No. 10-1320

In the Supreme Court of the United States

ALEX BLUEFORD, PETITIONER

v.

STATE OF ARKANSAS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN, 22 OTHER STATES, AND 1 TERRITORY IN SUPPORT OF THE STATE OF ARKANSAS

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212, Lansing,
Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Katherine Montgomery
Research Assistant

Department of Attorney General
State of Michigan
Attorneys for *Amici Curiae*

Luther Strange
Attorney General
State of Alabama
501 Washington Ave.
Montgomery, AL 36130

Fepulea'i Arthur Ripley, Jr.
Attorney General
Territory of
American Samoa
P.O. Box 7
Pago Pago, AS 96799

Tom Horne
Attorney General
State of Arizona
1275 W. Washington St.
Phoenix, AZ 85007

John W. Suthers
Attorney General
State of Colorado
1525 Sherman St.
Denver, CO 80203

Joseph R. Biden, III
Attorney General
State of Delaware
820 N. French St.
Wilmington, DE 19801

Pamela Jo Bondi
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, FL 32399

David M. Louie
Attorney General
State of Hawaii
425 Queen St.
Honolulu, HI 96813

Lawrence G. Wasden
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

Tom Miller
Attorney General
State of Iowa
1305 E. Walnut
Des Moines, IA 50319

Derek Schmidt
Attorney General
State of Kansas
120 S.W. 10th Ave., 2nd Fl.
Topeka, KS 66612-1597

James D. "Buddy" Caldwell
Attorney General
State of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

Lori Swanson
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin
Luther King Jr. Blvd.
St. Paul, MN 55155

Steve Bullock
Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620-1404

Catherine Cortez Masto
Attorney General
State of Nevada
100 N. Carson St.
Carson City, NV 89701

Gary K. King
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

Roy Cooper
Attorney General
State of North Carolina
P.O. Box 629
Raleigh, NC 27602

Wayne Stenehjem
Attorney General
State of North Dakota
600 E. Boulevard Ave.
Bismarck, ND 58505

E. Scott Pruitt
Attorney General
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK
73105-4894

Alan Wilson
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211

Marty J. Jackley
Attorney General
State of South Dakota
1302 E. Highway 14
Ste. 1
Pierre, SD 57501-8501

Mark Shurtleff
Attorney General
State of Utah
P.O. Box 140858
Salt Lake City, UT 84114

J.B. Van Hollen
Attorney General
State of Wisconsin
P.O. Box 7857
Madison, WI 53707

Gregory A. Phillips
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, WY 82002

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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INTEREST OF *AMICI CURIAE*

As independent sovereigns, the 22 *amici* and 1 territory (*amici* states) exercise the chief police powers of government, serving as guardians of community safety. The vast majority of criminal jury trials that are held in this country occur in state court, and the jury-decisional process is governed by state procedural rules. The question when a verdict is final and has been received is a critical one to the *amici* states, and there is a legitimate diversity in the processes by which the states render their verdicts.

Among the legitimate options is the Arkansas process, which does not require the issuance of partial verdicts where the jury is deadlocked only as to lesser-included offenses. The Arkansas Supreme Court's holding was a constitutional one that there was no formal announcement of a verdict by the foreperson in the circumstance of the case, where there was no opportunity for the other jurors to give assent to this statement. In fact, the principle that a verdict is *not* final when announced is the federal procedural rule.

The *amici* states seek to ensure that in establishing constitutional standards to shield criminal defendants from double jeopardy, this Court does not impose unnecessarily a single, uniform rule that negates the different—and fair—state processes currently in place for determining when a state jury verdict is final.

INTRODUCTION AND SUMMARY OF ARGUMENT

The *amici* states advance three distinct points in support of the State of Arkansas.

First, the Arkansas Supreme Court's conclusion that no verdict was rendered here was a constitutional one. The federal rule is that a verdict is not final when announced; it is only final when returned in open court, the parties are given an opportunity to poll the jurors, and polling (if requested) indicates a unanimous verdict. The Arkansas Supreme Court did not violate double jeopardy when it concluded that the foreperson's unofficial statement did not equate to a final verdict.

Second, the issue of what constitutes a final verdict is a question of state procedural law that should not be subject to a uniform federal rule, particularly when there already exists a legitimate diversity among the states. There is no constitutional requirement that a foreperson speak definitively for the entire jury, and no requirement that a foreperson's provisional report about the jury's status must be accepted as a verdict.

