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1 P R O C E E D I N G S

2 (11:22 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 10-1320, Blueford v. Arkansas.

5 Mr. Sloan.

6 ORAL ARGUMENT OF CLIFFORD M. SLOAN

7 ON BEHALF OF THE PETITIONER

8 MR. SLOAN: Mr. Chief Justice, and may it
9 please the Court:

10 The question in this case is whether the
11 jury foreperson's announcement that the jury had voted
12 unanimously that Petitioner was not guilty of capital
13 murder and first-degree murder has double jeopardy
14 consequences. We respectfully submit that it does, for
15 two reasons.

16 First, the foreperson's announcement on this
17 record establishes an acquittal; and, second, even if it
18 is not viewed as an acquittal, under this Court's
19 well-established standard, there was not manifest
20 necessity for a second trial on the same murder charges.

21 Now, with regard to the acquittal, the
22 reasons why the foreperson's announcement was an
23 acquittal are twofold: First, the foreperson's
24 announcement was clear and explicit that the jury had
25 voted unanimously against guilt; and, second --

1 JUSTICE GINSBURG: Is that -- is that
2 altogether clear, because she first said -- didn't she
3 first say that the jury cannot agree on any one charge?

4 MR. SLOAN: Yes, Your Honor. And then the
5 court specifically asked what is the count on capital
6 murder? And she said unanimous against that. What is
7 the count on first-degree murder? Unanimous against
8 that. And both the Arkansas trial court and the
9 Arkansas Supreme Court here observed that the foreperson
10 has been explicit that the jury had voted unanimously
11 against --.

12 JUSTICE SCALIA: Well, that's the count. The
13 jury takes lots of votes. Was it utterly clear that the
14 jury could not go back and reconsider that? Unless that
15 was absolutely clear, it seems to me a verdict had not
16 been announced. She just said how we voted the last
17 time.

18 MR. SLOAN: With regard to finality, Your
19 Honor, I think that -- that the jury could have changed
20 its mind, but I want to emphasize the reason I say that
21 because I think it highlights something very important
22 that is conspicuously absent here; and three brief
23 points on that, Your Honor.

24 First, when the foreperson announced that
25 the jury had voted unanimously against guilt on the

1 murder charges, she was announcing a jury decision.
2 There was nothing equivocal or qualified about that.

3 Second, Your Honor --

4 JUSTICE SCALIA: Excuse me. Excuse me.
5 When you say she was announcing a decision, then you
6 mean they can't go back on it?

7 MR. SLOAN: No, that was -- well, that's
8 my second --

9 JUSTICE SCALIA: She was announcing a vote.

10 MR. SLOAN: Yes. She was announcing the
11 decision that they had made at that point. But the
12 reason -- my second point, Your Honor, the reason why I
13 say that they could have gone back is the historic
14 traditional principle that a jury can correct or revise
15 a verdict while it continues to be sitting.

16 Now, in this Court's opinion, in *Smith v.*
17 *Massachusetts*, this Court talked about that traditional
18 and historic principle, cited an English case from 1824,
19 the *Parkin* case, where the jury had done that, had gone
20 back after announcing a verdict. And how that would
21 play out here, if the jury came back and they said, you
22 know, we were unanimous before, but now one juror says
23 that he doesn't really agree with that, then, of course,
24 a court could take that into account.

25 JUSTICE ALITO: I think you've conceded away

1 your case when you say that. The one characteristic of
2 a verdict that seems perfectly clear to me is that it is
3 final.

4 The jury can't render a verdict and be
5 discharged and then come back the next day and say, you
6 know what, some of us -- one of us has changed his mind
7 or her mind. It's the final vote. And so, why isn't
8 the critical question here whether what the -- what the
9 foreperson said was this is our final vote, we're not
10 going to go back, this is it; or this is the way we
11 voted now, and it's -- one or more of us may have wanted
12 to -- wanted to retain the right, reserve the right, to
13 go back and -- and vote again.

14 MR. SLOAN: Because the -- the reason why I
15 think the announcement was an acquittal here is twofold:
16 First, there was the explicit statement of -- of what
17 the vote was at that time; but, second, there is nothing
18 on the record in this case that contradicts that
19 statement. At the time the jury was discharged and at
20 the time the trial ended, the jury had said nothing that
21 contradicted that earlier statement.

22 JUSTICE KENNEDY: Suppose the -- suppose the
23 court said, after this colloquy, I want you to go back
24 and think about this whole case again. Could the jurors
25 then have revisited the first count?

1 MR. SLOAN: Well --

2 JUSTICE KENNEDY: The capital murder count?

3 MR. SLOAN: Your Honor, if -- if the jurors
4 had come back and said --

5 JUSTICE KENNEDY: No. The colloquy is what
6 we've got.

7 MR. SLOAN: Yes.

8 JUSTICE KENNEDY: And the judge said I want
9 you to deliberate more about this entire case. (A) was
10 he permitted to do that under Arkansas law, I guess is
11 one of my real questions.

12 MR. SLOAN: Oh. Well, in terms -- in terms
13 of Arkansas law and the particular transition
14 instructions here, no, we don't think that the
15 transition instructions operate that way, Your Honor.
16 There's nothing in the instructions that say that --

17 JUSTICE KENNEDY: Nothing -- nothing --
18 Arkansas law doesn't permit the jury to -- before it's
19 delivered its final formal verdict, to think about the
20 case again and vote on it again?

21 MR. SLOAN: No. It -- it does, Your Honor,
22 and that's why I'm trying to draw a distinction between
23 how the transition instructions here operate, the sort
24 of acquittal-first instructions, and the general
25 principle that a jury can correct or revise its verdict.

1 I mean, in a sense, one way to think about --

2 JUSTICE KENNEDY: Well, but I -- I think
3 this may be what Justice Alito asked. Well, I -- I
4 don't think it gave a verdict here. I don't think it's
5 revising its verdict.

6 MR. SLOAN: Well --

7 JUSTICE KENNEDY: It's mid-deliberation, as
8 Justice -- Justice Scalia said at the outset.

9 MR. SLOAN: There -- there's nothing in the
10 jury statement at all that suggested that it was
11 tentative. It said we have unanimously voted against
12 guilt on the murder charges.

13 JUSTICE SOTOMAYOR: Counsel, one --

14 JUSTICE GINSBURG: But then they went -- then
15 they went out again.

16 MR. SLOAN: Pardon me?

17 JUSTICE GINSBURG: And that's the problem.
18 They, the jury -- the judge gave them an Allen charge,
19 and they went out again. And I think you have
20 recognized that the jury could have then said we'll go
21 back to square one, we'll consider capital murder,
22 first-degree murder.

23 So, they -- I think you recognize that after
24 the judge gives them a charge of this kind, they can
25 begin all over again. And here, when they came in and

1 said we -- we can't agree, defense counsel didn't ask to
2 have the jury polled.

3 MR. SLOAN: The -- the defense counsel asked
4 for verdict forms to be sent into the jury room that
5 would allow them to record their verdicts on the murder
6 charges. And that's a very important point here, Your
7 Honor, because it was the State that prevented any
8 additional elucidation about what the jury thought on
9 the murder charges.

10 JUSTICE SCALIA: But that -- so long as it's
11 still tentative thoughts, it doesn't matter. The jury
12 could have -- suppose the jury went back after this
13 announcement -- you know, we -- you know, we've decided
14 on a -- on the greater charge, or we voted on the
15 greater charge for the defendant. Suppose they go back
16 and one of the people who wants to convict on the lesser
17 charge, as to which they are deadlocked, finally says,
18 well, look it, if you won't come along to convict him on
19 the lesser charge, by God, I'm not -- I'm not going to
20 acquit on the greater charge.

