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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 Supreme Court Of Arkansas

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

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

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The judgment of the Arkansas Supreme Court was delivered on January 20, 2011, and is published as *Blueford v. State*, 2011 Ark. 8, ___ S.W.3d ___.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution prohibits placing persons in jeopardy of life or limb twice for the same offense. The Due Process Clause of the Fourteenth Amendment makes it applicable to the States.

STATEMENT OF THE CASE

1. Petitioner was charged with knowingly causing the death of Matthew McFadden, the 19-month-old child of Petitioner's live-in girlfriend Kimberly Tolbert, under circumstances that manifested an extreme indifference to the value of human life in violation of Ark. Code Ann. § 5-10-101(9)(A) (Repl. 2006), a section of Arkansas' capital-murder statute. J.A. 45a-46a.

At his jury trial, the evidence presented by the State established that, on the morning of November 28, 2007, Tolbert left baby Matthew with Petitioner while she took a relative to a doctor's appointment. Arkansas Supreme Court Record ("ASCR") 123-24. Petitioner admits that he took a cell-phone call and began smoking marijuana shortly after Tolbert left. ASCR 647-48. Within an hour of being in Petitioner's "care," Matthew, who woke that morning healthy and playful, had sustained a closed-head injury so severe that he arrived at Arkansas Children's Hospital in cardiac and respiratory arrest due to a massive brain bleed that led to a coma and eventually his death three days later. ASCR 124, 132, 135, 201-09.

At the hospital, Petitioner denied any firsthand knowledge of what happened to Matthew, instead reporting to both the family and the initial investigating officers that minutes after leaving Matthew playfully jumping around his bedroom, he had found the baby unconscious and not breathing. ASCR 129, 182-83, 425-27. Despite the gravity of Matthew's injuries and the fact that he was not only dating but also living with his mother, Petitioner left the hospital and never returned to check on Matthew and did not attend his funeral. ASCR 133-35. Petitioner did not even speak to Tolbert when she returned to their apartment to collect her things. ASCR 134. When a warrant was issued, Petitioner attempted to evade arrest by fleeing to Texas, where he was apprehended following a routine traffic stop. ASCR 432-33, 671-72.

In the course of the investigation, Petitioner gave several statements to police in which he repeatedly denied any responsibility for Matthew's injuries, including a recorded statement given to an investigator in Texas accusing Tolbert of killing her son Matthew. ASCR 430-31, 443-45, 523, 528, 678-79. At trial, Petitioner admitted he lied, including implicating the baby's mother, in order to escape blame. ASCR 655-56, 678-79, 692-93. The version of events Petitioner asked the jury to believe at trial was that Matthew was injured accidentally when, startled by the boy, Petitioner elbowed him in the head knocking him into a table. ASCR 649-50. Rather than immediately seeking medical attention for Matthew, Petitioner testified that he told Matthew "my bad," laid him down on the bed, and left the room to talk to his other roommate only to find Matthew unresponsive sometime later. ASCR 651.

At trial, Petitioner argued that the severity of Matthew's condition was caused not by the initial injury, but, rather, by the emergency medical team's intubation of Matthew en route to the hospital. The State's experts, including Matthew's treating physicians, Drs. Rhonda Dick and Michele Moss, the State medical examiner, Dr. Adam Craig, as well as Dr. Karen Farst, Arkansas Children's Hospital's pediatric physician charged with reporting suspicious injuries to police, all disagreed.

Dr. Dick, who is board certified in pediatric emergency care, estimated that in 28 years of working for Arkansas Children's Hospital, she had treated

between 35,000-45,000 children. ASCR 197-99. Dr. Dick testified that in all her years of experience she had never seen such a large amount of blood accumulating behind a child's eyes and opined that such an injury could only result from trauma and not, as Petitioner alleged, from a faulty attempt at intubation. ASCR 211-12, 244. Dr. Moss, who had 24 years' experience treating children in intensive-care units, testified that based on the nature and extent of the damage, it was her opinion that Matthew had sustained severe head trauma stemming from a violent event comparable to a high-speed car accident or intentional trauma. ASCR 252-56, 272. Dr. Farst similarly testified that Matthew's injuries were most consistent with the intentional infliction of a severe head injury. ASCR 568-69. Independent of the conclusions of Matthew's treating physicians, Dr. Craig, who performed the autopsy, testified that Matthew died as a result of a closed head injury and that the severity of the injury led him to conclude that the manner of death was homicide. ASCR 321-22.

Petitioner's experts expounded on studies to the effect that severe head injuries such as that suffered by Matthew could result from minor accidents where a child falls just a few feet and strikes his head on a hard surface. ASCR 482, 728. While not ruling out the State's experts' conclusions, one of Petitioner's experts, Dr. John Galaznik, testified that it was just as likely for Matthew to have sustained his injuries by accidentally being elbowed and knocked into a table, as Petitioner described. ASCR 734-36.

2. The parties agreed to the jury instructions on the lesser-included offenses of first-degree murder, manslaughter, and negligent homicide, and also agreed to the verdict forms instructing the jury to find petitioner guilty of one of the homicide offenses or not guilty of any homicide offense. J.A. 48a-50a. The jury was instructed to consider the charged offense and its lesser-included offenses as follows: "If you have a reasonable doubt of the guilt of the defendant on the greater offense, you may find him guilty only of the lesser offense. If you have a reasonable doubt as to the defendant's guilt of all offenses, you must find him not guilty." J.A. 51a. The instructions continued, "If you have a reasonable doubt of the defendant's guilt on the [greater offense], you will consider the charge of [the next lesser included offense]" J.A. 51a-52a.

The State argued in closing that the jury could not consider the lesser-included offenses until it had found Petitioner not guilty of the greater offense, and emphasized that all 12 must agree on the greater offense before consideration was given to its lesser-included offenses. J.A. 54a-55a. Petitioner's attorney argued in closing that the jurors must consider the greater offenses first but that it was free to consider the intent necessary to establish the lesser offenses to determine guilt on the greater offense and said that it was important for the jurors to read and discuss all of the jury instructions during deliberations. J.A. 57a-58a. She concluded, asking the jury to find Petitioner guilty of negligent homicide. J.A. 58a, ASCR 839.