Third, this Court should not impose on state courts a federal rule mandating partial verdicts for those states that instruct juries to deliberate on lesser-included offenses only after first acquitting on greater offenses. The State of Arkansas has persuasively argued here that it does not fit within this category. But even for those jurisdictions that do, a state may legitimately determine that such a requirement may be coercive and would invade the jury's province. It is not constitutionally required.

ARGUMENT

I. There is no double jeopardy violation where a state court determines that the foreperson's statement does not constitute the jury's verdict.

A. The federal rule is that a verdict is not final when announced.

The central, controlling question in this appeal is whether the foreperson announced the official verdict of the entire jury when she informally mentioned to the trial court that the jury was unanimously "against" a finding of capital murder and first-degree murder in giving a report of the jury's status. J. App. 64, 65. Under Arkansas law, such a casual declaration did not constitute a verdict on behalf of the entire jury. In fact, under the federal rule, the result would be the same.

For 115 years, this Court has contemplated that a verdict of acquittal be "duly returned and received" before jeopardy will attach. *Ball* v. *United States*, 163 U.S. 662, 671 (1896) ("As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution."); *Kepner* v. *United States*, 195 U.S. 100, 130 (1904) (double jeopardy attaches after an acquittal verdict has been "duly rendered"). But this Court has not explained what is constitutionally necessary for an acquittal verdict to be "duly returned and received" or "duly rendered."

Instead, an acquittal's finality depends on the individual circumstances of each case, and this Court has appropriately allowed individual states to decide for themselves, as a matter of state procedural law, whether a state verdict is final for purposes of jeopardy.

In the federal circuits, Rule 31 governs the receiving of a verdict in criminal cases. And the federal rule requires more than a mere "announcement" by the foreperson of the current juror break-down on a particular charge. Rather, the jury must provide its verdict, unanimously in open court. FED. R. CRIM. P. 31(a). And the rules require that the parties be given an opportunity to poll the jury before discharge. FED. R. CRIM. P. 31(d) ("After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.").

As a consequence of these procedures, the federal circuits have determined that "a verdict is not final when announced." E.g., *United States* v. *Love*, 597 F.2d 81, 84 (6th Cir. 1979). Accord *Government of the Virgin Islands* v. *Hercules*, 875 F.2d 414, 419 (3d Cir. 1989); Moore's Federal Practice (3d ed), § 631.20[2][a], 631–51 ("[t]he verdict is not final when it is announced but is final only when it has been recorded."). This conclusion is premised on the opportunity in Rule 31(d) to have the jury polled to confirm that the announced verdict reflects the opinions of all of the jurors and not just the foreperson, or the written indications on the verdict forms. See *Hercules*, 875 F.2d at 419 ("we find that the

mere reliance on verdict slips signed in the juryroom is inadequate . . . [j]urors must be given an opportunity to express their agreement or disagreement with the verdict.").

As a result, the jury's verdict cannot become final until the "deliberations are over, the result is announced in open court, and no dissent by a juror is registered." *United States* v. *Rastelli*, 870 F.2d 822, 834 (2d Cir. 1989), quoting *United States* v. *Taylor*, 507 F.2d 166, 168 (5th Cir. 1975) (internal quotes omitted). Accord, e.g., *United States* v. *Chinchic*, 655 F.2d 547, 550 (4th Cir. 1981); Wright's Federal Practice and Procedure, § 516, p. 52 ("A verdict is valid and final when the deliberations are over, the result is announced in open court, and no juror registers dissent."). It is only after the jurors are discharged that the verdict can become final and thus "unalterable." *United States* v. *Marinari*, 32 F.3d 1209, 1214–1215 (7th Cir. 1994) ("There is a long line of cases which demonstrate the practical reason why finality of the verdict comes upon the separation and dispersal of the jurors. It is from that time that the jurors are exposed to outside contacts. . . . Thus, in the absence of a poll, it is upon separation and dispersal of the jury that the verdict, initially read into the record, becomes final and unalterable[.]").

This Court has emphasized the significance of allowing the parties to poll the juries; the process confirms that each juror is assenting to the decision announced, there has not been a mistake, and that the verdict is not a product of coercion:

> That, generally, the right to poll a jury exists, may be conceded. Its object is to ascertain for a

> certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent.

