No. 10-1320

In The
Supreme Court of the United States

ALEX BLUEFORD,
Petitioner,
v.

STATE OF ARKANSAS,
Respondent.

On Writ of Certiorari
to the Arkansas Supreme Court

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
**Counsel of Record*
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St., NW, Suite 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—continued

Page

Constitutional Provisions and Legislative Materials

TABLE OF AUTHORITIES—continued

Page

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms and structural safeguards it guarantees.

This case raises the question whether the Double Jeopardy Clause of the Fifth Amendment, applied to the states through the Fourteenth Amendment, permits the government to subject a criminal defendant to a second trial for the same serious offences a jury had acquitted him of, simply because the jury had deadlocked on a lesser-included offense. As an organization dedicated to the Constitution's text and history, CAC has an interest in safeguarding the right not to be placed twice in jeopardy of life or limb for the same crime and ensuring the integrity of the jury as a constitutional bulwark of liberty.

---

[1] Counsel for all parties have consented to the filing of this brief; letters indicating this consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND **SUMMARY OF ARGUMENT**

The text and history of the Double Jeopardy Clause and this Court's jurisprudence plainly establish that the Double Jeopardy Clause prohibits the government, following acquittal by a jury, from subjecting a defendant to a second trial or prosecution for the same crime. Below, the Arkansas Supreme Court held that the Double Jeopardy Clause did not prevent the state from retrying Alex Blueford on charges that the jury in his first trial had unanimously rejected, relying on the fact that the jury had deadlocked on a lesser-included offense. This ruling is unconstitutional.

In complex criminal cases involving greater and lesser-included offenses, like Blueford's, Arkansas law instructs juries to consider the charges one at a time, beginning with the most serious and proceeding to lesser-included offenses only after the jury has unanimously voted to acquit the defendant of the more serious charges. While no official verdict was entered on the capital and first-degree murder charges, the jury unequivocally stated in open court that it had unanimously rejected those charges. Moreover, as a matter of state law, the jury could not have considered the lesser-included offense on which it ultimately deadlocked without first acquitting Blueford of the more serious offenses.

There is nothing in the Double Jeopardy Clause's text or history to suggest that its fundamental protection of liberty against

government overreaching is inapplicable to partial verdicts or the functional equivalent of a partial verdict, as in this case. Indeed, this Court's protection of "implicit acquittals" suggests that it is of no constitutional moment that the jury's acquittal in this case was not reflected in any order or judgment. *See, e.g.*, *Green v. United States*, 355 U.S. 184, 190 (1957) (holding that jury's refusal to convict on first-degree murder charge was an "implicit acquittal" protecting the defendant from retrial since "[h]e was forced to run the gantlet once on that charge and the jury refused to convict him").

Had the capital murder and first-degree murder offenses been the only charges sent to the jury at Blueford's trial, there could be no serious question that, after the jury's announcement in open court that they had voted unanimously to acquit Blueford on those two charges, the Double Jeopardy Clause would bar the prosecutor from retrying him on those offenses. The result should not be any different simply because, after the jurors told the trial court that they had voted unanimously to acquit Blueford of the more serious charges against him, the jury deadlocked on the lesser-included offense of manslaughter. The Double Jeopardy Clause protects Blueford from being "subject for the same offence to be twice put in jeopardy," U.S. CONST. amend. V, and forbids a second trial on the more serious charges against him that were unanimously and explicitly rejected by the jury.

ARGUMENT

THE TEXT AND HISTORY OF THE DOUBLE JEOPARDY CLAUSE PROHIBIT ARKANSAS FROM RETRYING BLUEFORD ON THE CHARGES UNANIMOUSLY REJECTED BY THE JURY.

The jury that heard Alex Blueford's case voted to acquit him of charges of capital and first-degree murder before deadlocking on the lesser-included offense of manslaughter. As the forewoman of the jury explained in open court, the jury was "unanimous against" the charges of capital and first-degree murder, but could not unanimously resolve the manslaughter charge. *See* Joint App. at 64-65. Because of the deadlock on the manslaughter charge, the jury did not consider the least serious of the four charges against Blueford, negligent homicide. *Id.* at 65.

By holding that Arkansas could prosecute Blueford for capital and first-degree murder, notwithstanding the jury's unanimous rejection of both charges, the decision below threatens core constitutional values at the heart of the Fifth and Fourteenth Amendments. This Court has squarely held that a jury's refusal to convict on a more serious charge is an "implicit acquittal" triggering double-jeopardy protections, given that the defendant had been "forced to run the gantlet once on that charge and the jury refused to convict him." *Green v. United States*, 355 U.S. 184, 190 (1957). While the State, of course, is free to retry Blueford on the charges on which the jury deadlocked or did

not decide—*i.e.*, the manslaughter and negligent homicide charges—the Double Jeopardy Clause makes the jury's vote to acquit Blueford on capital and first-degree murder charges final.