21 Isn't that the kind of stuff that goes on in
22 jury rooms all the time?

23 MR. SLOAN: Yes, it does, Your Honor.

24 JUSTICE SCALIA: So, there is no certainty
25 whatever that -- that what was the vote at that time

1 would be the vote when they finally got done.

2 MR. SLOAN: Well, but, Your Honor, on the
3 record as the case comes to this Court, what you have is
4 this very clear and explicit statement against guilt on
5 the murder charges and then nothing in what the jury
6 says when it comes back that contradicts that --

7 JUSTICE KAGAN: Well, I guess one --

8 JUSTICE SOTOMAYOR: Counsel, I thought that
9 part of your argument was that, given the instructions
10 in this case, which the jury appears to have followed to
11 the T, they can't get to a lesser count unless they've
12 acquitted on the preceding count.

13 MR. SLOAN: Yes.

14 JUSTICE SOTOMAYOR: When the judge asks
15 them, did you reach criminal negligence, they say we
16 were told not to.

17 Now, the judge, whether he was right or
18 wrong under Hughes as to whether they followed the
19 instructions or he misunderstood them, I don't know.
20 But it's very clear in context from the government's
21 arguments to the jury, to the defense argument to the
22 jury, you don't reach the split count or even talk about
23 it unless you've been acquitted.

24 So, given that the jury responds at the end
25 we haven't reached a verdict, and the jury said earlier

1 that they hadn't reached a verdict on the one issue,
2 isn't the -- the only assumption is that they didn't go
3 back?

4 MR. SLOAN: Yes, I think that's exactly
5 right, Your Honor, because the jury instructions very
6 explicitly said that you don't go to a lesser offense
7 unless you have a reasonable doubt on the greater
8 offense. The State --

9 CHIEF JUSTICE ROBERTS: Well, it's --

10 MR. SLOAN: -- over and over --

11 CHIEF JUSTICE ROBERTS: I'm sorry. Go
12 ahead.

13 MR. SLOAN: I was just going to say the
14 State over and over again in its closing argument said
15 to the jury you cannot reach a lesser offense unless you
16 unanimously find the defendant not guilty on the greater
17 offense. And as you point out, the Arkansas Supreme
18 Court in the Hughes case has said that the law in
19 Arkansas is that you don't get to a lesser offense
20 unless -- the jury doesn't get to a lesser offense
21 unless it in essence acquits on the greater offense.

22 CHIEF JUSTICE ROBERTS: Right, but that's
23 the final say. You don't know what the jury did as a
24 preliminary matter. I would think it in a case like
25 this perfectly reasonable for the jury to say: Let's

1 take a preliminary vote; we'll go down; and if -- if we
2 all agree on something right away, that's what we'll do.

3 Does everybody agree on capital murder? No,
4 some don't. Does everybody agree on murder? No. Does
5 everybody agree on manslaughter? Yes. Okay, we all
6 know that manslaughter, he's at least guilty. Now let's
7 go back and talk about the more serious offense, and
8 some of us will try to persuade the holdouts.

9 And yet, you would say as soon as they
10 reached the point of saying, yes, he's guilty on
11 manslaughter, they can't go back.

12 MR. SLOAN: Well, the instructions don't
13 provide for them to -- for them to go back. The State,
14 which had never made that argument until this Court in
15 this litigation, that they can go back, doesn't point to
16 any case that --

17 JUSTICE KENNEDY: Well, but then I'm not
18 sure it's just a matter of State law then, we're --
19 what we're doing here is talking about the
20 constitutional minimum. And I -- Justice Scalia gave a
21 hypothetical, you can have a more -- even a more
22 principled juror than that. He says, you know, now that
23 we're thinking about manslaughter, it is true that thus
24 and so happened; maybe we were wrong on the first --
25 first-degree count. I mean, that's perfectly plausible.

1 MR. SLOAN: Well, let me say, whatever one
2 thinks about finality -- and I do think there was
3 sufficient finality here for the reasons we have been
4 discussing, but whatever one thinks about finality,
5 let's consider this in the context of manifest necessity
6 because whatever one thinks of finality, I submit that
7 it is clear that when a jury foreperson stands up in
8 front of the jury, in front of the defendant, lawyers
9 for both sides, and says we have voted unanimously that
10 he is not guilty of these murder charges, that is
11 something at the very core of the Double Jeopardy
12 Clause --

13 JUSTICE ALITO: Are you saying --

14 MR. SLOAN: -- at the heartland of it.

15 JUSTICE ALITO: Are you saying that there
16 was no manifest necessity to declare a mistrial as to
17 any count, in which case there could be no retrial
18 whatsoever, or no manifest necessity to declare a
19 mistrial on capital murder? And if you're saying the
20 latter, then what would you have us do with the decision
21 by the Arkansas Supreme Court that Arkansas law does not
22 allow a partial verdict?

23 MR. SLOAN: Okay. Your Honor, so, first I'm
24 saying only that there was no manifest necessity as to
25 capital murder and first-degree murder, which were the

1 two charges on which they were unanimous. We agree he
2 can be retried on manslaughter and negligent homicide.

3 Now, as to the Arkansas Supreme Court
4 decision on that -- and that brings up a very important
5 point because the State's position essentially is it
6 could never be final enough, as Your Honor suggests,
7 because it simply is impermissible under Arkansas law to
8 have an acquittal on a greater offense as long as you're
9 deadlocked on a lesser offense.

10 And as to that, this Court's opinions are
11 clear that if you have a State law that prevents giving
12 effect to what is in substance an acquittal, it must
13 yield to the Federal constitutional command of the
14 Double Jeopardy Clause.

15 And Hudson v. Louisiana is very instructive
16 on this point because, in Hudson, Louisiana had a law
17 that after a conviction, a judge could not enter an
18 acquittal order; he could only enter a new trial order.
19 And after the conviction on murder in Hudson, the judge
20 entered a new trial order and explained that it was
21 because of insufficient evidence.

22 And this Court unanimously said that that
23 substantively was an acquittal; it has full double
24 jeopardy consequences, notwithstanding the fact that
25 Louisiana law does not allow a judge to enter an

1 acquittal order --

2 JUSTICE BREYER: What's bothering me is I
3 can't figure this out very well. We have an imaginary
4 State, and what the State says to the jury: Jury, you
5 have three choices. Choice one is you acquit this
6 person of everything. Choice two is you convict him of
7 something. Choice three is you say you're hung. Okay?

8 I don't see anything in the Constitution
9 that prevents a State from doing that. So, if that --
10 if no -- what is it? And, of course, if you follow
11 that, there was no acquittal on those early charges.
12 That wasn't a permissible verdict. And now you
13 structure your argument any way you want, but that
14 the State has -- I would think, within the limits of due
15 process, it can structure the jury's arguments as it
16 wishes.

17 But -- so, what's wrong with that? And if
18 that -- if there's nothing wrong with that, then how do
19 you win?

20 MR. SLOAN: Okay, Your Honor. Two points:
21 One that focuses on the jury foreperson's announcement
22 here --

23 JUSTICE BREYER: Well, you could say, well,
24 you could -- well, that's one route. What you say is
25 nothing wrong with that. But if the judge is foolish

1 enough to get the jury -- to get the foreperson to say
2 what the state of the deliberation is in detail, then
3 the Double Jeopardy Clause kicks in. Well, that's an
4 argument.