Humphries v. *District of Columbia*, 174 U.S. 190, 194 (1899).

In *Humphries*, a civil case, there was a claim that the jury's verdict was null and void based on the trial court's failure to allow the jury to be polled where the jury's verdict had been submitted in writing, sealed, and one of the jurors was unable to return to court for the announcement of the verdict due to illness. *Humphries*, 174 U.S. at 192–194. The other jurors confirmed under oath that they had signed the verdict as had the ill juror. *Id*. This Court determined that the defect of failing to enable an ill juror to be polled did not "render the verdict a nullity" when it was "clear the verdict *has received the assent of all the jurors*[.]" *Id*. at 195 (emphasis added).

Under federal law, then, one of the controlling considerations for verdict finality depends on the assent of all the jurors. And when a trial court violates Rule 31(d)'s polling requirement, the federal circuits have reversed and ordered an entirely new trial. E.g., *Marinari*, 32 F.3d at 1215 ("The delayed request for a poll was timely because it came prior to the separation of the jury and thus before the verdict was 'recorded.' Given the defendant's absolute right to a poll of the jury at the time it was requested, it was error *per se* for the district court not to recall the jury and conduct an oral poll."); *Hercules*, 875 F.2d at 419 ("we hold that a violation of Rule 31(d) is *per se* error requiring reversal of Hercules' conviction").

The decision in *Hercules* is particularly notable because there were twelve verdict forms, one for each count, apparently signed by each of the jurors. Notwithstanding that fact, the Third Circuit Court of Appeals determined that the opportunity of the other jurors to assent in "open court" was indispensable to the rendering of a true, final verdict. *Hercules*, 875 F.3d at 419. This was so despite the fact that the requirement of polling is not constitutionally required, but only by federal rule in the federal courts. *Cabberiza* v. *Moore*, 217 F.3d 1329, 1336–1337 (11th Cir. 2000) ("Although polling the jury is a common practice, we know of no constitutional right to have a poll conducted"); *United States* v. *Beldin*, 737 F.3d 450, 455 (5th Cir. 1984) ("The right to poll the jury derives not from the Constitution, but from rule 31(d)").

The federal rules reflect common sense wisdom that the mere fact that the foreperson has *announced* the jurors' disposition regarding their vote does not necessarily mean that the announcement represents the *actual* verdict of a unanimous jury. Consistent with this Court's analysis in *Humphries* and Rule 31(d) itself, a jurisdiction might reasonably require unanimous juror assent in open court before a verdict may be rendered final.

B. The Arkansas Supreme Court was reasonable in its factual determination that there was no verdict, and the Constitution does not require otherwise.

Under Arkansas procedural law, a judgment rendered in open court is not controlling until it is entered or filed of record. Pet. App. 9a, citing *Bradford* v. *State*, 94 S.W.3d 904 (Ark. 2003). Like the federal requirement, Arkansas law provides that, "When the jury has agreed upon their verdict, they must be conducted into court by the officer having them in charge, their names called by the clerk, and, if they all appear, their foreman must declare their verdict." ARK. CODE ANN. § 16-89-126(a). Just as in the federal system, Arkansas allows the jury to be polled regarding their decision. See ARK. CODE ANN. § 16-89-128 ("Upon a verdict's being rendered, the jury may be polled at the instance of either party, which consists of the clerk or judge asking each juror if it is his or her verdict. If one (1) answers in the negative, the verdict cannot be received."). Finally, in Arkansas, it is the jury's intention that governs the meaning of a verdict, and an ambiguous verdict may be clarified before it has been entered of record. *Barnum* v. *State*, 594 S.W.2d 229, 231 (Ark. 1980) ("Amendment of a verdict, made before it is entered of record, before the jury has separated, and after a poll of each juror reveals that each understands the effect of the verdict, is entirely proper.").

In applying these rules, the Arkansas Supreme Court correctly determined that "[t]he mere reading of the jury's verdict in open court does not constitute an acquittal." Pet. App. 9a. This conclusion is perfectly

consonant with the federal rules governing a verdict's finality. E.g., *Love*, 597 F.2d at 84 ("a verdict is not final when announced"). Blueford's contention—that the Arkansas Supreme Court relied exclusively on the failure to enter the judgment in violation of *Ball*, Pet. Br. 21—does not consider the Arkansas Supreme Court's full opinion.

