CASENOTE

RULING FROM A VACUUM: USING COMMON SENSE, PSYCHOLOGY, AND STATISTICS TO PROVIDE A MORE REALISTIC AND FAIR BASIS FOR DECIDING *BLUEFORD V. ARKANSAS*

I. INTRODUCTION

A man is charged with capital murder. His defense team has fought for him, and after hours of deliberations, the jury forewoman returns to open court and announces that the jury has voted unanimously to acquit. The defendant is relieved to be done with the trial and free to go about his business. However, he is later informed that the State plans to bring another capital murder charge against him and take a second stab at conviction.

If the defendant originally had been charged with capital murder only and was acquitted of that crime, then any attempt by the State to retry him on the same charge would run afoul of the Double Jeopardy Clause of the United States Constitution.[1] Unfortunately for this defendant, however, in addition to the charge of capital murder, he faced the lesser-included charges of first-degree murder, manslaughter, and negligent homicide.[2] And according to the U.S. Supreme Court in *Blueford v. Arkansas,*[3] because the jury could not reach an agreement on those other charges, the defendant must go through the anxiety and expense of another trial.

In holding that the Double Jeopardy Clause does not prohibit

1. U.S. CONST. amend. V. ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .").

2. Jury instructions on lesser-included offenses are issued when some elements of the crime charged constitute a lesser crime, and when the greater offense requires the jury to find a factual element that is in dispute and not necessary for conviction of the lesser offense. *See* Sansone v. United States, 380 U.S. 343, 349 (1965).

3. Blueford v. Arkansas, 132 S. Ct. 2044 (2012).

retrial of a defendant who was essentially acquitted on a greater charge when the jury deadlocked on lesser-included charges, the Supreme Court has directly contradicted the Double Jeopardy Clause's function of protecting defendants from repeated prosecutions by the State for the same offense.[4] This Note criticizes the Court's holding in *Blueford* because the holding ignores both the real-life operation of jury deliberation and also the policies underlying the Double Jeopardy Clause.

Part II of this Note describes the factual background that lead to the Supreme Court's decision. Part III discusses the history, development, and application of the Double Jeopardy clause. Part IV explains how the Court reached its holding in *Blueford* and also outlines the dissenting opinion. Finally, Part V analyzes the Court's holding and critiques the Court's rationale. The Note concludes by arguing that *Blueford* was decided incorrectly and that the dissenting opinion should have prevailed.

II. FACTS

In 2007, one-year-old Matthew McFadden, Jr., suffered a deadly head injury while under the care of Alex Blueford.[5] The State of Arkansas charged Blueford (the defendant) with capital murder under the theory that he had caused the death intentionally.[6] The defendant responded by arguing that the death was accidental.[7]

At the conclusion of the trial, the trial court instructed the jury on the charge of capital murder and three lesser-included offenses: first-degree murder, manslaughter, and negligent homicide.[8] The instructions included the following details regarding deliberations:

> If you have 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

4. U.S. CONST. amend. V.

5. Blueford v. Arkansas, 132 S. Ct. 2044, 2048 (2012).

6. *Id.* (citing ARK. CODE ANN. § 5-10-101(a)(9)(A) (Supp. 2011)) (stating, "The State's theory at trial was that Blueford had injured McFadden intentionally, causing the boy's death '[u]nder circumstances manifesting extreme indifference to the value of human life.'").

7. *Id.* ("The defense, in contrast, portrayed the death as the result of Blueford accidentally knocking McFadden onto the ground.").

8. *Id.*

> doubt of the defendant's guilt on the charge of murder in the first degree, you will 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.[9]

The prosecution repeated these instructions during closing arguments.[10]

The trial court gave the jury five verdict forms—none of these forms allowed the jury to acquit on some offenses but not others. Thus, the jury had two choices: to find the defendant guilty on one of the offenses or on none of them.[11] A few hours into deliberations, the jury announced they were deadlocked, so the judge issued an *Allen* instruction, sending the jury back for further deliberations.[12] After another half-hour, the jury sent a note to the trial judge reporting that they remained deadlocked.[13] The judge called on the jury forewoman to disclose the jury's votes on each offense.[14] In open court, the forewoman stated that the jury was unanimous in its decision against capital murder and murder in the first degree but deadlocked on manslaughter.[15] The forewoman indicated that they had not considered the charge of negligent homicide because they understood the instructions to mean that a lesser charge could not be considered without

9. Blueford v. Arkansas, 132 S. Ct. 2044, 2048 (2012).

10. *Id.* (quoting Brief for Respondent at 55 Blueford v. Arkansas, 132 S. Ct. 2044, 2048 (2012) (No. 10-1320) (stating:

> "Before you can consider a lesser included of [sic] capital murder, you must first, all 12, vote this man is not guilty of capital murder." . . . "[U]nless all 12 of you agree that this man's actions were not consistent with capital murder, then and only then would you go down to murder in the first degree.").

11. *Id.* at 2049.

12. *Id.* (citing Allen v. United States, 164 U.S. 492, 501-02 (1896)) (emphasizing the importance of reaching a verdict to a jury and urging jurors in the minority to reconsider their verdict).

13. *Id.* at 2049.