A. The Text and History of the Fifth Amendment's Double Jeopardy Clause Prohibit Retrial After Jury Acquittal.

The Double Jeopardy Clause of the Fifth Amendment provides "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. In incorporating into the Constitution this critical safeguard of liberty, the framers of the Fifth Amendment secured to all persons an individual right against "being subjected to the hazards of trial and possible conviction more than once for an alleged offense," *Green*, 355 U.S. at 187, and a structural protection of trial by jury. When the jury votes to acquit, exercising its "overriding responsibility to stand between the accused and a potentially arbitrary or abusive Government," *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977), retrial is absolutely barred.

The Double Jeopardy Clause has its origins in English common law, and the Americans of the founding generation viewed the prohibition on double jeopardy as a fundamental right essential to the protection of liberty from government over-reaching. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1781, at 659 (1833) (calling the prohibition on double

jeopardy "another great privilege secured by the common law"). The Double Jeopardy Clause was one of several amendments in the Bill of Rights that "fortify and guard th[e] inestimable right of trial by jury," *United States v. Gibert*, 25 F. Cas. 1287, 1294 (C.C.D. Mass. 1834) (Story, J.), a "part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power." 3 STORY, COMMENTARIES ON THE CONSTITUTION, § 1773, at 652-53.

In his famous Commentaries on the Laws of England, William Blackstone described the two common law pleas, *autrefois acquit* and *autrefois convict*, that inspired the text of the Double Jeopardy Clause. "[T]he plea of *autrefois acquit*, or a former acquittal, is grounded on the universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once . . . . [W]hen a man is once fairly found not guilty . . . before any court of competent jurisdiction, he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *335. Blackstone explained that the second of these pleas, "*autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given," also "depends on the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime." *Id.* at *336.

Blackstone's analysis highlighted the close connections between trial by jury, a right

Blackstone called "the grand bulwark of [every Englishman's] liberties," *id.* at *349, and double jeopardy principles. As Blackstone observed, "[T]here hath yet been no instance of granting a new trial where the prisoner was *acquitted* up on the first. If the jury, therefore, find the prisoner not guilty, then he is for ever quit and discharged of the accusation . . . ." *Id.* at *361. Double jeopardy principles, dating all the way back to Blackstone, thus "safeguard not simply the individual defendant's interest in avoiding vexation but also the integrity of the initial petit jury's judgment." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 96 (1998).

Drawing on Blackstone, the framers of the Bill of Rights wrote this critical guarantee against government overreaching explicitly into the Constitution, providing "a double security against the prejudices of judges, who may partake of the wishes and opinions of government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy." 3 STORY, COMMENTARIES ON THE CONSTITUTION, § 1774, at 653. Debates over the Bill of Rights explicitly affirmed the fundamental double jeopardy principle that a jury's acquittal is final, barring either a new trial or a successive prosecution.

During debates on an early version of the Double Jeopardy Clause proposed by James

Madison,[2] the framers repeatedly affirmed the finality of a jury's acquittal, barring a second trial or prosecution. Rep. Roger Sherman observed that "the courts of justice would never think of trying and punishing twice for the same offence. If the person was acquitted on the first trial, he ought not to be tried a second time." Annals of Congress, 1st Cong., 1st Sess. 782 (1789). Rep. Samuel Livermore noted that "[m]any persons may be brought to trial . . . but for want of evidence may be acquitted; in such cases, it is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence." *Id.* In this respect, the Double Jeopardy Clause provided an important structural protection of trial by jury, a right James Madison noted was "as essential to secure the liberty of the people as any one of the pre-existent rights of nature." *Id.* at 454.

Madison's initial proposal was amended in the Senate. In its final form, the Fifth Amendment's Double Jeopardy Clause used "the more traditional language employing the familiar concept of jeopardy, . . . language that tracked Blackstone's statement of the principles of *autrefois acquit* and *autrefois convict*." *United States v. Wilson*, 420 U.S. 332, 341-42 (1975).

The Double Jeopardy Clause included in the Bill of Rights did not originally apply to the actions

---

[2] Madison's initial proposal provided that "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." Annals of Congress, 1st Cong., 1st Sess. 451-52 (1789).

of state governments, but eighty years later, "[t]he constitutional amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3028 (2010). Introducing the Fourteenth Amendment in the Senate, Jacob Howard explained that its broad text protected against state action all of the "personal rights guaranteed and secured by the first eight amendments of the Constitution," Cong. Globe, 39th Cong., 1st Sess. 2765 (1866), including the Fifth Amendment's prohibition on double jeopardy.

It is now firmly established under this Court's precedents that the Fifth Amendment's Double Jeopardy Clause "is a fundamental ideal in our constitutional heritage that . . . appl[ies] to the States through the Fourteenth Amendment," *Benton v. Maryland*, 395 U.S. 784, 794 (1969), and forbids the government—whether state or federal—from retrying a defendant following a jury's acquittal. "[I]ncorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment,'" *McDonald*, 130 S. Ct. at 3035 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)).