5 MR. SLOAN: Well, Your Honor --

6 JUSTICE BREYER: So, they make a mistake and
7 now suddenly it's jeopardy where it wasn't before,
8 or -- this seems like a minor matter compared to the
9 issues of jeopardy, whether the jury honestly said what
10 was going on in the room, particularly if it's
11 changeable.

12 MR. SLOAN: With respect, Your Honor, I
13 disagree that it's a minor matter when a foreperson
14 stands up, with the jury present, and says we have voted
15 not guilty. And as to that, with an announcement -- for
16 example, the Massachusetts Supreme Judicial Court
17 decision in the Roth case, which is in the briefs, is
18 instructive because in that case the Massachusetts court
19 said very emphatically you should not ask a jury that
20 kind of question, but --

21 JUSTICE BREYER: Okay. So, let's -- go
22 ahead.

23 MR. SLOAN: But -- may I just finish --

24 JUSTICE BREYER: Please.

25 MR. SLOAN: -- the sentence, Your Honor?

1 But in that case, the trial court had asked
2 the jury, and the foreperson had said that they had
3 voted against guilt on the greater offenses. And so,
4 the Massachusetts court said, if the -- essentially,
5 these are my words -- but if the Double Jeopardy Clause
6 means anything, it means that when you have an
7 announcement like that, it has to matter.

8 And the other point, Your Honor, is that
9 this Court's opinions such as Fong Foo and Sanabria say
10 that it doesn't matter if an acquittal is on an
11 erroneous basis. Once it happens, we give full double
12 jeopardy consequence to it. So, even if one thinks that
13 the judge shouldn't have asked the question and it would
14 have been permissible not to ask the question, once he
15 did and once that's on the record, that is of
16 considerable constitutional --

17 JUSTICE SCALIA: Only if --

18 JUSTICE KENNEDY: Why should there --

19 JUSTICE SCALIA: Only if -- and I think this
20 is the premise of your argument. Only if there is a
21 constitutional necessity to -- to sever the various
22 charges, there is a constitutional necessity to let the
23 jury come in on one charge without coming in on the
24 other. It seems to me that's the premise of your
25 argument. And I don't know where that constitutional

1 necessity comes from.

2 MR. SLOAN: Well, Your Honor, first, on the
3 manifest necessity point, when there is an
4 announcement like this, because --

5 JUSTICE SCALIA: Your manifest necessity
6 depends upon the necessity of severing, yes. If you
7 sever, then there is no manifest necessity of
8 resubmitting the greater charge. But it assumes -- it
9 assumes a severing, and I don't know where the severing
10 comes from.

11 MR. SLOAN: The -- the manifest necessity
12 argument is that when there is an announcement like this
13 that goes right to the core of double jeopardy -- and,
14 you know, we know that with greater and lesser included
15 offenses, if there is a basis for an acquittal, then
16 that has to be given effect on the separate charges.
17 That's Green and Price.

18 JUSTICE KENNEDY: But that's -- but that's
19 after a verdict. Why is it that the purposes of the
20 Double Jeopardy Clause are implicated when a jury,
21 before it delivers a final verdict, says where -- where
22 it is mid -- mid-deliberations? The defendant, of
23 course, is terribly disappointed if they go back and
24 then find him guilty. So, I guess there's a personal
25 disappointment interest for the few hours that it takes

1 for the jury to come to a different verdict, but he
2 doesn't have to prepare the defense again; he doesn't
3 have to go to trial again. It's all one trial.

4 I don't see why there's a double jeopardy
5 interest in the Massachusetts case that you point out.
6 I don't see where the double jeopardy interest was in
7 saying that you can't go back.

8 MR. SLOAN: Well, because --

9 JUSTICE KENNEDY: What -- what --

10 MR. SLOAN: It's not --

11 JUSTICE KENNEDY: What purpose of the Double
12 Jeopardy Clause is implicated by the rule that says you
13 can't go back?

14 MR. SLOAN: Well, Your Honor, on the
15 manifest necessity point, I'm not saying you can't get
16 back. What I am saying is that when you have an
17 announcement of such constitutional moment at the
18 heartland of the Double Jeopardy Clause, a judge can do
19 many things --

20 JUSTICE KENNEDY: I'm asking why it's the
21 heartland of the Double Jeopardy Clause.

22 MR. SLOAN: Well, because this Court --

23 JUSTICE KENNEDY: I question that.

24 MR. SLOAN: Yes, Your Honor. Because this
25 Court, again and again, has talked about the special

1 role of an acquittal where a jury finds the defendant
2 not guilty. Now, even if one views that as not final,
3 it surely is significant at the heartland of the Double
4 Jeopardy --

5 JUSTICE BREYER: Why "surely"?

6 MR. SLOAN: Pardon?

7 JUSTICE BREYER: I mean, why "surely"?
8 Look, the thing ends. To go back to my example, the
9 case is over, the jury comes in and says, Judge, we're
10 hung. Okay? Everybody is going to go home.

11 MR. SLOAN: Okay.

12 JUSTICE BREYER: But the defense lawyer
13 says, Judge, I'd like to know which of the five charges
14 they're on. Does the defense lawyer or the prosecutor
15 have a constitutional right to find out?

16 MR. SLOAN: Okay. Well, Your Honor. If one
17 assumes the foreperson's announcement is not in it or
18 it's of no consequence -- it's --

19 JUSTICE BREYER: No, I'm not assuming
20 anything. I'm giving you the example.

21 MR. SLOAN: What -- but, no, no -- it's just
22 what I'm saying. So, there's just the question, does
23 the defendant have a right to inquire?

24 JUSTICE BREYER: Yes.

25 MR. SLOAN: And here --

1 JUSTICE BREYER: What's the answer?

2 MR. SLOAN: -- there's -- I would say
3 definitely, yes, in a hard-transition State. This
4 is where you get into the --

5 JUSTICE BREYER: In the State I imagine
6 is -- remember, there were three possible verdicts:
7 Acquit of everything, convict of something, or say
8 you're hung. That's what we're imagining. Okay? And
9 you can imagine the set of instructions -- go to A, B,
10 C. That's fair enough. Those four things.

11 MR. SLOAN: Right.

12 JUSTICE BREYER: Okay? Now, case over,
13 acquitted -- no, hung, Your Honor.

14 Defense attorney: I want to find out which
15 of the five they're on.

16 Does he have a constitutional right to get
17 the answer?

18 MR. SLOAN: He does, if --

19 JUSTICE BREYER: He does?

20 MR. SLOAN: Yes, if it is a hard-transition
21 State. And the -- or especially if it's a
22 hard-transition State.

23 JUSTICE BREYER: I don't know what -- I'm
24 sorry.

25 MR. SLOAN: Okay. What a hard transition --

1 or sometimes it's called an "acquittal first" State,
2 which may put it in relief more, which is where, as in
3 this case, the jury is told you may go to a lesser
4 offense --

5 JUSTICE BREYER: Okay. Okay. I see, okay,
6 fine.

7 MR. SLOAN: -- only if you acquit on the
8 greater offense.

9 JUSTICE BREYER: In other words, here -- I
10 got it. If --

11 MR. SLOAN: And every State court, except
12 for Arkansas here, that has addressed the issue in the
13 context of a hard transition, has said that the
14 defendant does have a right to inquire --

15 JUSTICE BREYER: Okay. Okay.

16 MR. SLOAN: That's very different if you
17 don't have that kind of hard transition.

18 JUSTICE BREYER: Wait. I'm only midway,
19 because I'm trying to follow this through. I still
20 don't know why the Constitution does that, but I'll take
21 your word for it. I'd assume it was State law that does
22 that, but -- but fine.