14. *Id.*

15. *Blueford*, 132 S. Ct. at 2049 (quoting Brief for Respondent at 64-65 Blueford v. Arkansas, 132 S. Ct. 2044, 2048 (2012) (No. 10-1320):

> THE COURT: All right. If you have your numbers together, and I don't want names, but if you have your numbers I would like to know what your count was on capital murder.
> JUROR NUMBER ONE: That was unanimous against that. No.
> THE COURT: Okay, on murder in the first degree?
> JUROR NUMBER ONE: That was unanimous against that.
> THE COURT: Okay. Manslaughter?
> JUROR NUMBER ONE: Nine for, three against.

agreeing unanimously on the greater charge.[16]

After the exchange, the jury returned to its deliberations.[17] At this point, the defendant requested that the court submit new verdict forms to the jury with only the counts of capital murder and murder in the first degree so the defendant could obtain a partial verdict for the acquittal of these charges.[18] This request was denied.[19] The jury returned after another half-hour to announce that it had still not reached a verdict as to the charge of manslaughter, and the court declared a mistrial.[20]

Arkansas then sought to retry the defendant on *all* of the charges.[21] The defendant moved to dismiss the capital and first-degree murder charges under double jeopardy, citing the forewoman's report that the jurors had voted unanimously against guilt on these offenses.[22] The trial court denied the motion, and the Supreme Court of Arkansas affirmed on interlocutory appeal, reasoning that the forewoman was not "making a formal announcement of acquittal," so the pronouncement had no effect on the State's ability to retry the defendant.[23] Further, the Arkansas Supreme Court held that the trial court did not err in denying the defendant's request for new verdict forms, which would have allowed the jury to render a partial verdict on the charges of capital and first-degree murder.[24] The defendant sought review in the United States Supreme Court and was granted *certiorari*.[25]

The Supreme Court of the United States affirmed the

16. Blueford v. Arkansas, 132 S. Ct. 2044, 2049 (2012):
THE COURT: Okay. And negligent homicide?
JUROR NUMBER ONE: We did not vote on that, sir.
THE COURT: Did not vote on that.
JUROR NUMBER ONE: No, sir. We couldn't get past the manslaughter. Were we supposed to get past that? I thought we were supposed to go one at a time.

17. *Id.*

18. *Id.*

19. *Id.* (quoting Brief for Respondent at 69 Blueford v. Arkansas, 132 S. Ct. 2044, 2048 (2012) (No. 10-1320) (explaining that it would be "like changing horses in the middle of the stream"). Perhaps more significantly, Arkansas law does not allow for partial verdicts. *See* Blueford v. State, 370 S.W.3d 496, 502 (Ark. 2011).

20. *Blueford*, 132 S. Ct. at 2049.

21. *Id.*

22. *Id.*

23. *Id*. at 2049-50 (citing Blueford v. State, 370 S.W.3d. 496, 501 (Ark. 2011)).

24. *Id.*

25. *Id.*

judgment of the Supreme Court of Arkansas, holding that there was no finality in the jury verdict, the mistrial was properly declared, and the Double Jeopardy Clause did not bar a second trial on the same offense.[26]

III. BACKGROUND

The Double Jeopardy Clause, found in the Fifth Amendment of the United States Constitution, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[27] To understand the *Blueford v. Arkansas* decision and why it was inconsistent with the policy underlying the Fifth Amendment, it is important to trace the history of the Double Jeopardy Clause as well as the mechanics of its application.

A. THE HISTORY OF DOUBLE JEOPARDY

The roots of modern double jeopardy protection can be found in the common-law courts of England in the thirteenth century, which offered limited protection for individuals against multiple private prosecutions.[28] Today, double jeopardy protection is extended to individuals against repeated private actions as well as multiple prosecutions and punishments by the State.[29]

The first references to the concept of double jeopardy in American law is found in the law of the colonies, beginning with the colonial criminal code of Massachusetts, which extended protection against multiple punishments and repeated prosecutions to individuals facing criminal charges as well as civil trespass actions.[30] This marked a divergence from English common law, which only protected a man's *life* from being put in

26. Blueford v. Arkansas, 132 S. Ct. 2044, 2053 (2012). In its holding, the Court found that the forewoman's announcement of unanimous decisions against conviction on the counts of capital and first-degree murder was not final because the jurors could have reconsidered their votes when they went back to deliberating. It also found that because there was a hung jury as to the count of manslaughter, manifest necessity existed for declaring the mistrial. *Id.* at 2048-53.

27. U.S. CONST. amend. V.

28. Jay A. Sigler, *A History of Double Jeopardy*, 7 AM. J. OF LEGAL HIST. 283, 290 (Oct. 1963), *available at* http://www.jstor.org/stable/844041.

29. U.S. CONST. amend. V. *See, e.g.,* Green v. United States, 355 U.S. 184, 190-91 (1957) (holding that a conviction of second-degree murder was an implied acquittal of first-degree murder.).

30. Sigler, *supra* note 28, at 298 (citing THE LAWS AND LIBERTIES OF MASSACHUSETTS (Farrand ed., 1929)).

jeopardy twice.[31] In 1784, the New Hampshire Constitution adopted a double-jeopardy clause in its bill of rights, but the clause only extended protection to former acquittals.[32] The Pennsylvania Declaration of Rights of 1790 used wording almost identical to that of the current Bill of Rights.[33]

Following the trend in state law, the framers of the federal Bill of Rights decided that protection from double jeopardy was too important to overlook. While debating what amendments to add to the Bill of Rights, several legislators proposed a second amendment that provided that there should be "no second trial after acquittal."[34] James Madison proposed that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence."[35] The House of Representatives adopted this amendment, along with others, and sent the articles of amendment to the Senate for its approval.[36] The Senate struck the words "except in case of impeachment, to more than one trial, or one punishment" and replaced them with "be twice put in jeopardy of life and limb by any public prosecution."[37] Later, the words "public prosecution" were dropped, and the Double Jeopardy Clause ultimately became part of the Fifth Amendment to the United States Constitution after ratification by the states in 1791.[38]

B. EVOLUTION OF THE DOUBLE JEOPARDY CLAUSE IN THE SUPREME COURT OF THE UNITED STATES

The first time the U.S. Supreme Court provided substantial guidance on the policy underlying the Double Jeopardy Clause was in *Green v. United States*:

> The State with all its resources and power should not be allowed to make repeated attempts to convict an individual

31. Sigler, *supra* note 28, at 298.

32. *Id.* at 300 (citing RICHARD PERRY & JOHN C. COOPER, SOURCES OF OUR LIBERTIES 384 (1959)).

