American Bar Association
www.supremecourtpreview.org

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

LISA S. BLATT
CHARLES G. CURTIS, JR.
Counsel of Record
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
Charles.Curtis@aporter.com

Counsel for Amici Curiae

Amici Curiae Criminal Law Professors:

George C. Thomas III

Michael Benza

Alafair Burke

Morgan Cloud

Russell Covey

Joshua Dressler

John J. Farmer, Jr.

Brian Gallini

Bennett L. Gershman

Adam Gershowitz

Stuart Green

Lissa Griffin

Bernard E. Harcourt

Stephen E. Henderson

Peter J. Henning

Kyron James Huigens

Yale Kamisar

Jeffrey L. Kirchmeier

Alex Kreit

Arthur LaFrance

Richard A. Leo

Michael J.Z. Mannheimer

Lawrence C. Marshall

Jonathan A. Rapping

Michael Risinger

Susan D. Rozelle

Laurent Sacharoff

Christopher Slobogin

Carol Steiker

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, AND RULES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors of criminal law and related disciplines who have studied, taught, written about, and litigated cases involving the Double Jeopardy Clause. *Amici* believe this case presents fundamental issues of double jeopardy law, and for that reason many of the *amici* joined in an earlier brief urging this Court to grant *certiorari.* The forewoman in this case announced in open court, in response to the judge's call for the jury's "count," that the jury had voted "unanimous against" convicting Alex Blueford on the capital and first-degree murder charges. Joint Appendix ["JA"] 64-65. Jeopardy on those charges terminated at that point, and the Fifth Amendment's Double Jeopardy Clause (incorporated through the Fourteenth Amendment) bars a second prosecution of Blueford on the same charges. "For whatever else that constitutional guarantee may embrace, . . . it surely protects a man who has been acquitted from having to 'run the gantlet' a second time" on the identical charges. *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970) (internal citations omitted). And what would the right to a trial by jury be worth if the judge could reject a verdict of acquittal pronounced in open court before that verdict had been reduced to a formal judgment "entered of record"?

The lead *amicus*, George C. Thomas III, is a Board of Governors Professor of Law and Judge Alexander P. Waugh, Sr. Distinguished Scholar at Rutgers School of Law—

---

[1] The parties have consented to the filing of this brief; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Newark. He is the author of *Double Jeopardy: The History, the Law* (1998), and, with Joshua Dressler, of the casebook *Criminal Procedure: Principles, Policies and Perspectives* (4th ed. 2010). Professor Thomas and the undersigned Counsel of Record co-authored this brief.

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

SUMMARY OF THE ARGUMENT

One of the enduring principles in this Court's double jeopardy jurisprudence is the protection of substantive judgments by a jury in favor of the accused. This noble principle tracks hard-won jury independence from British monarchs in the seventeenth century. Until *Bushel's Case* in 1670, judges felt free to ignore a jury's acquittal when the Crown wanted a conviction. The Framers' embrace of verdict protection in the Fifth Amendment's Double Jeopardy Clause has spared American defendants that kind of overt governmental interference with favorable jury decisions. But there are more subtle ways that a favorable jury outcome can be avoided or undermined.

In this case, Arkansas law permits a jury to consider a lesser-included offense only if it already has voted unanimously to acquit on all greater offenses. A colloquy between the judge and forewoman confirmed that the jury followed this rule. When the jury advised that it was deadlocked, the judge asked the forewoman for the jury's "count" on the capital and first-degree murder charges. She responded that the jury was "unanimous against" guilt on both charges. JA 64-65. This was a "ruling" in Blueford's favor "of some or all of the factual elements of the offense[s] charged." *United States v. Martin Linen Supply Co*., 430 U.S. 564, 571 (1977). Such a ruling is an acquittal on the murder charges, and this Court repeatedly has emphasized

that substance governs over form and technicalities in determining when a defendant has been "acquitted." (Blueford has conceded that he remains subject to reprosecution on the lesser-included manslaughter and negligent homicide charges.)

What constitutes an "acquittal" for double jeopardy purposes is a federal question wholly independent of any state criteria for the entry of formal judgments "of record." This Court should therefore reverse the Arkansas Supreme Court's ruling that required formal "entry" of a written verdict before jeopardy terminated on the capital and first-degree murder charges. *See especially Ball v. United States*, 163 U.S. 662, 671 (1896) ("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 offense.").

But even if the jury's oral verdict were not a "ruling" under *Martin Linen*, this Court has designed several doctrines that respond to more subtle attacks on favorable jury outcomes. *First*, this Court's double jeopardy decisions recognize "implied" acquittals—when the jury convicts on a lesser-included offense but is silent about guilt on a greater charge. In implied acquittal cases, no prosecution can proceed on the greater charge. *See Price v. Georgia*, 398 U.S. 323 (1970); *Green v. United States*, 355 U.S. 184 (1957). In Blueford's case, the jury was hung on the lesser offense of manslaughter, which should be treated the same for implied acquittal purposes as a conviction on a lesser offense. But Blueford's jury was far from silent on the greater charges, announcing that it was "unanimous against" guilt on both murder counts. If silence about guilt on a greater charge is an acquittal when the jury convicts of a lesser offense, it follows that an express "not guilty" of the greater charge plus a hung jury on the lesser must be treated as an acquittal on the greater charge as well.

Second, under the doctrine of defensive collateral estoppel embodied in the Double Jeopardy Clause, the State may not relitigate issues that the first jury necessarily determined in Blueford's favor. The State may not "hale [Blueford] before a new jury to litigate th[ose] issue[s] again." *Ashe v. Swenson*, 397 U.S. 436, 446 (1970); *see also Yeager v. United States*, 129 S. Ct. 2360, 2367-68 (2009) (facts "necessarily decided" by jury in voting to acquit on some counts were issue preclusive even though jury had deadlocked on other counts).