23 Now he says, yes, you have the right, either
24 of you has the right.

25 We're on number three.

1 Your Honor, I would like a poll of the jury
2 as to the acquittal as to one and two.

3 Does both -- do both sides have the right to
4 get that?

5 MR. SLOAN: So, after -- after they've
6 announced an acquittal?

7 JUSTICE BREYER: No. Well, here's what
8 happened: Judge, I want to know what number they were
9 on when they couldn't reach a --

10 MR. SLOAN: Right.

11 JUSTICE BREYER: Foreman: Number five, Your
12 Honor.

13 Judge, I would like a poll of the jury, each
14 juror, as to numbers one, two, three, and four to be
15 sure that they were unanimous on each as to the
16 acquittal, which under the instruction allowed them to
17 go to the next one.

18 Okay? Constitution requires it?

19 MR. SLOAN: Well, no. I mean, look, I think
20 there can be variations in State procedure, but I think
21 the core --

22 JUSTICE BREYER: No, no. Why doesn't the
23 Constitution require it? You have to be sure there was
24 an acquittal. You have to be sure there was an
25 acquittal. And what -- what I'm doing obviously is I'm

1 spinning out what I see as the constitutional
2 consequences of taking your constitutional position, and
3 I'm going to be ending up by saying I've never heard of
4 this before.

5 MR. SLOAN: Well --

6 JUSTICE BREYER: But there's a lot of stuff
7 I haven't heard of. So, that doesn't prove that much.

8 (Laughter.)

9 MR. SLOAN: Well, there are several States
10 that have this, and the reason --

11 JUSTICE SOTOMAYOR: Counsel, what do several
12 States have? I've -- if I read what those States are
13 saying, including the Massachusetts State that you point
14 to, it's a very simple rule. And you seem to be arguing
15 past it or around it or -- I think what they say is,
16 once the jury announces an acquittal, then that's the
17 substance; the person's been acquitted once they've made
18 a judgment and announced it. It -- the Constitution
19 doesn't -- the Double Jeopardy Clause doesn't entitle
20 someone to have it announced, doesn't entitle someone to
21 force the jury to announce it.

22 But if the jury gets up at the end of the
23 trial in a State that doesn't permit partial verdicts
24 and said, contrary to the instructions of the judge,
25 contrary to the law of the State, the jury says we

1 acquitted on counts one and two, we're hung on count
2 three, the Constitution says jeopardy attaches because
3 there has been an announcement of a verdict. Isn't that
4 your position?

5 MR. SLOAN: That's exactly right. There's
6 another body of case law also which I was addressing,
7 which talks about when jeopardy attaches even if there's
8 not that kind of announcement. But, Your Honor --

9 JUSTICE SOTOMAYOR: Well, Ball -- our case
10 in Ball says it doesn't matter whether a judgment is
11 entered or not. As far back as 1896, Ball said the
12 judgment is irrelevant. It is the verdict of acquittal,
13 and it basically equated that verdict with -- it doesn't
14 matter if it's entered properly, if the jury is polled,
15 if anything happens. It's as soon as the jury announces
16 acquittal, that's the operative double jeopardy kicker.
17 Isn't that what you're saying?

18 MR. SLOAN: Yes. Yes, Your Honor.

19 JUSTICE SOTOMAYOR: And I thought I heard
20 you arguing that here the lack of manifest necessity was
21 that the judge had heard they reached that verdict.

22 MR. SLOAN: Well --

23 JUSTICE SOTOMAYOR: And he should not have
24 discharged the jury without asking them, could they
25 reach a verdict that they had -- had they reached the

1 verdict that they announced?

2 MR. SLOAN: Yes. From a manifest necessity
3 perspective, this Court's decisions on manifest
4 necessity, from United States v. Perez in 1824 through
5 Renico v. Lett in 2010, have emphasized the judge has to
6 exercise sound discretion. And to exercise sound
7 discretion here, the judge could have done many things,
8 but the one thing he could not do, consistent with sound
9 discretion, is to do nothing and to proceed as though
10 that announcement hadn't happened, and --

11 JUSTICE ALITO: You suggested that the --

12 CHIEF JUSTICE ROBERTS: You've talked about
13 our manifest necessity decisions. It's true that we --
14 isn't it, that we said last year we have never reversed
15 the district courts' exercise of discretion under the
16 manifest necessity standard?

17 MR. SLOAN: In the case of a jury deadlock?

18 CHIEF JUSTICE ROBERTS: Yes.

19 MR. SLOAN: Is what Your Honor is talking
20 about? Yes, this Court has emphasized the -- the
21 deference due a district court. But Renico --

22 CHIEF JUSTICE ROBERTS: In -- and under
23 that -- I'm sorry. Go ahead.

24 MR. SLOAN: Renico did not present the
25 important threshold issue about what are the charges on

1 which the jury is deadlocked. And here there's an
2 insufficient basis to conclude that the jury was
3 deadlocked on the murder charges. There was nothing
4 like the foreperson's announcement at issue in Renico.

5 CHIEF JUSTICE ROBERTS: I don't want to --
6 I'm sorry for taking up your time, but your friend says
7 you did not object when the judge announced that he was
8 going to declare a mistrial; is that correct?

9 MR. SLOAN: Your Honor, there's not an --
10 an objection at that time, but that is not a waiver for
11 a couple of reasons. First, the Arkansas Supreme Court
12 reached the merits. It's a Federal constitutional
13 issue.

14 Second, before that point, defense counsel
15 had been very explicit that it only wanted a mistrial on
16 the -- on the remaining counts and not on the other
17 ones.

18 And, third, this Court has emphasized that
19 the distinction in manifest necessity is when the
20 defendant affirmatively consents or moves for a
21 mistrial, as opposed to either if the judge does it
22 sua sponte, and the defendant doesn't have to object, or
23 the prosecutor moves for it.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 General McDaniel.

1 ORAL ARGUMENT OF DUSTIN MCDANIEL

2 ON BEHALF OF THE RESPONDENT

3 MR. MCDANIEL: Mr. Chief Justice, and may it
4 please the Court:

5 There are three key reasons why jeopardy has
6 not terminated in this case. First, the jury was free
7 to revisit capital and first-degree murder when it
8 resumed its deliberations. Thus --

9 JUSTICE KAGAN: Where does it say that in
10 the jury charge?

11 MR. MCDANIEL: I think that there's a
12 critical misunderstanding by Petitioner of Arkansas's
13 jury instructions, and there's a lot of use of -- of
14 titles, such as "acquittal first" or "hard transition"
15 or "soft transition."

16 JUSTICE KAGAN: Well, as I understand what
17 the Arkansas instructions said, what the instructions in
18 this case said, is that the jury unanimously had to have
19 a reasonable doubt on an offense before it could go down
20 to the next offense. So, that's to say that the jury
21 unanimously had to find what is -- what leads to an
22 acquittal. So, the jury had to unanimously acquit on
23 the greater offense before it could go down to the next.

24 And the -- the instructions don't say
25 anything about moving back up. And this jury seems to

1 take its responsibility under these instructions
2 extraordinarily seriously. This jury was instructing
3 the judge on the instructions --

4 (Laughter.)

5 JUSTICE KAGAN: -- and about how they had to
6 go down step by step and reach unanimity on the one
7 before they could get to the next lowest down. So, I
8 guess I'm asking why do you think, under these
9 instructions, that the jury felt itself able to go back
10 up?