After deliberating for three hours, the jury sent out a note asking "what happens if we cannot agree on a charge at all?" J.A. 62a. The trial court gave the jury a dynamite instruction[1] and ordered it to return to deliberations and "make every sincere effort to reach a proper verdict." J.A. 62a-63a. Roughly an hour later, the jury sent out a second note, this time stating that "[t]he jury cannot agree on any one charge in this case." J.A. 64a. This prompted inquiry by the trial court of the foreperson, during which the foreperson reported that the jury had voted "unanimous against" capital murder and first-degree murder but had voted 9-3 on manslaughter. J.A. 64a-65a. When asked if the jury had voted on negligent homicide, the foreperson explained that that instruction had not yet been considered. J.A. 65a. ("We did not vote on that, 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.").

Upon Petitioner's request, and apparently in the belief the jury "would at least take a vote on negligent homicide[,]" the trial court gave the jury a second dynamite charge and told it to return to deliberations. J.A. 66a-67a. At this point, Petitioner's counsel asked that the jury be given the option of returning verdicts on the two greater offenses. J.A. 67a-68a. In response, the trial court suggested that such a

[1] The judge read to the jury Arkansas Model Criminal Instruction 2d 8102 based on *Allen v. United States*, 164 U.S. 492 (1896).

request was equivalent to changing horses in midstream, noting that the jury had already been instructed and been given verdict forms that required either a finding of guilt as to capital murder or one of its lesser-included offenses or a finding of not guilty as to all homicide offenses. J.A. 68a. After the jury again reported that it was hopelessly deadlocked, the trial court declared a mistrial, based on what it called confusion about instructions and because the jury had deliberated over five hours "without being able to reach a verdict." J.A. 69a-70a.

3. After learning through a response to his motion for a bill of particulars that the State intended to retry him on capital murder, Petitioner moved to have his case dismissed on double jeopardy grounds. The trial court denied Petitioner's motion, finding that the jury had not rendered any findings or verdicts, had not completed its deliberations, and had not acquitted Petitioner of any charge. Pet. App. 15a-16a. Petitioner then filed an interlocutory appeal with the Arkansas Supreme Court, which upheld the trial court's findings that jeopardy did not terminate when the jury reported its state of deliberations; therefore, Petitioner could be retried for capital murder. Pet. App. 1a-14a.

Observing that it is "axiomatic that a judgment is not valid until entered of record," the Court emphasized that the formalities surrounding the announcement of a final verdict are not trivial and, instead, insure that it is, in fact, final. Pet. App. 9a-12a. Applying this premise to the facts, the Court found

that the foreperson was simply engaging in a discussion with the trial court that the jury could not reach a verdict and not, as Petitioner argued, announcing a formal verdict of acquittal. Pet. App. 10a-11a. The Court then upheld the trial court's rejection of Petitioner's request for partial verdicts, adopting the majority view that they are not compelled by the Double Jeopardy Clause. Pet. App. 12a-13a. After Petitioner's request for rehearing was denied, Pet. App. 17a, Petitioner filed a Petition for a Writ of Certiorari, which was granted.

SUMMARY OF ARGUMENT

1. Petitioner's deadlocked jury was the classic example of manifest necessity warranting a mistrial, *see Arizona v. Washington*, 434 U.S. 497, 509 (1978), and the Double Jeopardy Clause, therefore, permits the State to retry him for capital murder and its lesser-included offenses. This is so despite the foreperson's mid-deliberation colloquy with the trial court regarding the jury's deliberations to that point on capital murder and first-degree murder. Contrary to the arguments of Petitioner and his amici, the foreperson's report that the jury had voted unanimously against those offenses does not amount to a verdict of acquittal.

2. As the most common and straightforward form of acquittal, a jury's verdict that a defendant is not guilty of the charged offense is the paradigm for

judicial acquittal events, which this Court has defined as clear, final "resolution[s], correct or not, 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). A jury verdict bears these hallmarks; it is a resolution; it represents juror agreement at the end of deliberations; it is unmistakably clear when it is issued; and it ordinarily cannot be reconsidered once it is accepted.

The foreperson's mid-deliberation report of the jury's votes on murder does not have any of these acquittal hallmarks. There is no confirmation in the record that the report accurately reflected each juror's vote or the reasons for it. The report came in the middle of the jury's deliberations; a point after which juries frequently change their collective minds, particularly, as here, after a dynamite instruction. Unlike a verdict at the end of deliberations, the foreperson's mid-deliberation report did not constitute a "resolution" with unmistakable clarity, but represented only a tentative decision.

The jury's transitional instructions, moreover, were not "acquittal first" instructions that converted the foreperson's report into an event of greater consequence. Unlike actual "acquittal first" instructions, the instructions used in Petitioner's case did not require the jury to issue a verdict or to acquit before considering a lesser-included offense. Secondly, while using a step-down procedure, the instructions in Petitioner's case did not foreclose the jury's ability to step back up and reconsider its prior votes on greater

offenses. Indeed, there is no basis to believe that the jury ultimately did not revisit its earlier votes on murder. Arkansas's transitional instructions do not establish that the foreperson's mid-deliberation vote report represented a verdict of acquittal any more than the report itself does.

3. Similarly, the transitional instructions do not establish that the jury impliedly acquitted Petitioner. Petitioner's "implied acquittal" theory rests on the faulty premise that the jury deadlocked on manslaughter after completing its deliberations on capital murder and first-degree murder. At bottom, therefore, Petitioner's implied acquittal argument is no different from his argument that the transitional instructions converted the foreperson's interim report on murder into an acquittal, and it fails for the same reasons. Nothing in the transitional instructions, the prosecutor's closing argument, the foreperson's report, or the notes passed by the jury indicate that it could not – or in fact did not – reconsider the murder offenses during its final half hour of deliberations. The jury's report of a deadlock immediately prior to the declaration of a mistrial, in fact, did not indicate the offenses on which the jury was hung or whether the jury had reached a unanimous resolution on any of the offenses.

Even if Petitioner's jury had been deadlocked on the lesser offense of manslaughter at the end of its deliberations, it would not have amounted to an implied acquittal of capital murder and first-degree murder under *Green v. United States*, 355 U.S. 184

(1957), and *Price v. Georgia*, 398 U.S. 323 (1970). *Convictions* on lesser-included offenses, which raised the "legitimate assumption" that those juries acquitted the defendants of the greater offenses, were indispensable components of both *Green* and *Price*. *Green*, 355 U.S. at 190-91; *see also Price*, 398 U.S. at 328. A jury that deadlocks, on the other hand, does not decide anything. *Yeager v. United States*, 129 S. Ct. 2360, 2370 (2009). Therefore, a jury's report of a deadlock on a lesser-included offense cannot, as a conviction can, imply an acquittal on the greater offense.