Third, under this Court's mistrial cases, a second prosecution on the murder charges is barred unless the mistrial on those charges was justified by "manifest necessity." At its irreducible minimum, the rule of "manifest necessity" requires a judge to consider potential alternatives to a mistrial and "to exercise the 'sound discretion' entrusted to him" in choosing among the alternatives. *Arizona v. Washington*, 434 U.S. 497, 510 n.28 (1978); *see also Renico v. Lett*, 130 S. Ct. 1855, 1863 (2010); *Illinois v. Somerville*, 410 U.S. 458, 469 (1973) (grant of mistrial must be "designed to implement a legitimate state policy"). There were, in Blueford's case, logical and easy alternatives to a mistrial—such as accepting the jury's report of the acquittal and undertaking the purely "ministerial" acts required to give formal effect to that ruling, *Ball*, 163 U.S. at 671, or providing verdict forms that would allow the jury to enter its verdicts on the two murder counts regardless of the outcome on the lesser-included charges. Under no stretch of the words "manifest" or "necessity" was the judge's mistrial ruling on the murder counts "manifestly necessary."

One recurrent theme in this Court's mistrial cases is that the State may not avoid an acquittal through a mistrial and then attempt to present a strengthened case a second time around—a practice this Court repeatedly has condemned as "'abhorrent,'" *Washington*, 434 U.S. at 508 (citation omitted), and that this brief will refer to as

"acquittal avoidance."[2] *Washington* noted that one of the purposes of the Double Jeopardy Clause was to guard against the practice of English judges "exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict." *Id.* at 507. Here it not only "appeared" that the State's evidence was weak, the jury declared in open court that it was "unanimous against" conviction on the capital and first-degree murder charges.

Taken together, the "implied" acquittal cases, defensive collateral estoppel cases, and mistrial cases stand for a fundamental principle that follows from *Bushel's Case*: Substantive outcomes of criminal trials that favor the accused should be treated as an acquittal. A recent application of that principle appears in *Smith v. Massachusetts*, 543 U.S. 462 (2005), where the trial court granted a mid-trial acquittal on one charge and then changed its mind before the case was submitted to the jury. Even though no additional proceedings would have been necessary to allow the jury to deliberate on the dismissed charge, the Court held that the mid-trial acquittal terminated jeopardy on that particular count. *Id.* at 467-75. This acquittal-protection principle applies with even greater force in this case, where Blueford is being subjected to a *second* full prosecution that would be tried to a *second* jury on the identical charges that the first jury was "*unanimous against*."

ARGUMENT

This case presents several core double jeopardy issues in stark and unambiguous terms. Blueford's jury was instructed that it could not even "consider" lesser-included

---

[2] *See* George C. Thomas III, *Double Jeopardy: The History, the Law* 230 (1998) (discussing need for a mistrial doctrine that discourages "using early trial termination as acquittal avoidance"); *see also id.* at 237-46.

charges unless and until it had *unanimously* determined that the State had failed to "sustain" the capital and first-degree murder charges—that is, only "[i]f you have a reasonable doubt of the defendant's guilt" on those greater charges. Instructions 12-15, JA 51-52. The State relied heavily on these instructions in closing argument:

> "[W]hat's important for you to understand is 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 to the lesser included offenses. As the Judge indicated to you, there is a lesser included offense of murder in the first degree. . . . But like I said before, you don't even get to this instruction until all 12 of you are able to vote that you do not believe this man is guilty of capital murder, and we submit to you that he is. There is a lesser after murder in the first degree, so if you all 12 vote that he is not guilty of murder in the first degree, then there is manslaughter." JA 55 (paragraph breaks omitted).

After defense counsel's closing argument, the State returned to the need for a unanimous acquittal on the murder charges before lesser-included charges could even be considered:

> "It's not a situation where you just lay everything out here and say, well, we have four choices. Which one does it fit the most? . . . [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." *Id*. at 59.

The jury squarely rejected the capital and first-degree murder charges on the merits. The jurors voted unanimously, to borrow from the State's language, that they "d[id] not believe this man is guilty" of murder and that "this man's actions were not consistent with capital murder" or first-degree murder. *Id.* at 55, 59. Although they voted to acquit Blueford on these charges, they deadlocked 9-3 on the manslaughter charge. The court then directed the forewoman to report the jury's "count" on each charge in open court. *Id.* at 64. As for capital murder, the forewoman announced the jury "was unanimous against that. No." *Id.* As for first-degree murder, the forewoman announced that the jury "was unanimous against that" too. *Id.* at 65. The forewoman then reported the jury was deadlocked on manslaughter and had not yet considered negligent homicide. *See id.* She emphasized that the jury had not considered the latter count because "[w]e couldn't get past the manslaughter," and the jurors understood, pursuant to the judge's instructions, that they were not to consider lesser offenses unless and until they had acquitted on the greater ones—they "were supposed to go one at a time." *Id.*

The court ordered the jury to resume its deliberations. *Id.* at 65-67. Blueford's counsel then moved "that the jury be given verdict forms and that they fill out verdict forms for those counts that they have reached a verdict on"—capital and first-degree murder. *Id.* at 67.[3] The court denied that

[3] The jurors had been given verdict forms, but those forms did not allow the jurors to return an express verdict of "not guilty" unless they found Blueford innocent on *all four* counts. Specifically, immediately before the jurors retired to deliberate, the judge gave them four "guilty" verdict forms—one for each of the charges—and a fifth form declaring that "[w]e, the Jury, find Alex Blueford not guilty of a homicide offense," *i.e.*, of *any* of the four charges. JA 60. The jurors were instructed to choose from among these five verdict forms, and to have the foreperson sign and return the form they chose. *Id.* Thus, when defense counsel

motion and, after the jury was unable to resolve its impasse over the manslaughter count, declared a mistrial—not only as to the lesser offenses, but on the capital and first-degree murder counts as well. *Id.* at 69-70.