The Arkansas court focused on the fact that the foreperson did not intend her statement to be the formal announcement of a verdict, but rather only a declaration of the status of deliberations at that point:

> [T]he jury forewoman was not making a formal announcement of acquittal. She was engaged in a discussion with the circuit court about the jury's deliberation and the jurors' inability to agree on a verdict. Thus, this is not a situation where a formal verdict was announced or entered of record.

Pet. App. 10a–11a. This factual statement is unimpeachable; no one could contend that the foreperson was informing the court of the jury's official verdict. The foreperson did not purport to be making a definitive statement about the jury's posture with regard to the greater offenses, but rather one about the deliberations' deadlocked nature.

The argument that the foreperson's informal statement equaled an official jury verdict for which jeopardy has attached is not supported by this Court's precedent or the case law from the federal circuits, and is contradicted expressly by the federal rules themselves.

Most telling, after hearing the foreperson's statement, the trial court here asked the jury to continue deliberating. That fact alone established that there had been no definitive verdict. See, e.g., *Rastelli*, 870 F.2d at 834 ("the jury's verdict is not final until the deliberations are over") (internal quotes omitted). There was no requirement as a matter of Arkansas law, or as matter of federal constitutional law, that obligated the trial court to inquire into, and receive a verdict on, the greater offenses where the jury had indicated that it was deadlocked on a lesser offense. Following the majority of state jurisdictions, Arkansas has elected to reject the obligation to inquire about other included offenses where the jury indicates that it is deadlocked. Pet. App. 13a, citing *Walker* v. *State*, 825 S.W.2d 822 (Ark. 1992). See also *People* v. *Richardson*, 184 P.3d 755, 763 (Colo. 2008) (describing as the "majority" rule the one in which "judges should not initiate any inquiry into partial verdicts premised on lesser included offenses within a single complaint or count of an indictment").

It is true that a minority of states follows a different rule and requires the trial court to inquire further if faced with similar circumstances. E.g., *State* v. *Tate*, 773 A.2d 308, 324 (Conn. 2001) (finding error requiring the application of double jeopardy where the trial court refused to inquire whether the jury had reached a partial verdict). But there is no constitutional reason why all states must follow the minority rule, and this Court has not said otherwise. The decisions on which Petitioner relies, *Price* v. *Georgia*, 398 U.S. 323 (1970), and *Green* v. *United States*, 372 U.S. 184 (1957), are distinguishable. Each rests on the conclusion that a conviction on a lesser

offense operates as an acquittal of the charged offense. Thus, the charged offense may not be retried. *Price*, 398 U.S. at 328–29 ("this 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"). In stark contrast here, there has been no "verdict," but only a provisional, unofficial statement by a foreperson, unsupported by the assent of all jurors in open court.

Consider the circumstance in this case if the jury had ultimately returned a verdict of first-degree murder after the trial court directed further deliberation. Blueford's position would have to be that such a verdict would be improper, because the foreperson's first, unofficial statement would foreclose such a verdict. But the Constitution requires no such result. To the contrary, the fact that the jury was directed to continue deliberations without limitation *confirmed* that there had been no verdict with regard to the greater offenses. *Rastelli*, 870 F.2d at 834. The issue whether the trial court should be required to inquire further and receive a verdict should be left to the states.

If Arkansas followed the minority rule, and the trial court did (1) inquire further, (2) ask for a verdict on the two greater charges of capital murder and first-degree murder, (3) allow for a polling with respect to these counts, (4) accept the verdict of acquittal on these two counts, and (5) ask the jury to deliberate further with regard to the remaining charges of manslaughter and negligent homicide, then jeopardy could have

attached to the jury's verdict. But this did not happen; there was no verdict. Jeopardy did not attach for the greater charges because the foreperson's statement did not, standing alone, constitute a verdict.[1]

In an analogous setting, this Court unanimously ruled that a state court did not violate clearly established federal law when it decided that an acquittal must be sufficiently final for jeopardy to terminate. In *Price* v. *Vincent*, 538 U.S. 634 (2003), the defendant's counsel moved for a directed verdict of acquittal on the first-degree murder charge following the prosecutor's case-in-chief. The trial court responded by stating: "'[M]y impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. . . . I think that Second Degree Murder is an appropriate charge as to the defendants." *Price* v. *Vincent*, 538 U.S. at 637 (citation omitted). But after the trial court said this, it granted the prosecutor's request to speak about the first-degree murder charge the following day. The next morning, the defendant's counsel argued that jeopardy had terminated for the first-degree murder charge, and the prosecution should be barred from further pursuing it.