11 MR. MCDANIEL: Well, there are three primary
12 reasons. One, in States that are acquittal-first
13 States, States that truly require a resolution of each
14 charge before the transition to subsequent charges, they
15 use words like "unanimous." In fact, they all use the
16 word "unanimous" in their instruction. Arkansas doesn't
17 do that. We use a rather ambiguous, or unambiguous,
18 depending on how you look at it --

19 JUSTICE KAGAN: The chief prosecutor kept
20 saying: You all have to agree on this.

21 MR. MCDANIEL: And he was accurate, and he
22 was echoed by the defense counsel in her closing
23 argument as well. But there is no requirement of a
24 resolution. The jury verdict forms reflect that
25 perfectly.

1 In fact, Justice Breyer's example of a given
2 State is exactly what Arkansas does, as compared to a --
3 a true acquittal-first State, where there are multiple
4 jury verdict forms, where you truly resolve one charge
5 attaching final resolution and, in fact, attaching
6 jeopardy or terminating jeopardy at that point.

7 In this case, there is one verdict form.
8 You can decide something --

9 JUSTICE SOTOMAYOR: I'm sorry. I'm so
10 totally confused by you ignoring Hughes.

11 MR. MCDANIEL: I think --

12 JUSTICE SOTOMAYOR: The Arkansas charge
13 says: If you have a reasonable doubt of the defendant's
14 guilt on the charge of capital murder, you will consider
15 the charge of murder in the first degree.

16 And I thought the Arkansas cases said no one
17 juror is going to think they can go to the next count.
18 They have to understand from this charge that it has to
19 be unanimous. And that's what the prosecutor argued.
20 It's what the defense argued. It's what your supreme
21 court has said has to happen. I'm a little confused,
22 given your case law, your supreme court case law, that
23 says you can't move on to the next one unless it's
24 unanimous, how you can answer Justice Kagan's question
25 the way you have. I mean, there's nothing in your case

1 law that --

2 JUSTICE SCALIA: You didn't finish your
3 answer, did you? I thought you were going on to some
4 other points.

5 MR. MCDANIEL: I did. And, in fact, I think
6 that Hughes is extraordinarily important. And,
7 respectfully, I believe that the Petitioner has
8 mischaracterized Hughes. There is a line of dicta in
9 Hughes that is particularly useful in the Petitioner's
10 brief, but it is Justice Corbin of the Arkansas Supreme
11 Court who authored Hughes, who was rejecting a double
12 jeopardy claim in Hughes and, in fact, invoked this line
13 which says -- what has been quoted in the briefs. It is
14 Justice Corbin who was presented with this exact same
15 argument to interpret the instructions in Blueford and
16 authored Blueford and rejected what allegedly was his
17 position on the instructions. Hughes was not about the
18 instructions. No part of Hughes was asked to interpret
19 what our instructions are.

20 JUSTICE KAGAN: I think if you -- if you
21 look at what the -- what the judge said, what the
22 prosecutor said, what the defense counsel said, and then
23 what the jury said, it's clear that they all thought
24 that they had to unanimously agree on something before
25 they could go to the next crime. And, again, there's no

1 suggestion in what anybody said that they could go back
2 up.

3 JUSTICE SCALIA: Is there any suggestion
4 that they couldn't go back up?

5 MR. MCDANIEL: That is extraordinarily
6 important, Justice Scalia. There's not.

7 JUSTICE SCALIA: Isn't it usually assumed
8 that a jury is not finished until it's finished?

9 MR. MCDANIEL: The State would assert that
10 that is precisely the case here. You have exactly the
11 type of jury verdict form that Justice Breyer suggested
12 in his example. They have to decide on something. You
13 have one charge, capital murder and its lesser -- lesser
14 and included.

15 This person, Mr. Blueford, does not deny
16 that he is guilty of a homicide offense. That was
17 included in their closing argument. Does not deny that
18 he's subject to retrial because there was manifest
19 necessity on at least two of the charges. They simply
20 would like to say that there was not manifest necessity
21 for the greater of the two.

22 And the only way that that happens is
23 either -- to answer, I believe it was Justice Kennedy's
24 hypothetical earlier -- are you required to go in and
25 engage in partial verdicts even if a State does not

1 choose to do so, even if a State is, in fact, a general
2 verdict State?

3 JUSTICE KAGAN: Well, even if, General --

4 MR. MCDANIEL: Or --

5 JUSTICE KAGAN: Even if you're not
6 required -- and maybe you are required -- but even if
7 you're not, here the jury comes back. The jury tells
8 the judge we've unanimously reached acquittal on these
9 two counts. At that point, why doesn't the judge have
10 an obligation -- you know, the judge sends them back for
11 a half hour. There's no reason to think that in that
12 half hour they moved back up the scale. There's every
13 reason to think they just remained stuck where they
14 were.

15 But even assuming that there is some
16 conceivable possibility that they went back up, why
17 doesn't the judge, working with the manifest necessity
18 standard, have an obligation to say, well, what about
19 it? Did you? Did you reach acquittal? Did you reach a
20 judgment on these two counts?

21 MR. MCDANIEL: Well, there are a couple of
22 reasons. One, I think it's fair to say that the State
23 recognizes it was improper for the judge to inquire in
24 the way that he did. I think that it's fair to say that
25 he recognized that it was improper, as he didn't do it

1 on their first announcement of deadlock and he didn't do
2 it on their final announcement of deadlock.

3 It's important to note that, although
4 defense counsel at trial did ask for revised verdict
5 forms, that was not her initial reaction. Her initial
6 reaction was to say, judge, I think that the jury needs
7 to go back and keep deliberating, and I would ask that
8 you give them another Allen charge. That's not the
9 reaction that anyone would have if they had just heard
10 an acquittal of their client. This was, in fact, a
11 mid-deliberation report, probably wrongfully elicited by
12 the trial judge, but it was just that, a snapshot in
13 time with no intent by the jury to make an announcement.

14 So, when they returned, the real question, I
15 think, hinges -- as this Court analyzed in *Smith v.*
16 *Massachusetts*, is, is it possible for there to be
17 revision? And it doesn't, in fact, Justice Kagan, have
18 to be the entirety of the jury completely pivoting in
19 their decisions. All it would have to be is one. And
20 we recognize that, even after they have announced
21 unanimously, signed a verdict form, offered their
22 assent, if they're polled in the box and one person
23 changes their vote, then that bears the effect of
24 changing the verdict.

25 So, is it possible? Yes.

1 JUSTICE SOTOMAYOR: Would this be different
2 if they had -- if the judge had called them back in and
3 said, are you deadlocked on the third count? And -- my
4 hypothetical to your adversary. And they said: Well,
5 we have acquitted on capital murder. We've acquitted on
6 the second count. We are still, Judge, deadlocked.

7 If this had been announced at the very end,
8 what would be your position today?

9 MR. MCDANIEL: Certainly, there would be --
10 it would be a tougher case if everything ended at that
11 moment because, at that point, counsel would have to ask
12 the trial court, if you're declaring a mistrial at this
13 moment on this report, what are you going to do? Are
14 you going to accept this or are you not going to accept
15 it? Will there be an opportunity for polling?

16 JUSTICE SOTOMAYOR: Doesn't sound like the
17 judge was interested in any of the defense counsel's
18 positions on mistrial. He announced that whether the
19 jury told him they were deadlocked or not, he was going
20 to call them back.