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

The Arkansas Supreme Court acknowledged that "[j]urisdictions are split on the issue of partial verdicts," and that many state courts and legislatures have decided "that double jeopardy requires a partial verdict of acquittal as to the greater offenses if the jury is deadlocked only as to the lesser offenses." *Id.* at 12a-13a.[4] But the court was "simply

---

asked "that the jury be given verdict forms," she was asking for forms that would allow the jury to record its acquittals on the murder charges irrespective of the resolution of the lesser-included offenses. *Id.* at 67. The State objected, and the court denied the defense motion. *Id.* at 68.

[4] The Arkansas Supreme Court cited to *Whiteaker v. State*, 808 P.2d 270, 273-78 (Alaska Ct. App. 1991); *Stone v. Superior Court*, 646 P.2d 809, 816-17 (Cal. 1982); *State v. Tate*, 773 A.2d 308, 319-25 (Conn. 2001); and *State v. Pugliese*, 422 A.2d 1319, 1320-22 (N.H. 1980) (per curiam). *See also State v. Castrillo*, 566 P.2d 1146, 1151-52 (N.M. 1977); *People v. Richardson*, 184 P.3d 755, 766 (Colo. 2008) (Martinez, J., dissenting) (discussing

unpersuaded by the underlying rationale" of this position, and declined to depart from the "bedrock principle" of Arkansas jurisprudence requiring a formal judgment "entered of record" before jeopardy terminates. *Id.* at 10a, 13a.

The judgment of the Arkansas Supreme Court conflicts with this Court's double jeopardy decisions in at least four fundamental respects: it conflicts with this Court's acquittal decisions, its implied acquittal decisions, its collateral estoppel decisions, and its mistrial decisions. We examine each conflict in turn.

I. THE JURY'S PRONOUNCEMENT IN OPEN COURT WAS A SUBSTANTIVE RULING IN BLUEFORD'S FAVOR ON THE MURDER CHARGES.

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

---

caselaw in fourteen states requiring acceptance of partial verdicts). Other states have adopted, either through legislation or rulemaking, procedures that allow for judgments of partial acquittal in cases like these. *See, e.g.*, *Richardson*, 184 P.3d at 763 n.6 (en banc) (discussing states with "rules of criminal procedure that expressly require trial courts to poll deadlocked juries and accept partial verdicts"); *id.* at 766 (Martinez, J., dissenting) (discussing states that have "incorporated" this safeguard "into their rules, statutes, and jury instructions"); *see also* Note, *Acceptance of Partial Verdicts as a Safeguard Against Double Jeopardy*, 53 Fordham L. Rev. 889, 890 n.6 (1985).

"acquittal," which "terminates" jeopardy and bars any further jeopardy on the same charges. *Id.*

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

> "[W]e have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (internal citations omitted).

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

---

[5] Thomas, *Double Jeopardy*, n.2 *supra,* at 230-31; *see id.* at 229-50 (reviewing precedents demonstrating that a formal verdict is not necessary to bar a second trial when the first trial has

These principles are at their zenith where, as here, the constitutional right to a trial by jury is at stake. The right against successive prosecutions is intimately connected to the right to a jury trial. What would a jury trial be worth if the judge could reject a verdict announced in open court but not yet "entered of record," which is supposed to be a purely "ministerial act, involving no judicial discretion"? *Ball v. United States*, 163 U.S. 662, 671 (1896).

The Blueford jury's pronouncement in open court, in response to the judge's call for its "count," that it was "unanimous against" capital and first-degree murder was an acquittal or, at the very least, the equivalent of an acquittal for double jeopardy purposes on those charges. (Blueford concedes that he may be retried on the lesser-included manslaughter and negligent homicide charges.) The jury's action represented "a substantive determination" by the jury "that the prosecution ha[d] failed to carry its burden" on these charges. *Smith*, 543 U.S. at 468. The jury forewoman's response resolved in Blueford's favor "some or all of the factual elements of the offense[s] charged." *Martin Linen*, 430 U.S. at 571. There was nothing ambiguous or tentative about the jury's "substantive determination" of Blueford's innocence on the murder charges, and no reason to believe the jury might change its mind. The judge's instructions, prosecutor's closing argument, and judge's

---

resolved blameworthiness in favor of the defendant); *see also Stone*, 646 P.2d at 814 ("It is plain . . . that if we recognize the jury's actions to be the equivalent of an acquittal of murder, defendant cannot be retried for either degree of that offense."); James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. 1, 160 (1995) ("Ultimately, an action will be treated as an acquittal if the substance of that action measures up to the definition of an acquittal, no matter what the acquitting action may be labeled in the trial court record.").

colloquy with the forewoman all made clear that the jury understood that it had to decide unanimously to acquit Blueford of the greater offenses before considering the lesser-included ones. *See* pp. 5-7 *supra.* Thus, the jury's substantive determination of Blueford's innocence on the murder charges was a *Martin Linen* ruling in his favor.