Additionally, *Green* and *Price* do not support Petitioner's argument that jeopardy nonetheless terminated on capital murder and first-degree murder because his jury, like the juries in those cases, had a full opportunity to return a verdict and no extraordinary circumstances prevented it from doing so. A jury deadlock, of course, is an "extraordinary circumstance" that justifies a declaration of a mistrial and a retrial on the charged offense. Unlike the juries in *Green* and *Price*, the deadlock of Petitioner's jury prevented a verdict on the lesser-included offenses.

4. Finally, Petitioner's challenge to the trial court's declaration of a mistrial is waived and without merit. Petitioner cannot now complain that there was no manifest necessity warranting a mistrial on the murder offenses because, although he did not request a mistrial, he failed to object when the trial judge explained that he was going to declare a mistrial *sua sponte* if the jury failed to reach a decision. J.A. 68a-69a. Petitioner's contention that the trial judge

lacked the authority to order a mistrial of the entire case, including the murder offenses, also fails on its merits. Petitioner is essentially arguing that the Constitution mandates partial verdicts, and, thereby, urges a striking and unjustified departure from the longstanding practice of requiring only general verdicts in criminal cases.

A partial verdict in the context of greater and lesser-included offenses equates to a "special verdict," which has long been disfavored in criminal law because it can, among other things, hinder deliberations by guiding the jury to a conclusion. More generally, requiring a jury to return a partial verdict following a deadlock without allowing deliberations to fully conclude is more likely to yield a verdict that was made in the spirit of compromise, and not a just adjudication of the charged offense.

By asserting that the Double Jeopardy Clause compels partial verdicts, Petitioner and his amici urge the very kind of rigid, mechanical rule this Court has previously refused to apply to a trial judge's exercise of discretion in discharging juries, particularly those that are deadlocked. *See Renico v. Lett*, 130 S. Ct. 1855, 1863 (2010). The Court should reject the rule that Petitioner and his amici apparently propose: that a trial judge's discharge of a jury deadlocked on a single charged offense and its lesser-included offenses always requires partial verdicts to determine which offenses may be retried. The circumstances of Petitioner's case, moreover, confirm that the trial judge

did not abuse his discretion by declaring a mistrial on the entire case.

ARGUMENT

Juror deadlock resulting in the declaration of a mistrial is a clear, if unsatisfying, possibility in the criminal justice system. While a hung jury suggests failure, "it is a valued assurance of integrity" by its protection of minority dissent. H. Kalven & H. Zeisel, THE AMERICAN JURY 453 (1966). Long ago courts abandoned practices to coerce verdicts from juries that could not unanimously agree, recognizing that coerced verdicts came at the expense of justice by intruding into the deliberative process. As the Court has observed, it is an old idea that a verdict should be the product of the conviction of the minds of the jurors, not of their "suffering of mind or body." *Arizona v. Washington*, 434 U.S. 497, 510 n.27 (1978) (citation and internal quotation marks omitted). Whether jurors can reach a just verdict or a mistrial must be declared due to deadlock is left to the discretion of the trial court, subject to review only for abuse, *id*. at 509-10, and calls for no scrutiny of the jury's deliberations.

Thus, for nearly two centuries, the Court has said the Double Jeopardy Clause permits new trials following such mistrials, recognizing that retrial in that circumstance does not force a defendant to run the gantlet twice for the same offense. That defense

right is "subordinated to the public's interest in fair trials designed to end in just judgments." *Richardson v. United States*, 468 U.S. 317, 325 (1984) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

As explained in § I below, the Double Jeopardy Clause permits Petitioner's retrial for murder because the mistrial of his capital-murder case due to juror deadlock did not terminate jeopardy on that, or any lesser-included, offense. Petitioner's arguments for avoiding retrial for murder – all of which rely on the foreperson's mid-deliberation report on the status of those deliberations – cannot withstand scrutiny. As demonstrated in §§ II and III, Petitioner's jury neither expressly nor impliedly acquitted him of the murder offenses by virtue of its mid-deliberation report or the nature of its instructions on those offenses. Finally, as shown in § IV, any dispute with the court's declaration of a mistrial as to capital murder and the lesser-included offense of first-degree murder is waived and, in any event, without merit.

I. A Mistrial Due To A Deadlocked Jury Does Not Terminate Jeopardy, But Instead Permits Retrial.

For nearly 200 years, this Court has recognized that instances of juror deadlock are the prototypical examples of the manifest necessity that warrant a mistrial and permit retrial. *United States v. Perez*, 9 Wheat. 579 (1824). Such mistrials – due to deadlock or other manifest necessity – are compelled by "the

public's interest in fair trials designed to end in just judgments." *Wade*, 336 U.S. at 689-90 (1949) (quoting and discussing *Perez*). As the Court explained in *Arizona v. Washington*, if a trial court does not discharge a jury unable to reach a verdict after "protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Id.*, 434 U.S. at 509.

For those reasons, this Court has held that a defendant's jeopardy does not terminate due to deadlock, thereby giving "the prosecution one complete opportunity to convict" lawbreakers. *Richardson*, 468 U.S. at 324-25 (internal quotation marks and citation omitted). Invoking Justice Holmes' aphorism that a page of history is worth a volume of logic, the Court restated the simple rule that applies here: "jeopardy does not terminate when the jury is discharged because it is unable to agree." *Id.* at 325-26.

The crucial, central fact in this case is that, after deliberating over a five-hour period, the jury never reached a verdict, prompting the trial court to declare a mistrial. J.A. 69a. Because the jury was discharged without reaching a verdict of guilty or not guilty on the charged or any lesser-included offense – it did not reach any final decision that terminated original jeopardy. Thus, the Double Jeopardy Clause does not bar any retrial on the charged offense and its lesser-included offenses.

Petitioner and his amici nevertheless argue that this general rule does not apply to him because, before the trial court declared a mistrial, the foreperson provided a mid-deliberation report that the jury was "unanimous against" capital murder and the lesser-included offense of first-degree murder and was deadlocked 9 to 3 on the still lesser-included offense of manslaughter. Petitioner and his amici offer several arguments for equating that mid-deliberation report with a verdict of acquittal as to murder, but all fail: the Double Jeopardy Clause does not elevate a mid-deliberation colloquy in a trial ending in jury deadlock into a bar to retrial.