21 So, I don't know that the judge would have
22 done what you suggested.

23 MR. MCDANIEL: It's --

24 JUSTICE SOTOMAYOR: Because a judge -- the
25 defense attorney did ask for partial verdicts after

1 their first announcement.

2 MR. MCDANIEL: And, Justice Sotomayor, they
3 were -- they were rightly rejected. Partial -- partial
4 verdicts are not contemplated in Arkansas law. It would
5 have been error for him to engage in partial verdicts at
6 that time. And there's nothing in the Fifth Amendment
7 that would require this Court to intrude upon the
8 liberty of the States to determine whether they're
9 general --

10 JUSTICE SOTOMAYOR: So, if the State rule
11 says we don't take partial verdicts and the judge had
12 entered a verdict -- a judgment -- declared a mistrial
13 or entered a judgment saying hung jury as to all counts,
14 would jeopardy have attached?

15 MR. MCDANIEL: If there's a hung jury as to
16 all counts, then --

17 JUSTICE SOTOMAYOR: No. If the jury had
18 announced what it did, but following Arkansas law as you
19 read it, you don't take partial verdicts, it could only
20 be one hung jury.

21 MR. MCDANIEL: Correct.

22 JUSTICE SOTOMAYOR: Would jeopardy have
23 attached?

24 MR. MCDANIEL: No. If there's manifest
25 necessity for a mistrial, and in this case there's one

1 charge, one homicide offense, and as this Court has long
2 recognized, Brown v. Ohio being a key -- a key
3 analysis --

4 JUSTICE SOTOMAYOR: So, really the only
5 issue here is whether it's reasonable to conclude that a
6 jury that had been told acquit first comes back and says
7 we're only hung on this, and the jury says listen to
8 each other on what your hung on, that that jury
9 reasonably -- the judge could have ignored their stated
10 verdict and enter a trial -- a mistrial on everything
11 else.

12 MR. MCDANIEL: Respectfully, Justice
13 Sotomayor, they were not told acquit first.

14 JUSTICE SCALIA: You don't agree --

15 MR. MCDANIEL: That is a -- a subtle but key
16 distinction.

17 JUSTICE SCALIA: You don't agree -- I don't
18 think you agree that it was their stated verdict, do
19 you?

20 MR. MCDANIEL: I absolutely do not. It was
21 not a verdict. And bears none of the hallmarks.

22 JUSTICE BREYER: There is no room in Arkansas
23 law for saying you're acquitted as to one, acquitted as
24 to two. But Arkansas law says you come in with a
25 verdict of guilty of something, a verdict of acquittal

1 of everything, or the words "hung jury." Is that right?

2 MR. MCDANIEL: Well, it's not up to the jury
3 to determine whether they're hung.

4 JUSTICE BREYER: No. They say to the judge,
5 Judge, we are hung. Judge says "hung jury."

6 MR. MCDANIEL: That is correct, Justice
7 Breyer. That is correct.

8 JUSTICE KAGAN: I guess, General McDaniel,
9 one question about what Arkansas law does is -- it seems
10 a little bit as if it's trying to get the sweet of an
11 acquittal for a State without the bitter. So, the sweet
12 is an acquittal-first system, where you force a jury to
13 reach agreement on one thing before it goes to the next
14 thing, makes compromised jury verdicts harder, and
15 that's why a State might say we want an acquittal-first
16 system.

17 The bitter that most States take with that
18 is that they say, well, if we're forcing them to agree
19 on these things and they agree on a verdict of not
20 guilty, we're stuck with that.

21 Now, what Arkansas seems to want is a system
22 in which it forces juries to agree on the -- the greater
23 charges before going to the less, but won't take the
24 consequence of that, which is that sometimes they agree
25 that on the greater charges, they're not guilty.

1 MR. MCDANIEL: No, Justice Kagan. The --
2 the majority of the States and circuits recognize there
3 is a difference between a hard-transition instruction
4 and an acquittal-first instruction. They recognize the
5 difference between a partial verdict and a general
6 verdict on charges that include lesser and includeds.
7 And what we require is one verdict on a charge: guilty
8 or not guilty.

9 And they are at liberty to consider -- they
10 can be at the very end -- again, it's very important to
11 know -- it's wholly speculative in this case to know
12 where they were when they ultimately were hung. And so,
13 we are -- we are operating in the world of bright-line
14 rules, which are very important for jeopardy.

15 We know when jeopardy attaches. When the
16 jury is in the box. We know when jury -- or when
17 jeopardy terminates, and it's when there's some
18 conclusion with finality. Every case that this Court
19 has analyzed, even Price and Green and Selvester, where
20 the jury remained silent, there was some finality that
21 led to termination of jeopardy.

22 JUSTICE GINSBURG: General McDaniel, in this
23 case, they deliberated for 4-1/2 hours at the point
24 where the judge asked them where do you stand on this
25 count; where do you stand on that? And so, they were up

1 to the manslaughter, and they were stuck on that. And
2 the jury foreman said we can't go to negligent
3 homicide because we haven't reached agreement on -- on
4 the manslaughter charge. Then they go back for just a
5 half hour.

6 How realistic is it to think that they began
7 over at that point, rather than trying to resolve the
8 manslaughter charge so they could do exactly what the
9 judge told them, and then get to the negligent homicide
10 charge?

11 MR. MCDANIEL: The State wouldn't venture to
12 speculate as to what they did, although I would
13 respectfully say that that is probably what happened.
14 They went back and they tried to follow the instructions
15 of the court. That's certainly viewing things in a
16 light most favorable to the Petitioner, and there's no
17 evidence --

18 JUSTICE SCALIA: General McDaniel, how --
19 how probable is it that when the jury is polled, and
20 having voted unanimously when they were back in the jury
21 room, one of the members of the jury changes his mind
22 and votes the other way? That's not at all probable, is
23 it? But it happens sometimes, doesn't it?

24 MR. MCDANIEL: It does.

25 JUSTICE SCALIA: And when it happens, what's

1 the result?

2 MR. MCDANIEL: It -- it bears all of the
3 difference in the finality of the verdict. And, again,
4 as this Court noted in Smith, it's the availability;
5 it's the incorporation within a State's procedure for
6 that finality to be undone. My Lord, how likely is it
7 truly for a trial court to completely reverse his or her
8 granting of a motion of dismissal? But this Court said,
9 if there's a procedure in place for it to be revisited,
10 then jeopardy doesn't terminate until the point at which
11 there's no return.

12 JUSTICE ALITO: Is this a fair explanation
13 of Arkansas law, which doesn't seem to me to be
14 perfectly clear? What the jury is supposed to do is to
15 vote on the greatest offense first and reach a
16 reasonably firm vote. And if they reach a reasonably
17 firm vote that is unanimous not guilty, then they can
18 move on to the next -- to the lower offenses, but that
19 reasonably firm vote is not an absolutely final vote,
20 and there is still the possibility for the jury to go
21 back.

22 MR. MCDANIEL: Yes, Justice --

23 JUSTICE ALITO: Is that a correct
24 understanding?

25 MR. MCDANIEL: Yes, Justice Alito, that's

1 precisely correct. And, just as Justice Scalia noted
2 earlier, we recognize that there are compromises that
3 are incorporated into transitions. One may be willing
4 to say: I'm willing to move on from first-degree
5 murder. I'm the only one here that believes that we
6 should find guilty of first-degree murder, but that's
7 not going to happen. I'm not going to change your
8 votes. But I'm willing to move on and go to
9 manslaughter.