Consider several variations on the *Blueford* facts that underscore why the jury's action in this case must be construed as operating to terminate jeopardy on the capital and first-degree murder counts. Suppose the jury forewoman had announced that the jury was "unanimous against" all four counts, and the judge angrily ordered that the jurors be held in confinement until they changed their minds. Or, to pose a less extreme variation, suppose the jurors forgot to fill out the verdict form, or failed to complete the form because it was confusingly worded. But the forewoman announced in open court that the jury was "unanimous against" conviction on *all* charges. At this point the judge engaged in "acquittal avoidance"—he declared a mistrial because he was convinced the defendant was guilty and that the prosecution should have another shot at conviction, having learned from its mistakes in the first trial. Or, to offer one more variation, suppose the jury properly filled in the verdict form and delivered it to the judge, who, appalled by the outcome, promptly tore the verdict form in half and threw it away rather than having it "entered of record" and instead declared a mistrial. Finally, suppose that the judge and clerk simply forgot to take the ministerial steps necessary to make the verdict formally "of record."

We cannot imagine a persuasive argument that any of these scenarios would be anything other than a "substantive determination" by the jury in the defendant's favor "of some or all of the factual elements of the offense charged." *Smith*, 543 U.S. at 468; *Martin Linen*, 430 U.S. at 571. Can it be true that the lack of a fully completed verdict form, the apparent refusal of the judge to accept the jury's acquittals,

or a simple ministerial error would render any of these jury actions any less a "ruling" on the substantive merits in the defendant's favor? The jury's substantive ruling in Blueford's case is not different in any material way from these variations.

Smith v. Massachusetts further supports treating the jury's actions here as an "acquittal" or the equivalent thereof. After the prosecution rested in that case, the defense moved for acquittal on the firearm-possession count of a multi-count indictment. The trial court orally "granted the motion. . . . and the allowance of the motion was entered on the docket." 543 U.S. at 465. At the close of the trial, but before the case was submitted to the jury for its determination, the prosecutor asked the court to reverse its ruling on the motion for acquittal. The court agreed and "allow[ed] the firearm-possession count to go to the jury." *Id*.

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

Blueford also prevails under the analysis of the four Justices who dissented in *Smith*. The *Smith* dissenters reasoned that Smith had "suffered no prejudice fairly attributable to" the reversal of the mid-trial bench dismissal because he was not exposed to "*further* trial proceedings"; the dismissal of the charge followed by its reinstatement occurred during the course of "a *single, unbroken trial proceeding*" that all took place before "the court of *first* instance." 543 U.S. at 476-80 (Ginsburg, J., dissenting) (emphasis added); *see also id*. at 479 ("the jury remained seated with no break in the trial"). Here, on the other hand,

Blueford is being subjected *precisely* to the core evil that the Double Jeopardy Clause was intended to prohibit: a *second* prosecution to a *second* jury after the *first* jury had voted to acquit on the murder charges.

The *Smith* dissenters emphasized that the trial court's reversal of its mid-trial dismissal did not give the prosecution a second opportunity to prove a claim it already had failed to prove, because (as the Appeals Court of Massachusetts had found) "the Commonwealth's evidence presented before the [motion to dismiss] was made and granted, in fact, sufficed to prove every element of the firearm possession charge." *Id.* at 479 (Ginsburg, J., dissenting). Thus there was no reason to believe that acquittal avoidance might be afoot. Here, on the other hand, we know the State's evidence to the first jury was insufficient to convict of murder because that is what the jury decided and announced. And for good reason: as amply documented in the trial record, the prosecution's circumstantial murder case was riddled with flaws, flouted the medical evidence and elementary principles of forensic pathology, and fell apart at trial. *See* Pet. Br. 3-8, 16. Thus, unlike the situation in *Smith*, the prosecution here is seeking to try Blueford a *second* time, having learned from its errors and omissions the first time around—something the Double Jeopardy Clause clearly prohibits. *See* pp. 25-28 *infra.* The judgment by the jury that Blueford is not guilty of capital or first-degree murder should be respected as the acquittal it is.

History supports the argument that the judge cannot engage in acquittal avoidance, but must accept an acquittal with which he does not agree. In *William Penn's Case* in 1670, the judge refused to accept the jury's not guilty verdict and even threatened to cut the throat of the jury foreman. The judge also had Penn chained to the floor when he argued that the refusal to accept the jury verdict denied him "Justice." The judge ordered the jury locked up for two days "without Meat, Drink, Fire, and Tobacco," but the jury clung

to its not guilty verdict. The judge ultimately accepted the acquittal but ordered the jurors imprisoned until they paid a harsh fine. See William Penn, *The Peoples Liberties Asssrted in the Tryal of William Penn and William Mead, 1670*.

The jury foreman, Bushell, petitioned for a writ of habeas corpus. In *Bushell's Case*, 6 How. St. Tr. 999 (Common Pleas 1670), the ten judges on the Court of Common Pleas unanimously held that a trial court lacked the authority to punish the jury on account of its verdict. Today, *Bushell's Case* is regarded as a watershed case that established the jury's independence from the court and thus elevated jury trial to a fundamental right. While this is true enough, it misses the deeper point, which is *why* a jury verdict of acquittal cannot be impeached. Chief Justice Vaughan's opinion noted that if judges could tell the jury how to decide a case, there would be no point in having juries at all. Vaughan could have stopped there but he made another, more fundamental, point: a jury finding that the evidence is not "full and manifest" is unimpeachable *because it is true*. *Id*. at 1006. Just as two barristers could "deduce contrary and opposite conclusions out of the same case in law . . . two men [could] infer distinct conclusions from the same testimony," and thus no reason exists to prefer the court's view over the jury's. *Id*.[6]

---

[6] For an earlier example, consider the fate of the London jury that acquitted Sir Nicolas Throckmorton of high treason. The jurors were "called into the Star Chamber in October, [1554], forasmuch as the matter was held to have been sufficiently proved against [Throckmorton]; and eight of them were there fined in great sums, at least five hundred pounds each, and remanded back to prison to dwell there until further order were taken for their punishment. The other four were released, because they submitted and confessed that they had offended in not considering the truth of the matter." Theodore F.T. Plunknett, *A Concise History of the*