33. *Id.*

34. *Id.* at 304 (citing JONATHAN ELLIOT, THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 548-49 (2d ed. 1881)).

35. David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 227 (2005) (citing 1 ANNALS OF CONG. 257 (Joseph Gales ed., 1834)).

36. *Id.* at 230 (citing 1 ANNALS OF CONG. 808 (Joseph Gales ed.,1834)).

37. *Id.* (citing S.J., 1st Cong., 1st Sess. 71 (1789)).

38. *Id.* at 232 (citing U.S. CONST. amend. V).

> for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[39]

Green explains that the Double Jeopardy Clause is designed to protect the "accused's interest in repose"[40] as well as his interest in "being able, once and for all, to conclude his confrontation with society."[41] *Green* also stands for the proposition that a second trial might create "an unacceptably high risk that the Government, with its superior resources, would wear down a defendant."[42]

Protection from double jeopardy did not originally extend to defendants in state courts. In 1937, the United States Supreme Court found that the Fourteenth Amendment did not incorporate the Fifth Amendment against the states and that the Double Jeopardy Clause was only implicated when a defendant was subjected to "a hardship so acute and shocking that our policy will not endure it[.]"[43] But, in 1969, the Supreme Court reversed this position and determined that the Due Process Clause of the Fourteenth Amendment incorporated the double-jeopardy provision of the Fifth Amendment against the states.[44] In *Benton v. Maryland*, the Court found that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment."[45] The same protection would now be offered to defendants at the state and federal levels.

C. MODERN APPLICATION OF THE DOUBLE JEOPARDY CLAUSE

Today, the Double Jeopardy Clause prohibits multiple prosecutions for the same offense after a conviction or an

39. Green v. United States, 355 U.S. 184, 187-88 (1957).

40. Donald Eric Burton, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799, 803 (1988) (citing Benton v. Maryland, 395 U.S. 784, 810 (1969) (Harlan, J., dissenting)).

41. *Id.* (citing United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality)).

42. *Id.* at 804 (citing United States v. DiFrancesco, 449 U.S. 117, 130 (1980)).

43. Palko v. Connecticut, 302 U.S. 319, 328 (1937).

44. *See* Benton v. Maryland, 395 U.S. 784, 810 (1969).

45. *Id.* at 794.

acquittal for that offense, and it also prevents the State from pursuing multiple punishments for the same offense.[46] Jeopardy attaches once an entire jury is sworn in,[47] and protection against double jeopardy begins when there is an acquittal[48] or a conviction.[49] For the purposes of double jeopardy, an acquittal is defined as a resolution of some or all of the elements of which a defendant is charged in the defendant's favor.[50]

While the Double Jeopardy Clause offers broad protection, it does not protect a defendant from the same charges being brought again after an appropriate declaration of a mistrial.[51] A retrial after an appropriate declaration of a mistrial does not offend the principle of double jeopardy because there is no conviction or acquittal. A mistrial can only be declared for "manifest necessity", and in 1824, the U.S. Supreme Court explained that such necessity exists when jurors are unable to agree on a verdict.[52] The Court further held that retrying a defendant on the same charges does not offend the Double Jeopardy Clause because a declaration of a mistrial does not terminate jeopardy.[53] The subsequent proceedings brought against a defendant are considered to be part of the same jeopardy initiated when the jury was first sworn in.[54]

In cases where the jury is able to agree on greater charges but not on lesser charges, some states require a verdict to be entered on the greater charges—a "partial verdict"—prior to the declaration of a mistrial so as not to offend double jeopardy and

46. William S. McAninch, *Unfolding the Law of Double Jeopardy,* 44 S.C. L. REV. 411, 446-47 (1993) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

47. Anne Bowen Poulin, *Double Jeopardy and Judicial Accountability: When Is an Acquittal Not an Acquittal?*, 27 ARIZ. ST. L.J. 953, 963-64 (1995) (citing Crist v. Bretz, 437 U.S. 28, 35-36 (1978)).

48. Kyden Creekpaum, Note, *What's Wrong With a Little More Double Jeopardy? A 21st Century Recalibration of an Ancient Individual Right,* 44 AM. CRIM. L. REV. 1179, 1184 (2007) (citing Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986)).

49. In re Nielsen, 131 U.S. 176, 189 (1889).

50. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

51. *See* Wade v. Hunter, 336 U.S. 684, 690 (1949).

52. United States v. Perez, 22 U.S. 579, 580 (1824) ("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 a manifest necessity for the act, or the ends of public justice would otherwise be defeated.").

53. *Id.*

54. Yeager v. United States, 557 U.S. 110, 118 (2009) (citing Arizona v. Washington, 434 U.S. 497, 505-06 (1978); *Perez,* 22 U.S. at 580).

prevent a defendant from being retried on those charges.[55] In holding that the jury be given the opportunity to render a partial verdict prior to the declaration of a mistrial, the Supreme Court of New Hampshire reasoned that "[a]ll reasonable alternatives to a mistrial must be considered, employed and found wanting before declaration of a mistrial over the defendant's objection is justified."[56] In *State v. Castrillo,* the Supreme Court of New Mexico reasoned that a mistrial may only be declared for "very plain and obvious reasons," so when the jury has reached unanimous agreement of acquittal on any included offense, there is no plain and obvious reason to declare a mistrial.[57] Other states mandating partial verdicts have also focused on the absence of manifest necessity required to declare a mistrial in cases where juries deadlock on lesser-included charges.[58]

In contrast, other states, such as Arkansas, prohibit the use of partial verdicts and find that this practice does not offend the Double Jeopardy Clause.[59] Many of the states that prohibit partial verdicts are concerned that the deadlock on a lesser charge was the result of a temporary compromise by the jurors and not a true indication that the jury was unanimous for acquittal on the greater charges.[60] Other concerns include intruding on the province of the jury[61] and inappropriately

55. Blueford v. Arkansas, 132 S. Ct. 2044, 2058 (2012) (citing State v. Tate, 773 A.2d 308, 324-25 (Conn. 2001); Stone v. Superior Court of San Diego Cnty., 646 P.2d 809, 820 (Cal. 1982); Whiteaker v. State, 808 P.2d 270, 274 (Alaska Ct. App. 1991); State v. Pugliese, 422 A.2d 1319, 1321 (N.H. 1980) (*per curiam*); State v. Castrillo, 566 P.2d 1146, 1149 (N.M. 1977)). Juries in federal courts are also authorized to report partial verdicts. *See* FED. R. CRIM. PRO. 31(b).