Consistent with the text and history of the Fifth Amendment, this Court has repeatedly held that retrial following an acquittal is strictly prohibited. In interpreting the Double Jeopardy Clause to give "absolute finality to a jury's verdict of acquittal," *Burks v. United States*, 437 U.S. 1, 16

(1978), this Court has drawn specifically on the Fifth Amendment's text and history, quoting at length from Blackstone and demonstrating that his Commentaries "greatly influenced the generation that adopted the Constitution," *Green*, 335 U.S. at 187 (discussing Blackstone), and informed the specific wording of the Fifth Amendment's Double Jeopardy Clause. *See Wilson*, 420 U.S. at 341-42.

It is thus no surprise that the Court has recognized that "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." *Martin Linen*, 430 U.S. at 571 (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)); *see also Green*, 355 U.S. at 188 ("[A] verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.'") (quoting *Ball*, 163 U.S. at 671). Giving the government a second chance to prove an acquitted defendant guilty of the same crime "would violate the very core of the double jeopardy prohibition." *Monge v. California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting).

B. The Trial Court's Declaration of a Mistrial on the Murder Charges Violated the Fifth Amendment's Protection of Jury Acquittals.

As discussed above, "the Double Jeopardy Clause affords a criminal defendant a 'valued right

to have his trial completed by a particular tribunal."" *Oregon v. Kennedy*, 456 U.S. 667, 671-72 (1982) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). Nonetheless, a court may, in narrow circumstances of "manifest necessity" declare a mistrial and allow for retrial. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824); *see also Wilson*, 420 U.S. at 344 n.12 ("In *Perez*, the Court emphasized the limited scope of this exception."). Because the declaration of a mistrial threatens the defendant's "valued right" to "have his trial completed by a particular tribunal," the State must shoulder a "heavy" burden to justify a mistrial and "avoid the double jeopardy bar." *Arizona v. Washington*, 434 U.S. 497, 505 (1978). *See also Renico v. Lett*, 130 S. Ct. 1855, 1862-64 (2010). "The policy of avoiding multiple trials has been regarded as so important that exceptions to the principle have only been grudgingly allowed." *Wilson*, 420 U.S. at 343.

There was no manifest need for a mistrial on the murder charges against Blueford. While a jury deadlock is "the classic basis for a proper mistrial," in this case the jury unanimously rejected the capital and first-degree murder charges against Blueford and the trial court should not have declared a mistrial with respect to these charges. A court's wide discretion to call a mistrial where "there is a manifest necessity for the act, or the ends of public justice would be defeated," *Perez*, 22 U.S. (9 Wheat.) at 580, ends where the jury has, in fact, acquitted the defendant of all or some of the charges against him or her.

In considering whether Blueford should be subjected to the ordeal of retrial, it is of no constitutional moment that the jury's acquittal was not reflected in any order or judgment. The Fifth Amendment's prohibition on double jeopardy protects the jury's judgment that the defendant is not guilty of the charges against him and is entitled to an acquittal—not the ministerial act of reducing their vote to a judgment. The framers, who were concerned that "the prejudice of judges . . . may partake of the wishes and opinions of the government," 3 STORY, COMMENTARIES ON THE CONSTITUTION, § 1774, at 653, gave the jury final say over a criminal defendant's fate in a very real sense, not just as a formalism. *See generally Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) ("[T]he right of jury trial . . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."). The Double Jeopardy Clause applies even when there is no formal verdict or judgment of acquittal, so long as the jury has made clear its acquittal. *See Green*, 335 U.S. at 190 (holding that jury's refusal to convict on first-degree murder charge was an "implicit acquittal" protecting the defendant from retrial since "[h]e was forced to run the gantlet once on that charge and the jury refused to convict him").

Under the text and history of the Double Jeopardy Clause, the jury's acquittal of Blueford on charges of capital and first-degree murder was final, forever barring a second trial on those charges. Blueford should not be deprived of double jeopardy protections as to those charges simply

because the jury could not agree as to other charges against him. *Cf. Commonwealth v. Cook*, 6 Serg. & Rawle 577, 581-83 (Pa. 1822) (finding mistrial improper as to all defendants where jury acquitted two defendants of the charges, but deadlocked on third defendant). *See generally* Br. of Petitioner at 22-24. There was no "manifest necessity" to discharge the jury and retry Blueford on the murder charges. The jury unambiguously and unanimously refused to convict Blueford of capital and first-degree murder and the trial court should have accepted the jury's determination. The Arkansas Supreme Court's ruling to the contrary conflicts with the Constitution's prohibition against being placed "twice in jeopardy" for "the same offence."

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to reverse the judgment of the Arkansas Supreme Court.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA
Counsel of Record
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

December 2011