II. Petitioner's Jury Did Not Expressly Acquit Him Of Murder.

An acquittal carries "particular significance," *United States v. Scott*, 437 U.S. 82, 91 (1978), in the administration of justice, because an acquittal can terminate jeopardy and prevent retrial. *E.g.*, *Price v. Georgia*, 398 U.S. 323, 329 (1970). The most common and straightforward type of acquittal is a jury's verdict that a defendant is not guilty of a charged offense. And because juries invariably issue their verdicts at the end of their deliberations, after telling the court they have reached a verdict, followed by a declaration in open court by a foreperson of what the verdict is (sometimes followed by a poll of the jury), this Court has had no reason to expound upon what actions by juries constitute acquittals. Indeed, a verdict – of acquittal or of guilt – speaks for itself. As the

only means by which a jury makes its determination known, *Yeager v. United States*, 129 S. Ct. 2360, 2367 (2010), a verdict is both form and substance.

On the other hand, the Court has had occasion to say what actions of *courts* amount to acquittal events that terminate jeopardy. From those cases we know that a court's action, whatever its label, is an acquittal if it "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). That resolution must be clear – unmistakably meant to represent an acquittal. *See Burks v. United States*, 437 U.S. 1, 10, (1978). In addition, such a resolution, even if an acquittal event, will not terminate jeopardy if it may be reconsidered, *i.e.*, if it is understood at the time to be nonfinal. *See Smith v. Massachusetts*, 543 U.S. 462, 470-73 (2005).

A jury verdict of acquittal, naturally, bears similar hallmarks to judicial acquittal events – after all, it is the measure of the latter. A jury verdict of acquittal is a resolution; it represents juror agreement at the end of deliberations; it is unmistakably clear when it is issued; and it ordinarily cannot be reconsidered once accepted. By contrast, a mid-deliberation vote report – even "unanimous" against murder – does not have those hallmarks.

A. The Foreperson's Mid-deliberation Report Was Not An Acquittal Or Final.

Petitioner's first argument is that, putting to the side for now the so-called acquittal-first instructions, the foreperson's mid-deliberation report that the jury had voted 12-0 against the two murder offenses, (while voting 9-3 for conviction of manslaughter) constituted an acquittal that bars retrial of him on those two offenses. Pet'r. Br. 17-24. This is so, he argues, because "the jury ha[d] offered its clear, express, and final determination of [the] defendant's innocence on certain charges, and the jury ha[d] been discharged." *Id*. at 18. None of that is correct. The foreperson's mid-deliberation report was anything but final – deliberations continued after the colloquy, during which time the jury could have revisited its prior votes on the murder charges. Nor was there a "clear" or "express" unanimous vote against the murder charges as of the moment that counted: when the jury deliberations *concluded*, immediately after which it was discharged.

As an initial matter, the foreperson simply answered the trial court's inquiries, and there is no confirmation in the record that her report accurately reflected each juror's vote or reasons for it. In fact, the foreperson's report that the jury was unanimously against the murder charges is inconsistent with the written message sent by the jury that it "cannot agree on any one charge." J.A. 64a.

Even assuming the accuracy of the foreperson's report, Petitioner's argument fails for a more fundamental reason. His insistence that the mid-deliberation votes on the murder offenses were unchangeable, final votes for *acquittal* cannot be reconciled with the fundamental nature of jury deliberations, which is that they are fluid. Juror deliberations build consensus by "rational persuasion, sheer social pressure, and the psychological mechanism by which individual perceptions undergo change when exposed to group discussion." Kalven & Zeisel, at 489. Juries may, and often do, change their collective minds as discussions among the jurors continue, new arguments for a particular result are made, old ones are made in different ways. All the more so when, as happened here, jurors try to comply with a dynamite charge to "make every sincere effort to reach a proper verdict." J.A. 63a, 67a. And as explained in § II(B), *infra*, which responds to Petitioner's reliance on the jury instructions in this case, those instructions did not take away the jury's right to revisit its earlier votes on the murder counts.

The foreperson's mid-deliberation report that the jury had voted 12-0 against capital murder and first-degree murder was only that, a report. It is hardly mere formalism to say that no verdict of acquittal was reached here when, after returning to deliberations, the jury did not, in fact, reach a verdict of any kind. This might be a more difficult case if the jury reported at the *end of deliberations* that it had voted unanimously against guilty on the murder offenses

but was hung on the manslaughter offense. It did not do that, however, which is why Petitioner relies solely on the foreperson's statement midway through the deliberations. But the mid-deliberation report did not constitute a "resolution" with unmistakable clarity; it was only the tentative report of ongoing deliberations.

This is not a matter of mere form over substance. *See* Pet'r. Br. 18 (quoting *Martin Linen*, 430 U.S. at 571, for the proposition that "what constitutes an 'acquittal' is not to be controlled by the form of the [fact finder's] action"). The Court's analysis of what constituted an acquittal in *Martin Linen* considered "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." *Id.* (emphasis added). While the form of a *judge's* action does not dictate what constitutes an acquittal, a jury's action of acquittal comes in the form of a verdict, not tentative mid-deliberation vote reports. Juries, after all, speak only through their verdicts. *See*, *e.g.*, *Yeager*, 129 S. Ct. at 2367.

This is not formalistic logic; it is the axiomatic teaching of history. Here the jury could acquit Petitioner of the charged capital-murder offense and the lesser-included first-degree murder offense by reaching a verdict of guilty on the still lesser-included offenses of manslaughter or negligent homicide or by a verdict of acquittal of homicide altogether. Its mid-deliberation report was that it could not reach a verdict in any of those ways, and it was given a

dynamite charge. That report was a verdict on nothing. Ultimately, its final report was that it could not agree on a verdict, and it was discharged.

Unlike the certainty of a verdict duly returned by a jury or the unqualified or unmistakable findings of trial courts and appellate courts, Petitioner can point only to a mid-deliberation vote report by a single juror. While an appellate court's or trial court's determination of insufficiency of the evidence are non-speculative resolutions and the equivalent of a final acquittal for double-jeopardy purposes, *Richardson*, 468 U.S. at 325 & n.5, the mid-deliberation vote report of a foreperson bears little resemblance, and no equivalence, to a verdict of acquittal. The foreperson's report to the judge simply cannot bear the weight the Petitioner and his amici ask of it.