Contrary to the State's subsequent characterizations, what happened in court in Blueford's case was in no sense an "informal exchange[]" or "discussion." Opp. to Pet. Cert. at 6, 9. The forewoman was responding on behalf of the jury, in open court on the formal record, to the judge's call for the jury's "count" on the issue of Blueford's guilt or innocence. Chief Justice Vaughn would have said that the forewoman's response represented the *truth* about Blueford's guilt on the murder charges. It did not matter that a verdict form was not filled in or judgment "entered of record." The term "verdict," derived from the Latin *veredictum*, means literally to say or speak the truth, not to write it down. As this Court long ago emphasized, "[h]owever 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 offense." *Ball*, 163 U.S. at 671; *see also id.* ("the reception of the verdict and discharge of the jury is but a ministerial act, involving no judicial discretion"); *Kepner v. United States*, 195 U.S. 100, 130 (1904) (same). The trial judge lacked the authority at that point to ignore the jury's acquittals by declaring a mistrial. *See also* Part IV *infra.*[7]

Common Law 133 (5th ed. 1956) (quoting from 1594 treatise) (internal punctuation and footnote omitted) (citing additional examples).

[7] This case does not present a situation in which the trial court in the first case took pains to prevent the jury from disclosing any of its deliberations or votes on the various charges—a relevant, though not dispositive, factor. Compare *Renico v. Lett*, 130 S. Ct. 1855 (2010), allowing a retrial after a mistrial where the trial court had told the deadlocked jury that "I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay?" *Id.* at 1861. Here the trial court questioned the forewoman on the jury's "count." Moreover, the effect of so-called "hard transition" instructions was not at issue in *Renico*. *See* Part II *infra.*

II. GIVEN THE JURY INSTRUCTIONS AND OTHER CIRCUMSTANCES OF THIS CASE, THE HUNG JURY ON MANSLAUGHTER WAS AN "IMPLIED" ACQUITTAL OF BLUEFORD ON THE MURDER CHARGES.

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

In a unanimous opinion by Chief Justice Burger (Justice Blackmun not participating), this Court held that the Double Jeopardy Clause precluded a new trial. Relying in part on *Martin Linen*, the Court held that the Court of Appeals' judgment was "a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 10. "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." *Id*. at 11. Even though no jury form stated "not guilty," the Court looked to the *substance* of what had happened and refused to let the State have another bite at the apple. *See also Greene v. Massey*, 437 U.S. 19, 26 (1978) (retrial barred where "the legally competent evidence adduced at the first trial was insufficient to prove guilt") (emphasis omitted).

Burks also relied, in part, on *Green v. United States*, 355 U.S. 184 (1957), another case without a completed "not

guilty" verdict form. Green was charged with arson and first-degree murder. The judge instructed the jury that it could find Green guilty of second-degree murder as a necessarily included offense of first-degree murder. The jury returned a guilty verdict of second-degree murder and arson, but "[i]ts verdict was silent" on the first-degree murder charge. *Id.* at 186. After Green's convictions were reversed on appeal, the government sought to try him again for first-degree murder. This Court held that another trial on that charge would violate the Double Jeopardy Clause:

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

This Court re-affirmed and strengthened *Green* in *Price v. Georgia*, 398 U.S. 323 (1970), which unanimously held that a conviction of a lesser-included offense, manslaughter, barred a second trial for the greater offense, murder. As in *Green*, the jury verdict was silent on the greater offense. *Price* emphasized that the silence on the greater charge was irrelevant: "[T]his Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, *whether that acquittal is express or implied* by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge." *Id.* at 329 (emphasis added); *see also In re Nielsen*, 131 U.S. 176, 190 (1889) ("If a conviction might have been had, and was not, there was an implied acquittal.").

Blueford's case is even more compelling than *Green* or *Price*. Rather than "implied" innocence through jury silence on the greater charge, here the jury forewoman announced that the jury "was unanimous against" both

capital and first-degree murder. Rather than an *implicit* "refus[al] to convict," *Green*, 355 U.S. at 190, here the jury was *explicit* in its refusal. But if that declaration is ignored, Blueford's case is indistinguishable from *Green* and *Price*. The Blueford jury, like the jury in *Price*, had a "full opportunity to return a verdict on the greater charge," *id.*, and determined, in the words of the jury instructions, that the State had failed to "sustain" those charges and that "reasonable doubt" remained, JA 51-52. To borrow from the prosecution's characterization of these instructions, the jury determined "that this man is not guilty of capital murder" and "is not guilty of murder in the first degree." *Id.* at 55. Because a jury already has "refused to convict" on these charges, *Green*, 355 U.S. at 190, the Double Jeopardy Clause bars a retrial on either capital or first-degree murder.[8]

This conclusion is reinforced by the Arkansas procedure on jury deliberation. Unlike the practice in Arkansas, juries in some states are instructed that they may move back and forth between the issues and varying degrees of guilt until they have agreed upon an outcome. The issues in "soft transition" states like these may be different and more difficult than in "hard transition" states like Arkansas, where the jury is required to find the defendant not guilty of

---

[8] The "implied acquittal" principle of *Green* and *Price* can usefully be contrasted with other determinations that do not trigger double jeopardy protection. In *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), for example, the Court stressed that "the touchstone for double-jeopardy protection . . . is whether there has been an 'acquittal'"—a resolution of "guilt or innocence." *Id.* at 106, 109. Under this standard, a life sentence for capital murder did *not* constitute an "acquittal" that barred subsequent resentencing to death for the convicted offense. *Id.* at 109-10. *See also United States v. Scott*, 437 U.S. 82, 94-101 (1978) (defense-requested dismissal on the ground of pre-indictment delay is not equivalent to an "acquittal" and thus not a jeopardy bar to a new indictment).

the greater offenses before being allowed to consider lesser-included charges. *See, e.g.*, *State v. Tate*, 773 A.2d 308, 321-22 (Conn. 2001) (concerns about "tentative nature" of jury's decisions in "soft transition" states "do not surface" in hard-transition states, which "require[] the jury to reach a partial verdict" on the greater charges before turning to the lesser-included offenses).