56. State v. Pugliese, 422 A.2d 1319, 1321 (N.H. 1980) (citing United States v. Jorn, 400 U.S. 470, 486-87 (1971) (plurality) and United States v. Kin Ping Cheung, 485 F.3d 689, 691 (5th Cir. 1973)).

57. State v. Castrillo, 566 P.2d 1146, 1151 (N.M. 1977) (citing United States v. Perez, 22 U.S. 579 (1824)).

58. *See, e.g.,* Stone v. Superior Court of San Diego Cnty. 646 P.2d 809, 818 (Cal. 1982) and Whiteaker v. State, 808 P.2d 270, 278 (Alaska Ct. App. 1991).

59. Brief for Constitutional Accountability Center as Amicus Curiae Supporting Petitioner at 4, Blueford v. Arkansas, 132 S. Ct. 2044 (2012) (No. 10-1320) (citing People v. Richardson, 184 P.3d 755 (Colo. 2008) (en banc); State v. Booker, 293 S.E.2d 78 (N.C. 1982); State v. Bell, 322 N.W.2d 93 (Iowa 1982); People v. Hickey, 303 N.W.2d 19 (Mich. Ct. App. 1981); State v. McKay, 535 P.2d 945 (Kan. 1975); People v. Hall, 324 N.E.2d 50 (Ill. App. Ct. 1975)).

60. *See, e.g.,* State v. Bell, 322 N.W.2d 93, 95 (Iowa 1982); State v. Booker, 293 S.E.2d 78, 81 (N.C. 1982); and People v. Richardson, 184 P.3d 755, 764 (Colo. 2008).

61. People v. Hickey, 303 N.W.2d 19, 21 (Mich. Ct. App. 1981) ("[P]olling the jury on the various possible verdicts submitted to it would constitute an unwarranted and

issuing multiple verdicts for a single offense.[62]

From its roots in the common-law courts of England, the concept of double jeopardy has evolved significantly. American jurisprudence expanded protection against multiple prosecutions to encompass a variety of situations, including implied acquittals,[63] and until *Blueford v. Arkansas* was decided, there were lingering questions about whether this protection should be extended where juries unanimously acquitted a defendant on greater charges but deadlocked on the lesser charges.[64]

IV. THE COURT'S DECISION

In 2012, the United States Supreme Court addressed whether the Double Jeopardy Clause would prevent retrying Blueford on all charges, focusing on whether or not the jury reached a verdict and whether or not a mistrial was properly declared.[65] In a 6-3 decision, the majority held that the Double Jeopardy Clause was not offended because the verdict had no finality and the declaration of a mistrial was proper.[66]

A. WAS A VERDICT REACHED?

The defendant argued that no formal judgment of acquittal was necessary because an acquittal is a matter of substance not form.[67] He contended that the forewoman's announcement of the jury's unanimous decisions against convictions on the charges of capital and first-degree murder represented a resolution of some

unwise intrusion into the province of the jury.").

62. State v. Bell, 322 N.W.2d 93, 95 (Iowa 1982) (reasoning that a single verdict should issue for a single offense).

63. Green v. United States, 355 U.S. 184, 191 (1957).

64. *Compare* Blueford v. Arkansas, 132 S. Ct. 2044, 2058 (2012) (citing State v. Tate, 773 A. 2d 308, 324-25 (Conn. 2001); Stone v. Superior Court of San Diego Cnty., 646 P.2d 809, 820 (Cal. 1982); Whiteaker v. State, 808 P.2d 270, 274 (Alaska Ct. App. 1991); State v. Pugliese, 422 A.2d 1319, 1321 (N.H. 1980) (*per curiam*); State v. Castrillo, 566 P.2d 1146, 1149 (N.M. 1977)) *with* Brief for Constitutional Accountability Center as Amicus Curiae Supporting Petitioner at 4, Blueford v. Arkansas 132 S. Ct. 2044 (2012) (No. 10-1320) (citing People v. Richardson, 184 P.3d 755 (Colo. 2008) (en banc); State v. Booker, 293 S.E.2d 78 (N.C. 1982); State v. Bell, 322 N.W.2d 93 (Iowa 1982); People v. Hickey, 303 N.W.2d 19 (Mich. Ct. App. 1981); State v. McKay, 535 P.2d 945 (Kan. 1975); People v. Hall, 324 N.E.2d 50 (Ill. App. Ct. 1975)).