B. The Jury's Instructions Did Not Convert The Foreperson's Mid-deliberation Report Into An Acquittal.

Petitioner tries to convert the foreperson's mid-deliberation report into an event of greater consequence by characterizing Arkansas as an "acquittal first" jurisdiction and insisting that the instructions provided in this case required the jury to "acquit" Petitioner of a greater offense before it could consider a lesser offense. Pet'r. Br. at 24-30. That argument elevates jargon that does not appear in Arkansas law over the actual instructions given. The instructions to Petitioner's jury – that if "you have a reasonable

doubt of the defendant's guilt on the charge of [greater offense], you will consider the charge of [lesser offense]" – did not bar the jury from revisiting prior votes and deliberating on a greater offense even after it had considered a lesser offense. The instructions placed constraints on the jury's mode of deliberations, but they did not make the jury's initial mid-deliberation conclusions on the greater murder offenses definitive resolutions that finally terminated jeopardy as to them. Similarly, nothing the prosecutor said in closing argument prevented the jury from revisiting prior votes on greater offenses. In sum, the mid-deliberation vote reports on the murder offenses were not acquittals, were not final, and did not terminate the initial jeopardy.

1. A lesser-included offense's elements are a subset of the elements of the charged (greater) offense. *Schmuck v. United States*, 489 U.S. 705, 719 (1989). Transitional instructions are essential to guide juries through the formidable task of considering a defendant's guilt or innocence for a crime that includes lesser degrees of blameworthiness. The question is not merely guilt or innocence, but also *if guilt*, what level of culpability – the government's charge or a lesser-included offense.

Some jurisdictions fear that unless juries are required unanimously to agree on the charged offense, they will too readily render compromise verdicts in dereliction of their duty to avoid compromise by appeasing hold out jurors. *See e.g., People v. Boettcher*, 505 N.E.2d 594, 597, 513 N.Y.S.2d 83, 87 (1987).

Other jurisdictions encourage compromise verdicts and seek, instead, to avoid the coercive nature of an "acquittal-first" requirement because such a procedure could result in unnecessarily pressuring jurors to convict on a greater offense rather than cause a mistrial when a jury is deadlocked. *See*, *e.g*., *State v. Labanowski*, 816 P.2d 26, 31-36 (1991). Still other jurisdictions believe the better rule is to allow a defendant to elect between the two approaches. *See*, *e.g*., *United States v. Tsanas*, 572 F.2d 340, 345-46 (2d Cir. 1978).

Relying on Judge Friendly's opinion in *Tsanas,* 572 F.2d at 345-46, Petitioner suggests that transitional instructions fit neatly within two clearly distinguishable categories – hard transition and soft transition. They do not. There is a wider spectrum of views than a simple dichotomy among courts as how best to instruct juries to sequence to lesser-included offenses by the least intrusion into their deliberations. What matters is what the instructions directed the jury to do, not what label is fixed to those instructions.

2. In an "acquittal-first" state, strict step-down instructions and any associated verdict forms clearly and unambiguously instruct jurors that they must unanimously issue a "verdict" of not guilty, or must "acquit" the defendant of the greater offense, before considering the lesser-included offense.[2] In *Tsanas*,

[2] *See, e.g., State v. Davis*, 266 S.W.3d 896, 901 n.2 (Tenn. 2008) (reciting pattern jury instructions in part as: If you have a

(Continued on following page)

Judge Friendly explained that "insisting on unanimity with respect to acquittal" is characteristic of a "hard-transition" instruction. 572 F.2d at 346. Arkansas's transitional instructions do not have that

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reasonable doubt as to the defendant's guilt of the charged offense, then your verdict must be not guilty as to this offense, and then you shall proceed to determine whether the defendant is guilty or not guilty of the lesser included offense); *State v. Daulton*, 518 N.W.2d 719, 722 (N.D. 1994) (holding that "instruction which requires an acquittal of the offense charged before consideration of lesser-included offenses provides for a more logical and orderly process for the guidance of the jury in its deliberations"); *State v. Raudebaugh*, 864 P.2d 596, 599 (Idaho 1993) (reciting the instruction given by the trial court as follows: "If your unanimous verdict is that [the defendant] is not guilty of murder, you must next consider the included offense of voluntary manslaughter"); *State v. Sawyer,* 630 A.2d 1064, 1071 (Conn. 1993) (holding that "the court must direct the jury to reach a unanimous decision on the issue of guilt or innocence of the charged offense before going on to consider the lesser included offenses"); *State v. Van Dyken*, 791 P.2d 1350, 1356 (Mont. 1990) (reciting the instruction as follows: "in order to reach a verdict in this case, it is necessary that you consider the crime of deliberate homicide first, and that all twelve of you find the defendant either guilty or not guilty of that charge"); *Lindsey v. State*, 456 So.2d 383, 387 (Ala. Cr. App. 1983) (holding that the trial courts' instruction that "the jury should not consider the lesser included offenses unless it found the appellant 'not guilty' of the capital offense" and that "the jury's decision should be unanimous" was a correct statement of the law); *Pharr v. Israel*, 629 F.2d 1278, 1281 (7th Cir. 1980) (quoting federal pattern jury instructions that were set forth in Devitt and Blackmar: "[i]f the jury should unanimously find the accused 'Not Guilty' of the crime charged in the indictment (information), then the jury must proceed to determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in the crime charged").

characteristic and therefore are not properly considered "acquittal first."

First, the instructions used here did not require the jury to issue a verdict or to "acquit" before considering a lesser-included offense. The words "verdict" and "acquit" do not appear in the instructions, and the jury was not issued a verdict form through which it could transform its initial vote on greater offenses into a final verdict. On its face, the most that can be said of the instructions is that they required the jurors to agree that they have "a reasonable doubt of the defendant's guilt" on a greater offense before they can move on to consider a lesser offense.[3] But that characteristic does not make the instructions "acquittal first" instructions – at least if the word "acquittal" in that term of art is to retain any meaning.

Second and relatedly, not a word of the instructions took away the jury's ability to reconsider its prior votes on greater offenses. As discussed in § II(A) above, juries generally are entitled to revisit earlier votes during the course of deliberations. The instructions here did not tell the jury they could not engage in that routine jury behavior; nor has the Arkansas

[3] Although the State has argued, as the prosecutor did here, that the word "you" in the transitional instruction is used in the plural sense, requiring unanimity before sequencing to a lesser-included offense, the Arkansas Supreme Court did not resolve the question. *Boyd v. State*, 369 Ark. 259, 264, 253 S.W.2d 456, 460 (2007). The State is assuming for the sake of argument that the jury was only to sequence unanimously.

Supreme Court ever construed the transitional instructions as depriving a jury of that power. Arkansas's instructions require juries to consider greater and lesser-included offenses in a particular order as a sequencing guide, or a step-down procedure. While the instruction may be called a ratchet to guide the jury down from a greater to a lesser-included offense, it is not a one-way ratchet. Having considered a lesser-included offense under the step-down procedure, Arkansas juries may step back up and revisit earlier votes on greater offenses.