10 JUSTICE ALITO: For double --

11 MR. MCDANIEL: But would that vote equate to
12 an acquittal if asked in -- with finality?

13 JUSTICE ALITO: For double jeopardy
14 purposes, is the question what Arkansas law actually
15 says, or what the jury understood Arkansas law to be?

16 MR. MCDANIEL: I think what Arkansas law
17 actually says is how we should be judged, but at the
18 same time, the evidence here was that the jury came in
19 to answer questions about the status of their
20 deliberation. I think that Justice Kagan properly noted
21 that they were in fact giving the judge some
22 instructions on how the instructions should work.

23 And they were answering that question, and
24 the foreperson -- one person was asked, well, where are
25 you? And she announces -- and we have no reason to

1 believe that she was not being truthful. At the same
2 time, we have no way to verify it. And the defense
3 counsel said, Judge, I think they ought to be given
4 another Allen charge, and they need to go keep
5 deliberating.

6 And at that point, if they had returned, no
7 matter how unlikely -- if they'd come back in 10 minutes
8 later and said we find unanimously guilty of capital
9 murder, no matter how unlikely, if that was possible,
10 then jeopardy could not have terminated upon that
11 report. It could not have been an acquittal because
12 they couldn't have continued deliberating on those
13 charges for another instant.

14 JUSTICE SOTOMAYOR: General, how do you deal
15 with our cases, Ball and Martin Linen and the whole line
16 that says State -- the form of State law judgments
17 doesn't control?

18 MR. MCDANIEL: I think that Ball is
19 particularly helpful to us, and I think that the Hudson
20 case cited by Petitioner is also important.

21 If -- if a State puts a procedural bar to
22 considering a final judgment of acquittal, then that
23 procedural bar is trumped by the Fifth Amendment of the
24 Constitution. Mr. Ball was --

25 JUSTICE SOTOMAYOR: I'm not sure what that

1 means.

2 MR. MCDANIEL: Well --

3 JUSTICE SOTOMAYOR: And that's the problem
4 with all of this area, which is States vary on how they
5 enter judgments after the jury speaks its verdict. So,
6 where do we draw the line as to when a State law
7 trumps -- when a Federal law, the Double Jeopardy
8 Clause, trumps a State system?

9 MR. MCDANIEL: Justice Sotomayor, I think
10 that your answer is contained within the question. A
11 verdict is the true answer. If there is a verdict, then
12 the -- the force and impact of that verdict is what
13 matters. Did this jury announce a verdict? If so,
14 jeopardy attached. But this was not a verdict. It bore
15 none of the hallmarks of a verdict. It wasn't
16 published. It wasn't verified. It wasn't accepted by
17 the court. It wasn't even accepted by the defendant's
18 attorney. It wasn't a verdict.

19 In Ball, there was a clear verdict. The
20 jury announced acquittal. The judge entered acquittal.
21 And later, the indictment was dismissed as being faulty.
22 And under the law of England up until that time, even in
23 the United States, a faulty indictment dismisses
24 everything, and you start de novo. So, even the
25 acquittal gets thrown out because you can't acquit of

1 something that was void ab initio.

2 JUSTICE GINSBURG: Mr. Sloan told us that it
3 was the State that prevented the elucidation because
4 defense counsel said: Judge, we can try to do what
5 Double Jeopardy Clause says, not try a person twice for
6 the same offense. So, Judge, please ask the jury to
7 rule on those two -- give them a sheet that gives them a
8 choice of guilty or not guilty.

9 But they went -- that originally was just a
10 series of guilty on the four counts, and then their
11 other choice was acquittal.

12 Now, defense counsel says, ask them, is it
13 guilty or not guilty, instead of asking just is it
14 guilty. And the judge declines to do that. Isn't that
15 why we don't have definitive answers? Because defense
16 counsel says -- said, Judge, give the jury the chance to
17 tell us whether they --

18 MR. MCDANIEL: Some States do, in fact, give
19 the opportunity to inquire into the jury's
20 deliberations. Partial verdict forms and inquiries are
21 permitted, but they're not required. And in Arkansas,
22 the State properly objected to changing the agreed-upon
23 verdict forms, as the judge said, midstream. They had
24 been agreed to; they had been submitted; and they
25 properly reflected the law in Arkansas. So that to

1 change them would have either been by agreement or
2 because they were constitutionally required. And that's
3 ultimately the case -- the question in front of this
4 Court: Are they -- are they constitutionally required?

5 And that leads into the manifest necessity
6 analysis because anytime there is a charge with lesser
7 and included offenses and a general verdict State, and
8 the jury simply announces we cannot reach a
9 determination, is -- is the constitutional trigger truly
10 resting on the fortuity of the announcement of a
11 snapshot vote in open court, or is a constitutional
12 trigger how they voted back in the jury room? And if
13 that is the constitutional trigger, then wouldn't
14 verdicts -- partial verdicts be required?

15 In fact, this Court does not require partial
16 verdicts. A -- an announcement of unable to render a
17 verdict warrants a mistrial. This Court has said
18 clearly in Renico that we defer to a -- a trial court's
19 decision that manifest necessity exists. In fact, this
20 Court has never overturned a trial court's decision that
21 manifest necessity existed for the -- on a hung jury.

22 Here a jury was hung. They simply could not
23 render a decision on the verdict forms they were
24 submitted: guilty or not guilty of a homicide? They
25 couldn't answer the question. And, therefore, jeopardy

1 should continue, and the retrial should be permitted.

2 JUSTICE KAGAN: General, you mentioned Green
3 and Price before, and those are the cases, of course,
4 where there is a conviction on a lesser charge. We
5 don't know anything about the greater charge. And then
6 the conviction is overturned.

7 And what the Court says there is, well, we
8 don't know anything, but we're going to make a
9 reasonable assumption, and the reasonable -- no, I think
10 it said a "legitimate" assumption. The legitimate
11 assumption that they acquitted on the greater charges
12 before they went down to the lesser charge.

13 Now, it seems to me as though there are a
14 hundred reasons why that might not be true. The jury
15 could have just gone to the lesser charge immediately as
16 a compromise position without voting on the greater
17 charge, but the Court said we'll make a legitimate
18 assumption.

19 So, why isn't the same true here? We're
20 making a legitimate assumption, I think honestly, on the
21 basis of much more than Green and Price had to work
22 with, if you will, that the jury, in fact, acquitted of
23 those greater offenses.

24 MR. MCDANIEL: Well, in Green and Price
25 there were verdicts, and --

1 JUSTICE KAGAN: There was a verdict --

2 MR. MCDANIEL: -- in this case there's no
3 verdict.

4 JUSTICE KAGAN: -- that eventually got
5 overturned. There was no verdict on the greater
6 offenses.

7 MR. MCDANIEL: You have to look at Green and
8 Price in conjunction with this Court's holding in Brown
9 and the analysis of lesser included offenses within a
10 general offense. They are one for jeopardy purposes.

11 In this case, Mr. Blueford was facing one
12 charge for jeopardy purposes. The information, the
13 indictment, only included one charge. So, he could not
14 have been convicted of both manslaughter and murder in
15 the first degree. This Court's very clear about that.

16 So, in Green and in Price, where there was a
17 conviction on a lesser charge and silence -- in other
18 words, they didn't expressly say not guilty of this
19 higher charge and not guilty of this higher charge, and
20 guilty of this lesser charge -- it stands only to
21 reason, and certainly to constitutional scrutiny, you
22 can only be convicted of one of them. And if a jury
23 finds -- and, again, it still requires publication,
24 verification, and acceptance by a court of an actual
25 verdict of one of those charges -- it only stands to

1 reason and logic that the upper charges were dismissed.