The Michigan Supreme Court ruled that jeopardy did not terminate because the judge's statement was

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[1] It is also worth noting that there is no dispute that if a partial verdict had been rendered and accepted of acquittal for Blueford of capital murder and first-degree murder, that such a decision would bar his reprosecution on double jeopardy grounds. *Price* and *Green* would govern.

not a final acquittal of the first degree murder charge; instead, it required the judgment to "bear sufficient indicia of finality" in order for jeopardy to terminate. *Price* v. *Vincent*, 538 U.S. at 642 (citation omitted). The Michigan Supreme Court, in turn, looked at the particular circumstances and applied factors for determining finality. On habeas review, even though this Court withheld judgment for direct review, this Court held that the Michigan court acted reasonably when it concluded that there was no double jeopardy violation. *Price* v. *Vincent*, 538 U.S. at 643. The Arkansas Supreme Court acted equally reasonably here.

II. There is a legitimate diversity on the issue when a verdict is final, and federalism dictates that this diversity be respected.

The states' procedural rules governing the process of determining what constitutes a final, state-court verdict are entitled to respect. And on the question of when is a verdict issued, the states face a variety of factors that they may elect to weigh differently, for example: (1) whether the verdict must be in writing; (2) whether there is a requirement of a formal public declaration from the foreperson; (3) whether the other jurors must formally assent to the verdict, and whether they must be asked individually or whether asked as a group would suffice; (4) whether there must be an opportunity for polling; and (5) and whether the court may accept a partial verdict for separately charged counts and for lesser-included offenses.

There is no constitutional or practical reason for a single rule to govern all of these questions as long as

the state courts are consistent in determining when a verdict is final and jeopardy has attached, the verdict is given effect. In fact, this Court has acknowledged that there is room for the states to develop law in this area. For example, in *Smith* v. *Massachusetts*, 543 U.S. 462 (2005), this Court noted a double-jeopardy violation when a Massachusetts trial judge directed a verdict on one of several charges, a firearm charge, and then reconsidered this decision and submitted the charge to the jury. The trial court had determined that there was no evidence that a gun barrel was less than 16 inches long, a necessary element of the crime, and directed the verdict on that count. *Smith*, 543 U.S. at 464–65. This Court held that this was a judgment of acquittal to which the bar of jeopardy attached, because this determination was final *as a matter of Massachusetts law*. *Id.* at 471. But this Court made clear that the states are free to create their own rules regarding the finality of a state trial court's decision:

> And of course States can protect themselves still further against the "occasional errors" of law that the dissent thinks "inevitabl[e]" in the course of trial, . . . by rendering midtrial acquittals nonfinal. (Massachusetts, as we have observed, has specifically provided for the correction of mistaken utterances or scrivener's errors, but not for the reconsideration of legal conclusions. . . .)

Smith, 543 U.S. at 474. In other words, the finality of the decision in *Smith* was a matter of state law, and because that law rendered the decision "final," the Double Jeopardy Clause barred further trial proceedings on that issue.

As noted above, the states take different approaches to the process of receiving verdicts. One such difference is the approach to partial verdicts. Compare the Colorado Supreme Court's decision in *Richardson*, 184 P.3d at 763 ("the trial court properly accepted the jury's final verdict and properly refused to poll the jurors with regard to interim votes on the first- and second-degree murder charges") with the Connecticut Supreme Court's decision in *Tate*, 773 A.2d at 326 ("Without the inquiry by the trial court as to whether the jurors had reached a partial verdict on a greater offense, no manifest necessity existed.").

The same is true with respect to polling. The vast majority of states, like the federal courts, allows the parties to poll the other jurors to determine if each juror assents to the announced verdict. LaFave & Scott, Criminal Procedure (3d ed), § 24.9(d), pp 522–523 ("In the great majority of jurisdictions, the jury must be polled upon the request of a party, while elsewhere the matter is left to the discretion of the trial judge."). The states have also reached different conclusions where their procedural rules regarding polling are violated. Compare, e.g., *State* v. *Pare*, 755 A.2d 180, 196 (Conn. 2000) ("we conclude that a violation of a party's timely polling request requires automatic reversal of the judgment"), with *Commonwealth* v. *Dias*, 646 N.E.2d 1065, 1068 (Mass. 1995) (the trial court acted within its discretion in refusing to poll the jury where "[e]ach juror had an opportunity to object to the verdict when it was announced in open court, and no juror objected in a way that we accept as effective.").