Arkansas's transitional instruction is most similar to one of the varieties of "soft-transition" jurisdictions. "Soft-transition" jurisdictions utilize step-down instructions that include the following variations: (1) instructions that a jury is to consider the lesser-included offense after making reasonable efforts to agree on the greater offense;[4] (2) instructions that if a

[4] *See Green v. State*, 80 P.3d 93, 97 (Nev. 2003) ("[c]ourt must instruct the jury that it may consider a lesser-included offense if, after first fully and carefully considering the primary or charged offense, it either 'finds the defendant not guilty, or' is unable to agree whether to acquit or convict on that charge"); *State v. Klafta*, 831 P.2d 512, 517 (Hawaii 1992) ("[o]nly when one or more jurors are not convinced beyond a reasonable doubt that the defendant is guilty" can you consider whether defendant is guilty of a lesser included offense); *State v. Truax*, 444 N.W.2d 432, 436 (Wis. App. Ct. 1989) (instructing the jury that "[y]ou should make every reasonable effort to agree unanimously on your verdict on the [principle charge] before considering the lesser-included offense"); *State v. Thomas*, 533 N.E.2d 286, 292-93 (Ohio 1988); *State v. Cummings*, 744 P.2d 858, 863 (Kan. 1987).

jury cannot come to a unanimous decision on either guilt or innocence, it should consider the lesser-included offense;[5] and (3) instructions that suggest, but do not require, a step-down process and allow a jury to consider lesser-included offenses without first unanimously agreeing to "acquit" on the greater offense.[6] Arkansas's instructions are close to that third

[5] *State v. Daniels*, 156 P.3d 905, 908 (Wash. 2007) (jury instructed that it could either find the defendant guilty or not guilty of the greater offense, or if it could not reach a verdict, it could move to the lesser-included offense); *Donaldson v. United States*, 856 A.2d 1068, 1073 (D.C. 2004) (jury given the option of finding the defendant guilty or not guilty of charged offense, or if "after making all reasonable efforts to reach a verdict" and that if it could not do so, it could consider the lesser included offenses); *People v. Handley*, 329 N.W.2d 710, 712 (Mich. 1982).

[6] *State v. Shumway*, 63 P.3d 94, 96 (Utah 2002) (holding that a jury should be instructed to "consider the lesser included offenses if they do not find the defendant guilty of the charged offense," which is the proper method to avoid "any misunderstanding by jurors that they must, by unanimous vote, acquit the defendant on the charged offense before it may consider the lesser included offenses"); *Kunselman v. State*, 501 S.E.2d 834, 835 (Ga. App. Ct. 1998) (holding that the State's pattern instructions do not require a unanimous acquittal, but, rather a unanimous finding of not guilty on the charged offense leaving the jury free to consider lesser-included offenses without an "acquittal first" requirement); *People v. West*, 291 N.W.2d 48, 52 (Mich. 1980) ("There is an important difference between permitting a jury to consider lesser included offenses only if it fails to find guilt of the principal offense, and permitting it to do so only if it first acquits on the principal charge"); *Tisius v. State*, 183 S.W.3d 207, 217 (Mo. 2006) ("Missouri's instructions on lesser-included offenses do not require that the defendant first be acquitted of the greater offense" but provides that "juries are allowed to consider the lesser-included offense if they 'do not find the defendant guilty' of the greater offense").

category: they allow a jury to consider lesser offenses without requiring an initial "acquittal" on the greater offense.

3. There is no basis to believe that Petitioner's jury, during its final deliberation, did not revisit its earlier votes on the murder offenses. The foreperson's reports indicated that the jurors rightly were considering the charges in order, from greater to lesser. (Though when the trial court declared a mistrial it stated that "there seems to be a lot of confusion on the part of the – the jury about some of the instructions." J.A. 69a.) But nothing in the record indicates that the jury viewed itself as having definitively acquitted Petitioner of the murder offenses such that it could not revisit its initial vote on them. Indeed, Petitioner's counsel said in closing that, "You are free to read and talk and consider all of the charges," limited only by the requirement that it "vote first on capital murder." J.A. 57a. And although the prosecutor clarified in his closing rebuttal that the jurors must *all* agree that reasonable doubt exists as to capital murder before proceeding to first-degree murder, the prosecutor did not say that the jury could not step-back up to greater offenses. In the end, the foreperson stated only that the jury could not reach a verdict, J.A. 69a – providing no basis to believe the jury did not consider, and possibly (re)vote on *all* of the offenses during the deliberations that followed the earlier colloquy.

In sum, Arkansas's transitional instructions do not establish that the mid-deliberation vote report

from the foreperson represented a verdict of acquittal that terminated jeopardy any more than the report itself does.

III. Petitioner's Jury Did Not Impliedly Acquit Him.

Petitioner's final argument in support of treating his jury's deadlock as an acquittal is that, under *Green v. United States*, 355 U.S. 184 (1957), and *Price v. Georgia*, 398 U.S. 323 (1970), his jury impliedly acquitted him. In *Green* and *Price*, the Court held that a conviction on a lesser offense impliedly acquits a defendant of the greater offenses. Petitioner reasons that a deadlock on a lesser offense ought to have the same effect. Pet'r. Br. 32. That argument largely relies on the same faulty premises that underlie his prior two arguments; and it fails to account for the fundamental difference between a hung jury and a jury that reaches a verdict.

1. Petitioner's "implied acquittal" theory rests on the premise that the jury deadlocked on manslaughter after completing its deliberations on the murder offenses. At bottom, therefore, Petitioner's implied acquittal argument is no different from his argument that the transitional instructions converted the foreperson's interim report on capital murder and first-degree murder into an acquittal, and it fails for the same reasons set forth in § II(B), *supra*. Nothing in the transitional instructions, the prosecutor's closing argument, the foreperson's report, or the notes

passed by the jury indicate that the jury could not – or in fact did not – reconsider capital or first-degree murder after returning for its final half hour of deliberations.

The foreperson's report set forth the purported status of several offenses mid-deliberation; it was not a final resolution by the jury. That interim report did not itself constitute an "acquittal" of the murder offenses or establish that the only count the jury would consider when returned to deliberation was the manslaughter count. And the jury's report of a deadlock immediately prior to the declaration of a mistrial did not indicate the offenses on which the jury was hung or whether the jury had reached a unanimous resolution on any of the offenses. Accordingly, Petitioner is wrong to assume (Br. 32) that his "jury deadlocked on the lesser-included offense," much less that it deadlocked *only* on that offense.