But where a jury has expressly been instructed that it may consider lesser-included offenses only if it has first unanimously determined that the State has failed to "sustain" its burden of proof on the greater offenses, *see* JA 51, the very fact of jury deliberation on a lesser-included offense makes the case equivalent to a conviction of a lesser-included offense as in *Green* and *Price*. *See also CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139, 2141 (2009) (per curiam) ("[J]uries are presumed to follow the court's instructions."); *Richardson v. Marsh*, 481 U.S. 200, 206-07 (1987) (reviewing "the almost invariable assumption of the law that jurors follow their instructions") (citations omitted). The effect of Arkansas law is to make a hung jury on a lesser included offense, without more, a substantive acquittal on the greater charges.

III. THE COLLATERAL ESTOPPEL COMPONENT OF THE DOUBLE JEOPARDY CLAUSE ALSO BARS ARKANSAS FROM RELITIGATING THE JURY'S FINDING THAT BLUEFORD IS NOT GUILTY OF MURDER.

Because the jury's action constituted an acquittal of Blueford on the capital and first-degree murder charges, the State's reprosecution of Blueford on those charges also is barred under the doctrine of defensive collateral estoppel. "[C]ollateral estoppel in criminal trials is an integral part of

the protection against double jeopardy[.]" *Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam).[9]

In *Ashe v. Swenson*, 397 U.S. 436 (1970), several masked men robbed six poker players. Ashe was charged with robbing one player, and the jury acquitted him. This Court held the acquittal barred a trial for the robbery of another poker player. The Court conceded that the robbery of each player was a different offense, but Ashe had argued in the first trial that he had no connection to the robbery. Thus, when the jury acquitted, it necessarily found that Ashe had not been one of the robbers—a fact critical to culpability that the State would try to prove again in a second trial. The question, this Court said, was "whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." *Id*. at 446. The answer was "no."

Blueford makes an even more compelling collateral estoppel argument, because he is being reprosecuted not simply for a related offense involving common facts, but for the *identical* offense. Notice that Ashe, like Blueford, lacked a formal verdict of not guilty on the pending charge. What

---

[9] Just as the existence of an "acquittal" does not turn on formalities, neither does the application of collateral estoppel. What matters is whether a factual determination is "sufficiently firm to be accorded conclusive effect," even if not included in a formal, final judgment. Restatement (Second) of Judgments § 13 (1982); *see also id.*, cmt. *g* ("In particular circumstances the wisest course is to regard the prior decision of the issue as final for the purpose of issue preclusion without awaiting the end judgment. . . . [T]he court should determine that the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered."); 18A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 4434 (2d ed. 2011) ("practical finality").

Ashe had was a *finding* by a jury that he was not one of the robbers. What Blueford has here is a *finding* by the jury that the State did not prove the facts necessary to convict on either capital or first-degree murder. The State may not "hale him before a new jury to litigate that issue again." *Id.*; *see also Turner v. Arkansas*, 407 U.S. 366, 369 (1972) (jury's general acquittal of murder implicitly but "logical[ly]" determined that defendant had not been "present at the scene of the murder and robbery"; collateral estoppel prevented subsequent prosecution on any charge dependent on defendant's presence at the scene).

That the State properly got a mistrial on the lesser counts changes nothing in the collateral estoppel calculus, as demonstrated in *Yeager v. United States*, 129 S. Ct. 2360 (2009). There the Court held that an acquittal on some counts necessarily resolved certain facts in Yeager's favor on counts where the jury was hung. That some counts were hung made no difference in the analysis of the collateral estoppel effects of the *acquitted* counts; "a jury verdict that necessarily decided [a particular] issue in [defendant's] favor protects him from reprosecution for any charge for which that is an essential element." *Id.* at 2368-69.

Although the dissenting Justices in *Yeager* disagreed with the Court that the acquittals necessarily resolved the hung counts in the defendant's favor, *see id.* at 2374-75 (Alito, J., dissenting), no one suggested that Yeager could be retried on the *acquitted* counts. Yet that is what the State seeks to do in Blueford's case. Under *Yeager*, the mistrial on the manslaughter count in Blueford's case is irrelevant to the collateral estoppel effects of the jury's unanimous determination that he is not guilty of murder. The Arkansas courts treated the mistrial as the event that determines whether the acquittals are valid, precisely the opposite of what *Yeager* requires. The facts underlying capital and first-degree murder have been "necessarily decided" in Blueford's

favor, *id.* at 2366, and the Double Jeopardy Clause forbids re-litigating them.

IV. AFTER THE JURY HAD ANNOUNCED THAT IT WAS "UNANIMOUS AGAINST" CONVICTION ON THE MURDER CHARGES, NO "MANIFEST NECESSITY" JUSTIFIED THE MISTRIAL ON THOSE CHARGES.

Green relied on another rationale, in addition to implied acquittal, for holding that a retrial for first-degree murder was barred by the Double Jeopardy Clause after conviction of a lesser-included offense—that "the jury was dismissed without returning any express verdict on that charge and without Green's consent." 355 U.S. at 191. To be sure, mistrials based on hung juries are a long-established exception permitting the State to re-prosecute when the first jury has had a chance to reach consensus but failed to do so. *See Renico v. Lett*, 130 S. Ct. 1855, 1863-64 (2010); *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). Blueford does not dispute that the mistrial on the lesser charges permits retrial on them.

