the jury in this case "was given a full opportunity" to convict Blueford of murder. Before the jury began deliberating, the judge

issued verdict forms that allowed the jury to return a guilty verdict on the murder charges. App. 60. Armed with those forms, the jury conducted its initial deliberations, continued deliberations after receiving an *Allen* charge, and then resumed its deliberations once again after the judge re-issued the *Allen* charge. *Id.* at 61-70. Yet the jury steadfastly refused to convict on the murder charges and offered no indication that it was deadlocked on those charges.

Had the jury convicted Blueford of manslaughter, it is well settled that the state could not retry him on the murder charges. In *Green*, the jury convicted the defendant of second-degree murder and was silent on first-degree murder. After the second-degree murder conviction was overturned on appeal, this Court held that Green could not be retried for first-degree murder because "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." *Green* v. *United States*, 355 U.S. at 190. The Court held that it was sufficient that the first jury "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Id.* at 191. Therefore, "jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense." *Ibid.*

The Court unanimously reaffirmed *Green* in *Price* v. *Georgia*, 398 U.S. 323. On facts similar to those in *Green*, the Court explained that it had "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 (footnote omitted).

The only difference between this case and *Green* and *Price* is that Blueford's jury deadlocked on the lesser-included offense rather than convicting on it. If anything, that difference makes this a stronger case for Double Jeopardy than *Green* and *Price*. It would be a bizarre rule of law to afford Green and Price, whose juries unanimously convicted them on lesser offenses, greater Double Jeopardy protection than Blueford, whose jury included jurors voting to acquit on the lesser offense. Such a rule of law also would be inconsistent with the rationale in *Green*, which made clear that its result did not depend on the jury's determination on the lesser-included offense: "Even more important, Green's plea of former jeopardy does not rest on his conviction for second degree murder but instead on the first jury's refusal to find him guilty of felony murder." 355 U.S. at 194 n.14.

Moreover, the jury's deadlock on the manslaughter charge after it did not return a guilty verdict or deadlock on either of the murder charges does not create a "manifest necessity" for a retrial on the murder charges. *Perez*, 9 Wheat. at 580; see also *Smith* v. *Massachusetts*, 543 U.S. at 469 n.3 (citing *Price* for the principle that "jeopardy may terminate on some counts even as it continues on others"). As this Court has explained, *Perez*'s narrow "manifest necessity" exception to the rule against twice subjecting a defendant to jeopardy on any given charge serves to "accord[] recognition to society's interest in giving the prosecution one complete opportunity to

convict." *Arizona* v. *Washington* 434 U.S. at 509. Here, the state had its one complete opportunity to convict Blueford of murder, and the jury neither returned a guilty verdict on the murder charges nor reported a deadlock on the murder charges. Accordingly, there is no manifest necessity for a retrial on those charges.

Because the jury was afforded a full opportunity to return a guilty verdict on the murder charges, the Double Jeopardy Clause prevents the state from taking a second bite at the apple on those charges.

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The Arkansas Supreme Court's decision would create a rule of law that disregards a jury's unanimous vote against guilt on criminal charges—expressed in words, in prescribed sequence of deliberation, and in deadlock on a lesser-included offense—as long as the court refuses to accept that jury determination. The language, history, and purpose of the Double Jeopardy Clause establish a different legal regime. The jury's resolution of criminal charges, however expressed, must be given conclusive effect, and the prohibition against "jeopardy" for "the same offence" must be respected.

The Constitution prevents the state from forcing Alex Blueford to run the gantlet once again on capital murder and first-degree murder.

CONCLUSION

For the foregoing reasons, the judgment of the Arkansas Supreme Court should be reversed.

Respectfully submitted,

WILLIAM R. SIMPSON, JR.
SHARON KIEL
CLINT MILLER
SIXTH JUDICIAL DISTRICT (ARKANSAS) PUBLIC DEFENDERS OFFICE
201 S. Broadway, Ste. 210
Little Rock, AR 72201
(501) 340-6120

CLIFFORD M. SLOAN
Counsel of Record
GEOFFREY M. WYATT
DAVID W. FOSTER
MOSHE SPINOWITZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

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