2. Even if his jury had been deadlocked on the lesser offense of manslaughter at the end of deliberations, it would not have amounted to an implied acquittal of the murder offenses. An indispensable component of *Green* and *Price* was verdicts on lesser-included offenses that raised the "legitimate assumption" that those juries acquitted Green and Price of the greater offenses. *Green*, 355 U.S. at 190-91; *see also Price*, 398 U.S. at 328; *Richardson*, 468 U.S. at 325 (citing *Price* for the proposition that double jeopardy applies only if there has been some event, *such as an acquittal*, which terminates original jeopardy). A jury that convicts on a lesser-included offense

necessarily decides that the state failed to prove all of the elements of the greater offense, which explains why the conviction on the lesser-included offense, itself, is an "acquittal" of the greater offense. *See Yeager,* 129 S. Ct. at 2368-69.

It bears repeating that a charged offense and its lesser-included offenses are one charge for purposes of jeopardy calculus. *See Brown v. Ohio*, 432 U.S. 161, 168-69 (1977). For that reason, juries considering greater and lesser-included offenses need only return one, final verdict of either guilty of the charged or a lesser-included offense or not guilty – here that the petitioner was "guilty" of one of the four homicide offenses or "not guilty" of any homicide. Thus, when the *Green* and *Price* juries delivered verdicts of guilty on the lesser-included offenses, they delivered concomitant implied verdicts of acquittal on the greater offenses.

A jury that deadlocks, on the other hand, does not decide anything. *See Yeager*, 129 S. Ct. 2370 ("[T]he fact that a jury hangs is evidence of nothing – other than, of course, that it has failed to decide anything."). After all, "a jury speaks only through its verdict," *id*. at 2367, and thus "[t]o identify what a jury necessarily determined at trial," courts "scrutinize a jury's decisions, not its failures to decide." *Id.* at 2368. A jury's report of a deadlock on a lesser-included offense cannot, as a conviction can, imply an acquittal on the greater offense.

Petitioner nonetheless persists that his jury, like the juries in *Green* and *Price*, "'was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so.'" Pet'r Br. 30 (quoting *Green*, 355 U.S. at 191; *citing Price*, 398 U.S. at 329). A jury deadlock, of course, *is* an "extraordinary circumstance" that, as discussed in § I, *supra*, justifies a declaration of a mistrial and a retrial on the charged offense. Every jury that deadlocks can be said to have had "a full opportunity to return a verdict," thereby (under Petitioner's reasoning) barring retrial. The reason the quoted language from *Green* does not swallow the rule that defendants generally may be retried when their first jury hangs is that the juries in *Green* and *Price* did not hang. There were "no extraordinary circumstances" which "prevented" the jury from returning a verdict on the murder charges in *Green* and *Price* because the juries in those cases reached verdicts on the lesser-included offenses.

Unlike the juries in *Green* and *Price*, the deadlock of Petitioner's jury prevented a verdict on the lesser-included offenses. *Green* and *Price*, therefore, do not support finding an implied acquittal from the foreperson's mid-deliberation report that the jury was divided 9-3 on manslaughter.

IV. Any Challenge To The Court's Declaration Of A Mistrial Is Waived And Is Without Merit.

Near the end of his brief, Petitioner asserts that the trial court lacked the "manifest necessity" to declare a mistrial on the murder charges. Pet'r Br. 29-30, 32-33. His amici press that claim as well, expressly arguing that the Double Jeopardy Clause requires judges to seek partial verdicts from juries before discharging them and permitting retrial on the charged offense. Crim. Law Profs. Amicus Br. 23-28; NACDL Amicus Br. 10-20. Petitioner has waived this argument by failing to object to the trial judge's order of a mistrial; and in any event, the Double Jeopardy Clause does not mandate partial verdicts when a jury deadlocks on a charged offense and its lesser-included offenses.

1. Petitioner waived any argument that a second trial on capital murder or first-degree murder is barred because there was no manifest necessity warranting a mistrial on those charges. A defendant who fails to object to a trial judge's discharge of a deadlocked jury cannot later claim that double jeopardy bars a second trial because there was no manifest necessity warranting a mistrial. *See Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (stating that the manifest necessity test applies when a trial is terminated over a defendant's objection).

To be sure, Petitioner told the trial judge, after the jury was sent back into deliberations after its

second dynamite instruction, that he was not requesting a mistrial. J.A. 68a-69a. He said nothing, however, when the trial judge explained that he was going to declare a mistrial *sua sponte* if the jury failed to reach a decision because "[the jurors] have been out hours and hours now[,]" and "they have indicated twice that they're hopelessly deadlocked." J.A. 69a. Petitioner did not object or make any argument that a mistrial was not warranted on capital or first-degree murder. Petitioner therefore consented to the mistrial on the entire case and cannot now be heard to complain that there was no manifest necessity warranting a mistrial on the murder offenses.

2.a. Petitioner's contention that the trial judge lacked the authority to order a mistrial of the entire case, including the murder offenses, also fails on its merits. Petitioner is essentially arguing that the Constitution mandates partial verdicts, a position his amici expressly embrace. Interpreting the Double Jeopardy Clause to require partial verdicts, however, would constitute a striking and unjustified departure from the longstanding practice of requiring only general verdicts in criminal cases.

It bears recalling that the difference between a greater offense and a lesser-included offense is the jury's finding of an additional fact. A partial verdict in the context of greater and lesser-included offenses thus equates to a "special verdict" – which has long been disfavored in criminal law for weighty reasons that still hold true. *See Mathews v. United States*, 485 U.S. 58, 72 n.3 (1988) (White, J., dissenting) ("As a

general rule special verdicts are disfavored in criminal cases.") (quoting *United States v. Buishas*, 791 F.2d 1310, 1317 (7th Cir. 1986)); G. Clementson, SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES, 49 (1905) ("It is one of the most essential features of the right of trial by jury that no jury should be compelled to find any but a general verdict in criminal cases, and the removal of this safeguard would violate its design and destroy its spirit.") (footnotes omitted); Richard E. Myers II, *Requiring A Jury Vote of Censure to Convict*, 88 N.C. L. Rev. 137, 167 (2009) (finding that concerns with special verdicts date back at least to the famous sedition trial of John Peter Zenger, at which the jury refused to comply with the court's demand that it issue a special verdict as to the fact of publication).