Given the complexity and the possible variations, it makes sense to allow the states to establish their own procedural rules to govern the accepting of verdicts. And the rule Arkansas has established—not allowing an inquiry into possible verdicts for lesser-included offenses—a constitutional one.

III. The Constitution does not require state jurisdictions to take partial verdicts.

The United States Constitution is also silent with respect to partial verdicts, and this Court has not specifically addressed them. This Court's analysis in *Price* and *Green* addressed the circumstance in which a jury reached a verdict on lesser-included charges, but did not address the trial court's obligation to inquire into them. That is not the situation presented here.

Blueford argues that where a state creates a system by which the jury only considers a lesser-included offense after it "acquits" on the higher charge ("acquittal first"), there is then an obligation to inquire into and accept partial verdicts. Pet. Br. 23–24 ("the jury's determination must be given final effect"). But as the State of Arkansas explains, Res. Br. 21–29, Arkansas does not fall into the category of "acquittal first" jurisdictions, and therefore this claim is inapposite. Moreover, such a rule should not be imposed, even in genuine "acquittal first" state jurisdictions. Rather, the states should be allowed to confer a greater freedom on a jury in its deliberations, particularly where the Constitution does not require impinging on the jury's exclusive province.

A. The State of Arkansas is not an "acquittal first" jurisdiction.

Blueford relies on the jury instructions that directed the jury to deliberate on the lesser-included offenses only where there was "reasonable doubt" regarding the defendant's guilt on the charge:

> If you have a reasonable doubt of the defendant's guilt on the charge of capital murder, you will consider the charge of murder in the first degree.
>
> * * *
>
> If you have a reasonable doubt of the defendant's guilt on the charge of murder in the first degree, you will then consider the charge of manslaughter.
>
> * * *
>
> If you have a reasonable doubt of the defendant's guilt on the charge of manslaughter, you will then consider the charge of negligent homicide.

J. App. 51–52. Significantly, the instruction does not state that there must be unanimity regarding that decision, does not require the jury to "acquit" or reach a "verdict" before moving on, and does not permanently foreclose the jury from revisiting that decision. Res. Br. 25–26. The contention that the jury's decision to begin discussing a lesser-included charge has the same legal significance as an acquittal ignores the jurisprudence on verdict finality discussed above. For this reason alone, Blueford is wrong in asserting a trial-court duty

to inquire further regarding the foreperson's unofficial statement that the jury was unanimously "against" a finding of capital murder or first-degree murder. J. App. 64, 65.

B. There is no constitutional requirement that juries be forced to issue partial verdicts, even for "acquittal first" jurisdictions.

A majority of states are "reasonable efforts" states, in which a jury may move on to lesser charges after making reasonable efforts to reach a verdict on an original charge. See *State* v. *Davis*, 266 S.W.3d 896, 905–06 (Tenn. 2008) (identifying fourteen states as "reasonable efforts"). The Tennessee Supreme Court has identified eight "acquittal first" jurisdictions in addition to Tennessee (seven states and First Circuit), and listed five "optional approach" jurisdictions (two states and three federal circuits), in which the criminal defendant elects the approach. *Davis*, 266 S.W.2d at 906. There are three reasons why this Court should reject the conclusion that a trial court is required to make further inquiry when a jury is deadlocked, even in acquittal-first jurisdictions.

First, and foremost, the Constitution does not require it. In fact, the reasoning underlying this Court's decisions in *Green* and *Price* contradicts such a rule. The basis of the decisions in these cases is that a verdict on the lesser offense operates as an implied acquittal on the greater charge. *Green*, 398 U.S. at 328 ("the first jury's verdict of guilty on the second-degree murder charge [is] an 'implicit acquittal' on the charge of first-degree murder.").