Justice Story's opinion in *Perez* coined the term "manifest necessity" to explain why a retrial is ordinarily permissible after a hung jury. *Id.* One characteristic marks all of this Court's manifest necessity cases—no good alternative existed to a mistrial. This is obviously the case when the jury is hung. It also explains cases such as *Illinois v. Somerville*, 410 U.S. 458, 468-70 (1973) (fatally flawed indictment could not be remedied by amendment); *Wade v. Hunter*, 336 U.S. 684, 691 (1949) ("tactical situation brought about by a rapidly advancing army" into Germany made it impracticable to obtain necessary witnesses); and *Thompson v. United States*, 155 U.S. 271, 273-74 (1894) (juror discovered to be disqualified after trial began).

But in Blueford's case, the judge had readily available and logical alternatives to granting mistrial on the

murder charges. He simply could have accepted the verdict the jury announced in open court. Or he could have adopted the alternative that Blueford's counsel specifically requested and that is widely used throughout the country (*see* n.4 *supra*): The judge could have provided the jurors with a verdict form that enabled them to return a verdict of guilty or not guilty on the greater charges regardless of whether they could agree on manslaughter or negligent homicide. As defense counsel emphasized, "we also have an obligation to move forward where we can. And we're looking at, at least on the Defense side, expenditures of $10,000 or more at repeating this at a capital murder rate. 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." JA 68.

Indeed, the State's principal argument in this case has a fundamental contradiction at its core: If the State is correct that the jury's pronouncement in open court was not a cognizable "verdict" on the murder charges, the mistrial cases required the judge to provide the jury an opportunity to return a verdict on those charges. Once given such an opportunity, the jury might have acquitted, convicted, or deadlocked on the murder charges. But *any* of these outcomes would have avoided the second prosecution on the murder charges and the interlocutory appeal that has reached this Court.

This aspect of the case is governed by *United States v. Jorn*, 400 U.S. 470 (1971), where six members of the Court held that Jorn could not be retried after the trial judge had aborted the trial on his own motion without considering other alternatives to a mistrial. Writing for four members of the Court, Justice Harlan concluded that manifest necessity was not present because the judge had given "no consideration" to possible alternatives to a mistrial and "made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a

manifest necessity for the *sua sponte* declaration of this mistrial." *Id*. at 487.[10] Although a judge has broad discretion in considering the options, he must actually "exercise the 'sound discretion' entrusted to him" in evaluating those options "[]rationally" and "[]responsibly." *Arizona v. Washington*, 434 U.S. 497, 510 n.28, 514 (1978); *see also Renico v. Lett*, 130 S. Ct. at 1863; *Illinois v. Somerville*, 410 U.S. at 469 (court's declaration of a mistrial must reflect "a rational determination designed to implement a legitimate state policy"); *id.* at 468, 471.

The judge in this case could have allowed the jury to return a more "formal" verdict on the murder charges than it already had announced. How did the judge exercise his discretion in evaluating the alternatives to a mistrial? He said, "Well, it's—it's—it's like changing horses in the middle of the stream. I mean, we have submitted the instructions and the verdict forms. And to go back and then change that at this time, frankly, would create a mistrial within itself and that would not be appropriate." JA 68. But as discussed in note 3 *supra*, the forms the jury had been given did not permit a not guilty verdict solely on the murder charges. Until the jury was given such an opportunity, there was no necessity, "manifest" or otherwise, to grant a mistrial on the murder charges. And if the amended instructions and verdict forms *had* been given to the jury at Blueford's request, surely he could not then have complained and demanded a mistrial.

Blueford has an even more compelling argument than Jorn that a mistrial triggers a jeopardy bar. In *Arizona v. Washington*, this Court interpreted its "manifest necessity"

---

[10] Two other members of the *Jorn* Court would have held that the judge's discharge was an acquittal. *Id*. at 488 (Black and Brennan, JJ., joining in the judgment). Thus, a majority of six Justices in *Jorn* viewed the failure to consider alternatives to a mistrial as a bar to a second trial.

precedents as establishing "that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." 434 U.S. at 506. The "degrees of necessity" are on a spectrum:

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

A particularly vivid example of "acquittal avoidance" under the Stuart monarchs is *Ireland's Case*, 7 How. St. Tr. 79 (1678). Five defendants were tried for conspiring to murder Charles II. At the close of the evidence, the judge advised the jury that the Crown had presented insufficient evidence to sustain the charges against two of the defendants. But instead of dismissing the charges or allowing the jury to acquit these defendants, the judge returned them to prison "until more proof may come in." *Id.* at 120. They were later retried, convicted, and executed; their plea of double jeopardy was rejected "because there was no condemnation or acquittal" of them in the first trial. *Id.* at 316-17. *Ireland's Case* is a classic, and overt, example of acquittal avoidance.

This Court repeatedly has condemned the practice of acquittal avoidance, emphasizing that it can never provide the "manifest necessity" needed to end the first trial in a way that justifies a new trial on the same charges. In *Downum v. United States*, 372 U.S. 734 (1963), for example, the

prosecutor announced he was ready for trial even though his key witness had not been located. The Court characterized the need for a mistrial as based on the decision of the district attorney to "enter[] upon the trial of the case without sufficient evidence to convict." *Id.* at 737. *See also United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) ("if the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own"); *United States v. Dinitz*, 424 U.S. 600, 611 (1976) (Double Jeopardy Clause bars retrials where "declaration of a mistrial . . . afford[s] the prosecution a more favorable opportunity to convict the defendant") (internal quotation marks omitted); *Somerville*, 410 U.S. at 469 (fatally flawed indictment that could not be corrected by amendment constituted manifest necessity for a mistrial, unlike mistrials that "operate[] as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case"); *Gori v. United States*, 367 U.S. 364, 369 (1961) (Fifth Amendment prohibits a judge from "exercis[ing] his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused").