As Professors Wright and Welling have explained, "The rule against special verdicts in criminal cases is nothing more nor less than a recognition of the principle that 'the jury, as conscience of the community, must be permitted to look at more than logic.'" 3 Charles Alan Wright & Sarah N. Welling, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE 512 n.5 (4th ed. 2011) (quoting *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969)). Expressing related but distinct concerns, the Eleventh Circuit has held that special interrogatories in a criminal case "can unduly hinder jury deliberations by allowing the trial judge to carefully guide the

jury to its conclusion." *United States v. Birdsong*, 982 F.2d 481, 482 (11th Cir. 1993).[7]

More generally, partial verdict inquiries "no matter how carefully phrased and delivered" carry with them "significant potential for coercion." *Commonwealth v. Roth*, 776 N.E.2d 437, 447 (Mass. 2002). For example, a jury that is fatigued from deliberating and unable to reach a verdict may feel coerced to agree to a partial verdict in order to salvage the trial. Moreover, "until there is a final verdict on the entire charge, one cannot be certain whether jurors have been proffering 'compromise' votes in an attempt to reach a verdict." *Id*. at 448. In short, requiring the jury to return a partial verdict following a deadlock without allowing deliberations to fully conclude is more likely to yield a verdict that was made in the spirit of compromise, and not a just adjudication of the charged offense.

Some jurisdictions have concluded that the benefits of partial verdicts outweigh those downsides. *Whiteaker v. State*, 808 P.2d 270, 274-75 (Alaska App. 1991). Others states, however, have not. *E.g.*, *People v. Richardson*, 184 P.3d 755, 763 (2008). The Constitution permits the States to make that choice. This

[7] In addition, as civil practice demonstrates, once a jury starts explaining itself along these specific lines, it opens the verdict up to scrutiny and increases the likelihood of inconsistent verdicts. *See, e.g.*, Fed. R. Civ. P. 49(b)(4) & (b)(5) (2011) (providing appropriate action when special verdicts are inconsistent with the general verdict, and when answers are inconsistent with each other and the general verdict).

Court has not previously suggested that the Double Jeopardy Clause imposes a uniform national rule requiring partial or special verdicts, and it should not craft such a rule now.

b. In asserting that the Double Jeopardy Clause compels partial, even special, verdicts, Petitioner and his amici also urge the very kind of rigid, mechanical rule this Court has previously refused to apply to a trial judge's exercise of discretion in discharging juries, particularly those that are deadlocked.

A trial judge's belief that the jury is unable to reach a verdict is, of course, "the classic basis for a proper mistrial," *Arizona v. Washington*, 434 U.S. at 509, and this Court affords great deference to a trial judge's decision to grant a mistrial when he considers the jury deadlocked. *Id.* at 510. That is because "if retrial of the defendant were barred whenever an appellate court views the 'necessity' of a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the deadlock." *Id.* at 509-10. Therefore, this Court has "expressly declined to require mechanical application of any rigid formula when trial judges decide whether jury deadlock warrants a mistrial." *Renico v. Lett*, 130 S. Ct. 1855, 1863 (2010) (internal citation omitted).

To the contrary, "the law has invested Courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking

all the circumstances into consideration, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Wade*, 336 U.S. at 689-90. This rule "attempts to lay down no rigid formula." *Id.* at 690. Rather, it "command[s] courts in considering whether a trial should be terminated without judgment to take all circumstances into account, and thereby forbid[s] the mechanical application of an abstract formula." *Id.* at 691 (internal quotation marks omitted); *see also Illinois v. Somerville*, 410 U.S. 458, 464 (1973) (noting that "virtually all of the [manifest necessity] cases turn on the particular facts").

Applying this broad standard, the Court has rejected rules, for example, that categorically declare that "the absence of witnesses can never justify discontinuance of a trial," *see Wade* 336 U.S. at 691; and that a "trial on a defective indictment [always] precludes retrial." *Somerville*, 410 U.S. at 466. Nor has the Court "required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse." *Renico*, 130 S. Ct. at 1864. This Court should likewise reject the rule that Petitioner and his amici apparently propose here: that a trial judge's discharge of a jury deadlocked on a single charged offense and its lesser-included offenses always requires obtaining

partial verdicts to determine which offenses may be retried.

c. The circumstances of Petitioner's case confirm that the trial judge did not abuse his discretion by declaring a mistrial on the entire case. The trial judge submitted five verdict forms to the jury, permitting verdicts of "guilty" on capital murder or one of the lesser-included offenses, or "not guilty of a homicide offense." J.A. 60a. Petitioner did not proffer any forms that purported to allow the jury to render verdicts finding him "not guilty of capital murder" or "not guilty of first-degree murder," or any associated instruction that would have reconciled those proposed partial verdicts with verdict forms that the jury had already been given – particularly the single form allowing the jury to find Petitioner "not guilty of a homicide offense."

Petitioner requested that the trial judge submit additional partial verdict forms to the jury during its deliberations, J.A. 67a-68a, a point in time which the Arkansas Supreme Court has recognized "gives the [trial] court no opportunity to react to the instructions at issue or amend them." *Young v. Johnson*, 311 Ark. 551, 555, 845 S.W.2d 510, 512 (1993); *see also Stewart v. State*, 316 Ark. 153, 158, 870 S.W.2d 752, 755 (1994) (citing *Young* and stating that "objections made to the instructions given or based on an instruction not given are untimely after the jury

retires").[8] The trial judge, moreover, observed before closing arguments that "this jury is tired," ASCR 801, and by the time Petitioner requested the partial verdicts the jury had deliberated for over four hours and had twice indicated it was deadlocked and twice heard a dynamite charge – all circumstances that can ripen into coerced verdicts. *Cf. Roth*, 776 N.E.2d at 447-48 (noting that where jurors have twice reported themselves deadlocked and have heard the equivalent of a dynamite charge, a partial-verdict inquiry "by its nature, plays on the deadlocked jurors' natural sense of frustration, disappointment, and failure"). Under these circumstances, the trial judge did not abuse his discretion by denying Petitioner's request because the verdict forms and instructions had already been submitted to the jury, and "to go back and then change at this time . . . would create a mistrial within itself and that would not be appropriate." J.A. 68a.

[8] Rule 33.7 of the Arkansas Rules of Criminal Procedure (2011) permits trial judges to "recall the jury after it has retired to deliberate and give it additional instructions in order to: correct or withdraw an erroneous instruction; clarify an ambiguous instruction, or inform the jury on a point of law that should have been covered by the original instructions."

CONCLUSION

The judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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