65. Blueford v. Arkansas, 132 S. Ct. 2044, 2048-53 (2012).

66. *Id.*

67. *Id.* at 2050 (citing United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).

or all of the elements of those offenses in the defendant's favor.[68] The defendant further argued that although the jury returned to deliberations after the report in open court, the possibility of revisiting the charges of capital murder and murder in the first degree was foreclosed to them because of the jury instructions.[69] Citing the proposition that "[a] jury is presumed to follow its instructions," the defendant contended that the instructions required the jury to consider the offenses in order and prevented them from reconsidering the offenses of capital and first-degree murder.[70]

Writing for the Court, Chief Justice Roberts found that because the jury instructions did not indicate that the jurors were prohibited from reconsidering the greater charges, the option was not foreclosed to them.[71] The Court used a hypothetical to illustrate its point: during the half-hour discussion on the charge of manslaughter, one of the jurors has her reasonable doubt removed, and she decides she would like to convict on the charge of first-degree murder.[72] This juror then requests that the jury revisit the prior vote causing the entire jury to reconsider the greater offense.[73] The Court reasoned that the potential that the jury could revisit the greater charges "deprives the [forewoman's] report of the finality necessary to constitute an acquittal on the murder offenses."[74] The Court then found that there was no final decision from the jury, and, as such, the Double Jeopardy Clause was not violated.[75]

B. WAS THE DECLARATION OF A MISTRIAL IMPROPER?

The defendant's second argument was that the declaration of a mistrial was improper; the defendant contended that there was no manifest necessity for a mistrial on the charges of capital and first-degree murder due to the forewoman's report that the jury had voted unanimously against guilt on those charges.[76]

68. Blueford v. Arkansas, 132 S. Ct. 2044, 2050 (2012).

69. *Id.* at 2050-51.

70. *Id.* at 2051 (citing Weeks v. Angelone, 528 U.S. 225, 234 (2000)).

71. *Id.*

72. *Id.* (discussing the hypothetical used by the majority as supposing continuous deliberation after the instructions are initially given).

73. *Id.*

74. *Blueford*, 132 S. Ct. at 2050.

75. *Id.* at 2052.

76. *Id.* at 2052-53.

Additionally, the defendant argued that the trial court should have taken some action to give effect to those votes and then considered a mistrial as to the remaining charges of manslaughter and negligent homicide.[77]

The Court rebutted the defendant's contention by pointing to Arkansas law, which restricts a jury's options to either convicting a defendant of one of the offenses or acquitting on all of them.[78] Further, the Court found that the trial court did not abuse its discretion by refusing to take action to give effect to the votes of the jury because the Court had never before considered requiring a trial court to do so.[79]

C. THE DISSENT

Writing for the dissent, Justice Sotomayor argued that the verdict had finality, that the declaration of a mistrial was improper, and that the trial judge's misinterpretation of Arkansas law negated any deference to his decision to declare a mistrial.[80] First, the dissent argued that the forewoman's announcement in open court that the jury was "unanimous against" conviction on capital and first-degree murder was an acquittal for double-jeopardy purposes.[81] She pointed to the holdings of state supreme courts in other jurisdictions that a jury's deadlock on a lesser-included offense justifies the assumption that the jury acquitted on any greater offense.[82]

The dissent compared *Green v. United States*, where the Supreme Court found an implied acquittal, with the present case.[83] Justice Sotomayor argued that the *Blueford* defendant's position was stronger than that of the defendant in *Green*—whom the Supreme Court found received an implicit acquittal of first-degree murder when the jury returned a guilty verdict for the lesser charge of second-degree murder.[84] In *Green*, the jury remained silent on the first charge, yet in Blueford's case there

77. Blueford v. Arkansas, 132 S. Ct. 2044, 2052-53 (2012) (citing Reply Brief for Petitioner at 11, n.8, Blueford v. Arkansas, 132 S. Ct. 2044 (2012) (No. 10-1320)).

78. *Id.* at 2052.

79. *Id.* at 2052-53.

80. *Id.* at 2053-60. (Sotomayer, J., dissenting).

81. *Id.* at 2055.

82. *Id.* (citing State v. Tate, 773 A. 2d 308, 323-324 (Conn. 2001); Stone v. Superior Court of San Diego Cnty., 646 P.2d 809, 815, n.5 (Cal. 1982)).

83. *Blueford*, 132 S. Ct. at 2055.

84. *Id.* (citing Green v. United States, 355 U.S. 184, 190 (1957)).

was an announcement of the jury's agreement against conviction.[85]

The dissent also found that the Court's contention that the jury could potentially revisit the greater counts was inadequate, stating, "There is no reason to believe that the jury's vote was anything other than a verdict in substance."[86] To support this reasoning, the dissent pointed to another case from Arkansas, *Hughes v. State*, which explained: "The jury must, in essence, acquit the defendant of the greater offense before considering his or her guilt on the lesser included offense."[87] Because of the public announcement of unanimous votes of acquittal on the charges of capital and first-degree murder and the structure of the jury's deliberations, the dissent reasoned the announcement had finality and should have the effect of a full acquittal.[88]

Next, the dissent argued that the trial court judge had a duty to honor the defendant's request for a partial verdict prior to the mistrial, and in the alternative, there was no manifest necessity for granting the mistrial.[89] To support requiring trial judges to offer partial verdict forms on the unanimous greater charges prior to granting a mistrial, the dissent pointed to the public policy considerations of protecting a defendant from the situation of receiving less protection under the Double Jeopardy Clause by virtue of living in an acquittal-first state, where a jury has to acquit on the greater charges before it must deliberate on the lesser charges.[90] The dissent also stated that the Court was wrong in claiming that there has never been a duty imposed on a trial court to try to break an impasse before declaring a mistrial.[91] To support this, the dissent cited to a case that required a trial judge not to act "irrationally," "irresponsibly," or "precipitately,"[92] and another case that required a trial judge to use "scrupulous care" prior to discharging a jury.[93] The dissent then stated that even if partial verdict forms should not be required in these situations, there was no manifest necessity for granting a mistrial

85. Blueford v. Arkansas, 132 S. Ct. 2044, 2055 (2012).
86. *Id.* at 2056.
87. *Id.* at 2055 (citing Hughes v. State, 66 S.W.3d 645, 651 (Ark. 2002)).
88. *Id.* at 2054-55.
89. *Id.* at 2058-59.
90. *Id.* at 2058.
91. *Blueford*, 132 S. Ct. at 2059.
92. *Id.* (citing Arizona v. Washington, 434 U.S. 497, 514-15 (1978)).
93. *Id.* (citing United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality)).