If Blueford prevails on his claim, however, it is based on the principle that all firm decisions of the jury must be reduced to a verdict. Thus, where the jury announced that it was unanimous on a lesser-included charge, the clear implication of Blueford's position is that the trial court should inquire whether the jurors had all *unanimously* acquitted the criminal defendant on the greater charge. This is the corollary of the principle that a deadlocked jury should be examined to determine whether it really reached a verdict (acquittal) on the greater charge. If a deadlocked jury on the lesser offense requires the court to inquire whether the jury has acquitted on the greater offense, the corollary would apply. A conviction on the lesser offense would require the inquiry into whether the jury acquitted on the greater offense.

The reality is, of course, that jurors often compromise and agree to a lesser offense even where there are jurors who are in fact convinced that the defendant is guilty of the greater charge. This is one of the reasons that some state jurisdictions have opted for the "acquittal first" approach, because it reduces the risk of a compromised verdict. See, e.g., *Davis*, 266 S.W.3d at 907 ("an acquittal-first approach reduces the risk of a compromised verdict"). But it does not eliminate the risk, as evidenced here. Even with an instruction that directed the jury not to move to the next-lesser included offense unless there was reasonable doubt, the trial court inquired whether the jury had deliberated on the negligent homicide offense (the last included offense), even though the foreperson reported a deadlock of 9-to-3 on the manslaughter charge. J. App. 65.

Second, every jury "decision" during deliberations remains entirely provisional until announced as a verdict in a definitive way. Wright's Federal Practice and Procedure, § 516, p. 52 ("A verdict is valid and final when the deliberations are over, the result is announced in open court, and no juror registers dissent."). Rather than capturing a verdict already determined, the inquiry that Blueford advocates would require the jury to do something that it had not yet done: reach a definitive decision on the higher charges that rises to the level of formal verdict.

Blueford contemplates that the instruction directing the jury to disclose a partial verdict would be imposed on a jury that is already deadlocked on a lesser included charge. But as a practical matter, as already noted, there may be jurors who conceded the point of the greater charge as a compromise in an effort to reach a verdict. See *Davis*, 266 S.W.3d at 907. Thus, an instruction to revisit the higher charges, on which the jury had already "unanimously" agreed, may only serve to apply the very kind of pressure that this Court has feared may result in a coerced verdict. For this reason, this Court has acknowledged the "broad discretion" of a trial court to find manifest necessity for a deadlocked jury, allowing it to discharge the jury:

> [I]n this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial

> completed by a particular tribunal." *But if he fails to discharge a jury which is 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*.

Arizona v. *Washington*, 434 U.S. 497, 509 (1978) (emphasis added). See also *Renico* v. *Lett*, 130 S. Ct. 1855, 1863 (2010) ("In the absence of such deference, trial judges might otherwise employ coercive means to break the apparent deadlock, thereby creating a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.") (internal quotes omitted). Like the discretion given trial courts, the states should have the leeway to create their own rules on the question whether to require the trial court to inquire further where a jury has identified itself as deadlocked.

Third, this Court should be reluctant to create non-constitutional rules that invade the province of the jury. In rejecting the obligation to have the trial court poll a deadlocked jury on included charges, the Michigan Court of Appeals identified this consideration as the controlling one:

> We conclude that polling the jury on the various possible verdicts submitted to it would constitute an unwarranted and unwise intrusion into the province of the jury. . . . [I]t must be recognized as a practical matter that jury votes on included offenses may be the result of a temporary compromise in an effort

> to reach unanimity. A jury should not be precluded from reconsidering a previous vote on any issue, and the weight of final adjudication should not be given to any jury action that is not returned in a final verdict.

People v. *Hickey*, 303 N.W.2d 19, 21 (Mich. App. 1981). The same reasoning applies here.

The *amici* states do not argue that the decision to inquire as to a partial verdict is constitutionally impermissible, only that the states are in a proper position to make this decision by rule, and that there are a range of acceptable approaches. As noted by the Tennessee Supreme Court in *Davis*, even the federal circuits have a range of practice on the issue of whether to require "acquittal first" approaches or to allow the "optional approach." *Davis*, 266 S.W.2d at 906. Accordingly, this Court should affirm Arkansas' leeway to adopt the approach of its own choosing. This freedom and flexibility should be accorded to the states.

CONCLUSION

This Court should affirm the decision of the Arkansas Supreme Court.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Katherine Montgomery
Research Assistant

Department of Attorney General
State of Michigan

Attorneys for *Amici Curiae*

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