The mistrial on the capital and first-degree murder counts in Blueford's case presents an even more "extreme" and "abhorrent" situation than envisioned in *Washington* and the other cases cited above. Those cases addressed situations in which judges and prosecutors were simply *predicting* that the jury might acquit and acted to avoid the *risk* of such an outcome. Here the jury openly pronounced that it was "unanimous against" guilt on the murder charges. Here the prosecution's case was not simply "going badly" on the murder charges, *Gori*, 367 U.S. at 369; the jury had announced that the prosecution had lost on those charges. Only then did the court declare a mistrial, one that necessarily will allow the prosecutor to "buttress weaknesses in his evidence" and "strengthen [his] case" before a new

jury on the identical charges. *Washington*, 434 U.S. at 507; *Somerville*, 410 U.S. at 469.

When a State like Arkansas requires a unanimous jury decision to acquit on a greater charge before the jury can even consider lesser-included charges, the State's failure to accept partial verdicts in appropriate cases cannot constitute "manifest necessity" for a mistrial on the counts where the jury voted to acquit. To permit a retrial on such charges would be redolent of the English practice under the Stuart monarchs.

CONCLUSION

Blueford's jury made a substantive ruling in his favor "of some or all of the factual elements of the offense[s] charged." *Martin Linen*, 430 U.S. at 571. Moreover, given the Arkansas rule that lesser offenses cannot be considered unless and until the jury unanimously acquits on the greater offenses, the jury deliberation on manslaughter necessarily means that it had acquitted on the murder charges. The jury's action also reflects a resolution of facts in Blueford's favor that may not be relitigated under principles of defensive collateral estoppel.

Nor was there any manifest necessity requiring a mistrial on the murder charges: The trial court could have accepted the jury's acquittal, or it could have given the jury a verdict form that allowed them to return a verdict of guilty or not guilty on those charges regardless of the outcome on the lesser-included counts. The plain effect, if not the purpose, of the mistrial was acquittal avoidance. Even if the jury's "unanimous against" declaration was not itself an "acquittal" on the murder charges, the jury obviously was prepared to return a formal acquittal on those charges if given the opportunity. No "legitimate state policy," *Somerville*, 410 U.S. at 469, justifies such an exercise in acquittal avoidance.

This Court accordingly should reverse the judgment of the Arkansas Supreme Court.

Respectfully submitted,

LISA S. BLATT
CHARLES G. CURTIS, JR.
Counsel of Record
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
Charles.Curtis@aporter.com

Counsel for Amici Curiae

APPENDIX OF *AMICI CURIAE*

George C. Thomas III
Board of Governors Professor of Law and Judge Alexander P. Waugh, Sr. Distinguished Scholar
Rutgers School of Law—Newark

Michael Benza
Visiting Associate Professor of Law
Case Western Reserve University School of Law

Alafair Burke
Professor of Law
Hofstra University School of Law

Morgan Cloud
Charles Howard Candler Professor of Law
Emory University School of Law

Russell Covey
Associate Professor
Georgia State University College of Law

Joshua Dressler
Frank R. Strong Chair in Law
Michael E. Moritz College of Law, The Ohio State University

John J. Farmer, Jr.
Dean & Professor of Law
Rutgers University School of Law—Newark

Brian Gallini
Associate Professor of Law
University of Arkansas School of Law

Bennett L. Gershman
Professor of Law
Pace Law School, Pace University

Adam Gershowitz
Associate Professor of Law
University of Houston Law Center

Stuart Green
Professor of Law
Rutgers University School of Law—Newark

Lissa Griffin
Professor of Law
Pace Law School, Pace University

Bernard E. Harcourt
Professor and Chair, Department of Political Science
and Julius Kreeger Professor of Law
The University of Chicago

Stephen E. Henderson
Professor of Law
University of Oklahoma College of Law

Peter J. Henning
Professor of Law
Wayne State University Law School

Kyron James Huigens
Professor of Law
Benjamin N. Cardozo School of Law

Yale Kamisar
Clarence Darrow Distinguished University
Professor of Law Emeritus
University of Michigan Law School

Jeffrey L. Kirchmeier
Professor of Law
City University of New York School of Law

Alex Kreit
Associate Professor and Director of the Center for
Law & Social Justice
Thomas Jefferson School of Law

Arthur LaFrance
Visiting Professor of Law
University of Arizona James E. Rogers College of Law

Richard A. Leo
Associate Professor of Law
University of San Francisco

Michael J.Z. Mannheimer
Professor of Law
Salmon P. Chase College of Law
Northern Kentucky University

Lawrence C. Marshall
Professor of Law, Associate Dean for Clinical Education,
and David & Stephanie Mills Director of the
Mills Legal Clinic
Stanford Law School

Jonathan A. Rapping
Associate Professor of Law and Director of the
Honors Program in Criminal Justice
Atlanta's John Marshall Law School

Michael Risinger
John J. Gibbons Professor of Law
Seton Hall University School of Law

Susan D. Rozelle
Professor of Law
Stetson University College of Law

Laurent Sacharoff
Assistant Professor of Law
University of Arkansas School of Law-Fayetteville

Christopher Slobogin
Milton R. Underwood Chair in Law, Professor of Psychiatry,
and Director, Criminal Justice Program
Vanderbilt University School of Law

Carol Steiker
Howard J. and Katherine W. Aibel Professor of Law
Harvard Law School