on the greater offenses because the trial judge merely needed to ask the jury forewoman if the jury was still unanimous against conviction on the greater charges prior to discharging them.[94]

Finally, the dissent argued that the trial judge misunderstood Arkansas law, and because of this misunderstanding, there should be less deference paid to the judge's declaration of a mistrial.[95] The dissent reasoned that the judge's confusion over whether the jury had to consider the greater charges before considering the lesser charges was a misunderstanding because Arkansas law requires juries to consider the greater charges first.[96] The dissent pointed out that "[i]n state cases, a second prosecution has been barred where the jury was discharged through the trial judge's misconstruction of the law."[97] Therefore, the dissent concluded that the Double Jeopardy Clause would prohibit retrying the defendant on the charges.[98]

V. ANALYSIS

Prior to *Blueford v. Arkansas*, there was a circuit split as to whether protection against double jeopardy should attach to the greater charges when a jury unanimously voted against conviction on the greater charges but hung on a lesser charge.[99]

94. Blueford v. Arkansas, 132 S. Ct. 2044, 2059 (2012).

95. *Id.* at 2059-60.

96. *Id.* (quoting Brief for Respondent at 65-66, Blueford v. Arkansas, 132 S. Ct. 2044 (2012) (No. 10-1320)):

> After the colloquy with the forewoman, the judge commented at sidebar that the jurors "haven't even taken a vote on [negligent homicide] . . . . I don't think they've completed their deliberation . . . . I mean, under any reasonable circumstances, they would take a vote on negligent homicide." And after the jury retired for the last half-hour of deliberations, the judge said, "I don't think they have an understanding of really that they don't have to get past every charge unanimously before they can move to the next charge."

97. *Blueford*, 132 S. Ct. at 2060 (citing Koon v. United States, 518 U.S. 81, 100 (1996)).

98. *Id.*

99. *Compare id.* at 2058 (citing State v. Tate, 773 A. 2d 308, 324-25 (Conn. 2001); Stone v. Superior Court of San Diego Cnty., 646 P.2d 809, 820 (Cal. 1982); Whiteaker v. State, 808 P.2d 270, 274 (Alaska Ct. App. 1991); State v. Pugliese, 422 A.2d 1319, 1321 (N.H. 1980) (*per curiam*); State v. Castrillo, 566 P.2d 1146, 1149 (N.M. 1977)) *with* Brief for Constitutional Accountability Center as Amicus Curiae Supporting Petitioner at 4, Blueford v. Arkansas 132 S. Ct. 2044 (2012) (No. 10-1320) (citing People v. Richardson, 184 P.3d 755 (Colo. 2008) (en banc); State v. Booker, 293 S.E.2d 78 (N.C. 1982); State v. Bell, 322 N.W.2d 93 (Iowa 1982); People v. Hickey, 303 N.W.2d 19 (Mich. Ct. App. 1981); State v. McKay, 535 P.2d 945 (Kan. 1975); People v. Hall, 324 N.E.2d 50 (Ill. App. Ct. 1975)).

This Note contends that the Supreme Court's ruling in *Blueford* incorrectly resolves the split. This section will critique the holding and offer an alternative position.

The Court erred for three reasons in holding that double jeopardy does not attach to the charges of capital and first-degree murder: (1) deliberations had ended and the verdict had finality as to the greater charges; (2) even if deliberations did continue on the greater counts, the votes were statistically unlikely to change; and (3) there should not have been a mistrial declared as to the charges of capital and first-degree murder because there was no manifest necessity to do so. Overall, the Court's opinion conflicts with the policy considerations of *Green* and will have a negative impact on the rights of the accused.

A. THE VERDICT HAD FINALITY

In reaching its holding, the Court relied on a hypothetical wherein one of the jurors changed her mind after returning to deliberations and decided she no longer had a reasonable doubt as to the defendant's guilt. The Court assumed that one juror could have changed her mind and either hung the jury or convinced the other jurors to convict. However, this hypothetical is not analogous to the facts of the case.

At the time the jury forewoman announced the jury's unanimous decisions against conviction on the counts of capital and first-degree murder and deadlock on the count of manslaughter in open court, the jury had already been deliberating for several hours.[100] When the jury was sent back into the deliberation room, they only deliberated for another half-hour before sending back a note stating they were still deadlocked on manslaughter.[101]

As the defendant pointed out, a jury is presumed to follow its instructions,[102] and as *Hughes* made clear, a jury in Arkansas must acquit on the greater charges before moving on to the lesser charges.[103] Based on the instructions, it is unlikely a juror would have reconsidered the greater counts upon returning to the

100. Blueford v. Arkansas, 132 S. Ct. 2044, 2049 (2012).

101. *Id.*

102. *Id.* at 2051 (citing Weeks v. Angelone, 528 U.S. 225. 234 (2000)).

103. *See* Hughes v. State, 66 S.W.3d 645, 706-07 (Ark. 2002)).

deliberation room.[104] A more accurate hypothetical would be if all of the jurors had gone out to lunch after the verdict was read and one began to wonder if perhaps she should have voted differently—a futile inquiry once the verdict already has finality.

B. EVEN IF DELIBERATIONS CONTINUED, THE JURY'S VERDICT WAS UNLIKELY TO CHANGE

Accepting the Court's hypothetical as valid, and assuming that the jurors did return to the jury room to deliberate on the greater charges, their decision was still unlikely to change. According to a study of juries, a jury's verdict will match the first vote taken on the charges 89% of the time.[105] While that still leaves 11% of cases in which a jury will be swayed to a different verdict or to hang after a first vote, *Blueford* can be distinguished in that the announcement in open court was likely not the result of a first vote—rather, it was the likely result of hours of deliberation—so the jury would seem to be even less likely to change its verdict.