2 That's -- that is entirely different, respectfully --

3 JUSTICE KAGAN: Well --

4 JUSTICE ALITO: In Green --

5 MR. MCDANIEL: -- from this case.

6 JUSTICE ALITO: In Green and Price, the
7 defendants were tried once on the greater offense, and
8 jeopardy terminated without a finding of manifest
9 necessity regarding the termination of jeopardy. To me
10 that is the sound basis for those decisions. But I have
11 to agree with what Justice Kagan said. The -- Justice
12 Black's reasoning in Green, that the jury impliedly
13 acquitted the defendant of the greater offense by
14 convicting the defendant of the -- of the lesser offense
15 doesn't really make any sense because they could have
16 simply been in disagreement about the greater offense.

17 MR. MCDANIEL: Well, and I think that's
18 correct, and I think that there has to be some question
19 here as to, is it an implied acquittal or was it an
20 express verdict? I think the Petitioner can't really
21 decide, or at least hasn't articulated, where the
22 jeopardy terminating event occurred. Was it when they
23 made their announcement? In which case, why did they go
24 and subsequently deliberate even on the request of
25 counsel? Was it at the conclusion when there was the

1 possibility that nothing really had changed after the
2 report and a declaration of manifest necessity? Which
3 did not come, by the way, at the request of the State.
4 It was sui sponte by the court.

5 And then there was, in fact, a waiver, and I
6 think a legitimate waiver, of an objection by defense
7 counsel. There was -- at no time at that point before
8 releasing this jury did defense counsel renew a motion
9 to submit partial verdict forms, to inquire into the
10 jury, to poll where they were.

11 JUSTICE GINSBURG: Well -- she had asked;
12 so, why was it necessary for her to repeat it? And she
13 said, Judge, please let them vote yes or no on the --
14 the two most serious charges. And the judge said no.
15 She might have figured if she was going to repeat that,
16 she would just annoy the judge. She had made the -- she
17 had made the request.

18 MR. MCDANIEL: The primary difference would
19 be, in fact, the possibility that polling may be
20 different after another half hour of deliberations. All
21 it takes is one juror to change their mind. And, in
22 fact, it may have benefitted the defendant. What if they
23 had already decided they'd changed their mind again and
24 acquitted on -- on manslaughter and had moved down to
25 negligent homicide? And that's what they were talking

1 about.

2 Where they were at the end of the final 30
3 minutes of deliberation is purely speculative. And
4 because it's purely speculative, regardless of whether
5 it could benefit the State or the defendant, it means
6 that no report was a verdict. No report could have been
7 a verdict.

8 JUSTICE SOTOMAYOR: General, other than
9 trenching on State rules that don't create the
10 constitutional protection, what's wrong with a simple
11 rule that says, once a jury announces that it is
12 unanimous on acquittal of a count, you can't go back
13 unless the jury says that it's not unanimous in some
14 way? What's wrong with that rule?

15 MR. MCDANIEL: It would be difficult to
16 apply in practicality, and it certainly would be --

17 JUSTICE SOTOMAYOR: Why? The jury comes out
18 and says we're unanimous. There's a poll. One juror
19 says I'm really not unanimous. They go back. But once
20 a jury says it's unanimous, a judge can't declare a
21 mistrial, can't do something until it ensures itself
22 that -- that jeopardy hasn't attached.

23 MR. MCDANIEL: The primary reason why the
24 majority of jurisdictions have rejected that analysis,
25 whether it's announced or not, is the coercive effect on

1 -- on a jury.

2 If you have a tired, frustrated, potentially
3 angry jury, and they're told we're either going to let
4 you go or you're -- we're not going to let you go home
5 until you decide something; you have to tell
6 us something.

7 JUSTICE SOTOMAYOR: No, I'm not -- I'm not
8 asking -- I'm not announcing or setting a rule that says
9 you have to ask them, you have to force them to give a
10 verdict. I'm not -- I'm saying what's wrong with the
11 constitutional rule that simply says, once the jury says
12 we're unanimous, there can't be manifest injustice --
13 there can't be manifest necessity until you're sure that
14 they can't reach a verdict -- that that verdict is not
15 their verdict?

16 MR. MCDANIEL: So, we're not asking, but if
17 -- just so I understand your hypothetical -- we're not
18 asking them, but if for fortuitously they happen to
19 announce --

20 JUSTICE SOTOMAYOR: That's what --

21 MR. MCDANIEL: -- spontaneously or
22 otherwise --

23 JUSTICE SOTOMAYOR: That's what three State
24 courts have said. Three State courts have said, if
25 there's any meaning to jeopardy, it is that once a jury

1 out loud says to a defendant you're not guilty, the
2 defendant is entitled to rely on that. So, what's wrong
3 with that simple rule?

4 MR. MCDANIEL: First, this Court hasn't --
5 that court -- that rule -- could be allowed to work,
6 and, in fact, it does work in some States. I don't see
7 how it could benefit Mr. Blueford; and so, I don't see
8 how it follows into his relief because it didn't in fact
9 happen. And so, it takes us -- it might be beneficial
10 to future defendants if they ever find themselves in
11 such a circumstance, but it doesn't apply retroactively.

12 CHIEF JUSTICE ROBERTS: Thank you, General.

13 Mr. Sloan, you have 3 minutes remaining.

14 REBUTTAL ARGUMENT OF CLIFFORD M. SLOAN

15 ON BEHALF OF THE PETITIONER

16 MR. SLOAN: Thank you, Your Honor.

17 The core of the State's position is that the
18 foreperson's explicit announcement that the jury had
19 unanimously voted against guilt is of no constitutional
20 moment whatsoever.

21 Now, there is no opinion of this Court that
22 has ever said that a jury statement like that is
23 entitled to no weight whatsoever. And if this Court
24 were to say that in an opinion, it would open the door
25 to many of the core double jeopardy evils that this

1 Court has repeatedly focused on. For example, acquittal
2 avoidance, emphasized in the Arizona v. Washington. A
3 court doesn't want to accept the acquittal consequences;
4 so, it just says we're not going to accept that.

5 And something that's a very real and
6 practical danger here, which this Court has emphasized
7 over and over again in opinions, is giving the State the
8 opportunity to refine and hone its case based on what it
9 learned at the first trial about what went badly.

10 And that is exactly what happened here. So,
11 it was vigorously contested. The State's capital murder
12 and murder -- first-degree murder case fell apart.
13 Their lead expert on it was destroyed. The jury heard
14 both sides, voted unanimously not guilty. And as this
15 Court said in Ashe v. Swenson, a core evil of the Double
16 Jeopardy Clause is that we don't let the prosecutor have
17 a dry run at a first trial, and then get to go before a
18 second trial with a new jury and plug the holes in it.
19 And the State's position here, that this is of no moment
20 at all, would raise that danger very prominently.

21 In conclusion, Your Honor, the jury in this
22 case heard the evidence on both sides, unanimously voted
23 against guilt on the murder charges, announced that in
24 open court, and never said a word that contradicted it.
25 Forcing Petitioner to run the gauntlet a second time on

1 the murder charges would run counter to what this Court
2 has repeatedly emphasized as the core purposes, policy,
3 and language of the Double Jeopardy Clause.

4 If there -- if there are no further
5 questions, Your Honor --

6 CHIEF JUSTICE ROBERTS: Thank you,
7 Mr. Sloan, General.

8 The case is submitted.

9 (Whereupon, at 12:21 p.m., the case in the
10 above-entitled matter was submitted.)

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