The argument that the jury was unlikely to change its opinion about capital or first-degree murder after further deliberation is also bolstered by the nature of the counts. The defendant was charged with capital murder, first-degree murder, manslaughter, and negligent homicide. The charge of capital murder in Arkansas requires that the defendant "knowingly" and "[u]nder circumstances manifesting extreme indifference to human life" caused the death of a child,[106] and the charge of murder in the first degree requires that the defendant acted

104. *See* DENNIS J. DEVINE, JURY DECISION MAKING: THE STATE OF THE SCIENCE 174 (2012) (stating that, when asked to consider charges in order, juries are spending less time talking about the later charges than the first charge). Also, even if one juror reconsiders, she is still unlikely to hang the jury, much less sway its members to convict. *See* Nicole L. Waters & Valerie P. Hans, *A Jury of One: Opinion Formation, Conformity, and Dissent on Juries*, 6 J. EMPIRICAL LEGAL STUD. 513, 525 (Sept. 2009) ("[O]f the 184 jurors who said their one-person jury verdict was a conviction but the jury's majority favored an acquittal, just 23, or 12.5 percent, hung the jury.").

105. Waters & Hans, *supra* note 104, at 522 ("[8]9 percent of the juries in which a substantial majority (e.g., at least 8 of 12) favored conviction on the first vote ultimately convicted the defendant on the final vote.").

106. ARK. CODE ANN. § 5-10-101(a)(9)(A) (West 2012):

> A person is guilty of capital murder if . . . [u]nder circumstances manifesting extreme indifference to the value of human life, the person knowingly causes the death of a person fourteen (14) years of age or younger at the time the murder was committed if the defendant was eighteen (18) years of age or older at the time the murder was committed.

purposefully in causing the death of another person.[107] Conversely, the charge of manslaughter only requires that the defendant acted "recklessly,"[108] and negligent homicide merely requires that the defendant's actions were negligent.[109] In Arkansas, the charges of capital and first-degree murder require a defendant to act with intent, whereas manslaughter and negligent homicide do not demand such a high level of culpability. Asking the jurors to vote on conviction or acquittal on each of the charges means that each juror has to decide what the defendant was thinking at the time the incident occurred.

The majority failed to consider the relevant social science behind juror decision-making that suggests that jurors behave by constructing a narrative of the events of a case and picking the verdict that most closely conforms to that narrative.[110] The use of social science in Supreme Court decisions is not novel. The first recognized use of social science in a legal setting was the submission of the "Brandeis Brief" in 1908 in *Muller v. Oregon*.[111] Then in 1959, the Supreme Court decided *Brown v. Board of Education* and inserted footnote 11—which included citations to a number of social science studies—to buttress its holding.[112] More recently social science was again considered when the Supreme Court was determining whether or not a class had been created for purposes of a lawsuit.[113] There have been a number of studies into juror behavior and decision-making, and the majority may

107. ARK. CODE ANN. § 5-10-102(a)(2)-(3) (West 2012) ("A person commits murder in the first degree if with a purpose of causing the death of another person, the person causes the death of another person . . . .").

108. *Id.* § 5-10-104(a)(3) ("A person commits manslaughter if the person recklessly causes the death of another person . . . .").

109. *Id.* § 5-10-105(b)(1) ("A person commits negligent homicide if he or she negligently causes the death of another person . . . .").

110. DEVINE, *supra* note 104, at 28.

111. Amy Rublin, *The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn From Integration and Capital Punishment Case Law*, 19 DUKE J. GENDER L. & POL'Y. 179, 184 (2011) (citing Muller v. Oregon, 208 U.S. 412 (1908) and JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 8 (7th ed. 2010)). The "Brandeis Brief" consisted of just three pages of legal analysis and over one hundred pages of social science evidence. *Id.* (citing Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 106 n.61 (1993)).

112. Michael Heise, *Judicial Decision-Making, Social Science Evidence, and Equal Education Opportunity: Uneasy Relations and Uncertain Futures*, 31 SEATTLE U. L. REV. 863, 866-67 (2008). *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 n. 11 (1954).

113. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2553 (2011) (ultimately rejecting the creation of a class after finding the evidence too vague).

have been able to come to a decision that better reflects human nature if they had consulted such studies.[114]

In recent years, jury researchers have been moving away from mathematically-based approaches to describe jury decision-making and moving toward explanation-based approaches.[115] These approaches are favored because they describe the juror as an active decision-maker rather than a recipient of information whose job is merely to mechanically weigh evidence.[116]

One of the most accepted explanation-based approaches is the story model of juror decision-making, which posits that first each juror constructs a narrative using the facts of the case.[117] Then, as each juror learns about the different charges and verdict options, she reaches a decision by picking the verdict category that most conforms to the narrative constructed in her mind.[118] If the narrative constructed fits a particular verdict category, the juror will select that verdict category.[119] If the verdict category does not fit the story that the juror has in her mind, the juror will seek out a different category.[120] One way jurors define verdict categories is through their perception of the mental state of the accused at the time of the events alleged.[121]

Under this approach, when the jurors in *Blueford* rejected

114. *See, e.g.,* Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors* 7 J. EXPERIMENTAL PSYCHOL.: APPLIED, No. 2, 91-103 (2001), *available at* http://doi.apa.org/journals/xap/7/2/91.pdf; Reid Hastie, *Emotions in Jurors' Decisions,* 66 BROOK. L. REV. 991 (2001); and Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

115. Ryan J. Winter & Edith Greene, *Juror Decision-Making, in* HANDBOOK OF APPLIED COGNITION 739, 741-42 (Francis Durso ed., 2d ed. 2007). Explanation-based approaches focus on jurors' cognitive processes and "portray the juror as an active decision-maker who interprets, evaluates, and elaborates on the trial information, rather than as a passive recipient who merely weighs each piece of evidence as a discrete entity and combines these elements in a probabilistic fashion." *Id.* at 742.

116. *Id.* at 742.

117. *Id.* (citing Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision-Making, in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION-MAKING 192-221 (1993)).

118. *Id.*

119. *Id.*

120. Winter & Greene, *supra* note 115, at 742.

121. DEVINE, *supra* note 104, at 28 ("[V]erdict options are seen as mental categories defined by critical features regarding the identity of the perpetrator, his or her mental state, the circumstances surrounding the alleged crime, and the actions taken by those involved.").

the greater counts of capital and first-degree murder, they decided that their versions of the events on the day when Matthew McFadden, Jr., died did not include the defendant acting "knowingly" or with "premeditation and deliberation." Because the jury was deadlocked on the charge of manslaughter, jury members, at most, found that the defendant had acted "recklessly"—and there was not even a consensus as to that. Under the story model of juror decision-making, the greater charges of capital and first-degree murder were rejected because they did not conform to the stories the jurors had constructed in their minds about what happened. The narrative interpretations by each juror likely did not include the defendant desiring to harm Matthew McFadden, Jr. This construction of what happened means that additional deliberation was unlikely to result in a vote to convict the defendant of capital or first-degree murder. Because of the statistical improbability of the jurors changing their decisions and the story model of how each juror reaches a verdict, it is unlikely, even if further deliberations as to the greater charges continued, that any individual juror—let alone the entire jury—was going to change the verdict on the charges of capital or first-degree murder.

C. A MISTRIAL WAS IMPROPERLY DECLARED

A mistrial was improperly declared in this case because there was no manifest necessity as to the greater counts of capital and first-degree murder. While great deference should be given to the trial court's decision to declare a mistrial,[122] sound discretion should be used on the part of the trial judge, and a mistrial should not be declared in the absence of manifest necessity.[123] Manifest necessity most frequently occurs in situations where the jury is hung, as was the case with *Blueford*. However, the jury was not hung on the counts of capital or first-degree murder. If there was any question as to whether the jury had changed its mind on those charges, the trial judge should have polled the jurors again.

There is much respect for an acquittal, even when based on an erroneous interpretation of the law[124] or silence.[125] Asking a

122. *See* Arizona v. Washington, 434 U.S. 497, 506-10 (1978).

123. United States v. Perez, 22 U.S. 579, 580 (1824).

124. *See* Arizona v. Rumsey, 467 U.S. 203, 204 (1984).

125. *See* Green v. United States, 355 U.S. 184, 188 (1957) (holding that although the jury made no explicit acquittal of the defendant, the guilty verdict as to the lesser

judge to attempt to break an impasse and preserve the finality of some of the counts of the charge would not go beyond duties that have been imposed on trial judges in the past. Judges are already required to use scrupulous care,[126] and this would be merely a manifestation of that requirement.

D. POLICY CONCERNS AFTER *BLUEFORD*

The Court's holding in *Blueford* conflicts with the policy against double jeopardy as set forth in *Green*. A defendant has a right to be left alone and spared the anxiety of repeated prosecutions after acquittal. There is nothing in the jury forewoman's words or the transcripts of the court that would indicate that the jury's unanimous decisions against convicting the defendant of capital and first-degree murder should count as anything other than two acquittals. Trying the defendant again after previous acquittals on the charges does nothing to protect him from the expense or anxiety of another trial, and it gives the prosecution the opportunity to refine its case for the next jury. Not only does this offend the principles of double jeopardy, but it also increases the likelihood that an innocent person may be convicted.[127]

Those who find themselves in states that allow for partial verdicts are at a much greater advantage than those who are not. Defendants in states allowing for partial verdicts do not face the burden and expense of defending themselves against charges they have already been acquitted of by the jury. Defendants in states that do not allow for partial verdicts may face repeated prosecutions in situations exactly like *Blueford*.

It is easy to extrapolate the facts of *Blueford* to other cases. One recent study found that 6.2% of all jury trials result in a hung jury.[128] After *Blueford*, whether or not the jury unanimously agrees to acquit on the greater charges, if it hangs on one of the lesser charges, the state may retry the defendant on all charges without offending the Double Jeopardy Clause.

charge sufficed).

126. Blueford v. Arkansas, 132 S. Ct. 2044, 2059 (2012) (citing United States v. Jorn, 400 U.S. 470, 547 (1971) (plurality)).

127. Arizona v. Washington, 434 U.S. 497, 508-09 (1978).

128. Paula Hannaford-Agor et al., *Are Hung Juries a Problem?*, NAT'L CTR. FOR STATE COURTS, at 25 (2002), http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf (based on an average of 30 jurisdictions).

Furthermore, defendants facing lesser-included charges are already more likely to be convicted.[129] Also, after the first trial, the defense strategy is revealed and the prosecution gets to strengthen and refine its case, which also increases the odds of conviction.

The reasoning supporting the Court's holding did not take into account the process of jury decision-making, and the holding creates a disparity in the rights afforded to those in acquittal-first states that do not allow partial verdicts in contrast to defendants situated in states that do.

VI. CONCLUSION

The Supreme Court of the United States in *Blueford v. Arkansas* addressed whether or not the Double Jeopardy Clause is offended when a defendant is retried on the greater charges of a multiple charge indictment after the jury foreperson announces in open court that the jury is unanimous against conviction on those greater charges but deadlocked on one of the lesser charges. The Court held that the Double Jeopardy Clause is not offended in such a situation. The United States Supreme Court also determined that a mistrial was properly granted.

The Court's decision elevates form over substance. It fails to take into account the psychology of jury decision-making and is not in line with the policy considerations set forth by *Green*. Future defendants will be at a significant disadvantage by virtue of being prosecuted in an acquittal-first state that does not allow for partial verdicts. There is a grave danger of the State subjecting defendants to repeated prosecutions—exactly the situation against which the Double Jeopardy Clause strives to protect the accused.

Kara Larson

129. Michael H. Hoffheimer, *The Future of Constitutionally Required Included Offenses,* 67 U. PITT. L. REV. 585, 595 (2006).