DOUBLE JEOPARDY BLUES: WHY IN LIGHT OF *BLUEFORD V. ARKANSAS* STATES SHOULD MANDATE PARTIAL VERDICTS IN ACQUIT-FIRST TRANSITION INSTRUCTION CASES

INTRODUCTION

Consider the following: a defendant is charged with first-degree murder. The charge includes the lesser included offenses of manslaughter and negligent homicide. At trial, the jury is given "acquit-first" transition instructions,[1] which instructs the jury to consider the most severe charge first, to progress in descending order based on severity, and to not discuss any lesser included offense until the jury has unanimously acquitted the defendant of the greater offense.[2] During deliberations, the jury becomes

[1] "A 'transition' instruction guides jurors in proceeding from the consideration of a primary charged offense to the consideration of a lesser included offense." Green v. State, 80 P.3d 93, 95 (Nev. 2003).

[2] "Acquit-first" transition instructions are one of several specific types of transition instructions. *See infra* notes 16, 23, 25, 26.

deadlocked as to manslaughter, informs the court they have reached an impasse, and requests further guidance from the judge. The trial judge instructs the jury on the importance of reaching a verdict,[3] and the defendant subsequently moves for a partial verdict regarding the charge with which the jury has apparently made a decision: first-degree murder. The judge denies the defendant's motion for partial verdict. The jury once again informs the judge that it cannot reach a verdict and remains deadlocked regarding manslaughter. Consequently, the judge declares a mistrial. The state then retries the defendant on all charges, including first-degree murder. The defendant appeals, arguing that double jeopardy prevents his retrial regarding first-degree murder.

In this scenario, a common sense understanding of the double jeopardy concept compels the baring of the defendant's retrial regarding the greater charge of first-degree murder for several reasons. Even if the jury had not been explicitly told to "unanimously acquit" the defendant of the greater charge before discussing a lesser charge, the procedural structure of acquit-first jury instructions creates a clear inference that the jury has "in essence" acquitted the defendant of the greater charge when it chooses to transition from discussing the greater charge to the lesser charge.[4] Additionally, concluding that double jeopardy bars the defendant's retrial regarding the greater charge is consistent with several maxims of double jeopardy jurisprudence: that retrial is barred when a jury, given the opportunity to convict, declines to do so,[5] that the state has only one opportunity to make its case,[6]

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[3] This type of jury instruction is often referred to as an *Allen* instruction, a "dynamite" charge, or a "hammer" charge. *See* Allen v. United States, 164 U.S. 492, 501-02 (1896). It is commonly given in situations where a jury is struggling to reach a consensus.

[4] Hughes v. State, 66 S.W.3d 645, 651 (Ark. 2002).

[5] *See* Green v. United States, 355 U.S. 184, 191 (1957) ("[The jury] was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first-degree murder came to an end when the jury was discharged so that he could not be retried for that offense.").

[6] Arizona v. Washington, 434 U.S. 497, 505 (1978) ("Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.").

and that a defendant has a "valued right to have his trial completed by a particular tribunal."[7]

However, the Supreme Court recently held in *Blueford v. Arkansas*[8] that, in the scenario described above, federal double jeopardy law does not prevent a prosecutor from retrying the defendant on all charges. In *Blueford*, the Court held that when the jury is deadlocked regarding a lesser included offense, first, a jury's transition from the greater to the lesser charge is not an acquittal,[9] and second, a trial judge is not required to grant a defendant's motion for partial verdict prior to declaring a mistrial.[10]

As a result, the Court's decision in *Blueford* allows a defendant's double jeopardy rights to be substantively violated while the state's action to retry the defendant on all charges remains procedurally valid. In other words, it is possible for the state to try a defendant twice for the same charge, thereby violating the spirit of double jeopardy, without technically infringing a defendant's constitutional rights. This outcome offends a natural sense of fundamental fairness and runs contrary to the purpose of the Double Jeopardy Clause.[11]

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[7] *Id.* at 503 (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

[8] 132 S. Ct. 2044 (2012).

[9] *Id.* at 2051. The Court did not specifically address whether a jury's decision to transition constituted an acquittal. Rather, the Court held that an informal announcement in open court does not count as an acquittal for the purposes of double jeopardy. *Id.* at 2050. However, since an informal announcement represents an even more explicit form of acquittal, the Court's holding necessarily implies a jury's decision to transition falls short of an acquittal as well. Further, even though the majority does not specifically address the issue of transition, Justice Sotomayor raises the issue in dissent. *See id.* at 2055 (Sotomayor, J., dissenting) ("Courts in several acquittal-first jurisdictions have held that a jury's deadlock on a lesser included offense justifies the assumption that the jury acquitted on any greater offenses. That assumption is not even necessary here because the jury unmistakably announced acquittal.") (internal citations omitted)).

[10] *Id.* at 2052.

[11] *See* Green v. United States, 355 U.S. 184, 187-88 (1957) ("The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual 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.").

To rectify this problem, states should adopt broader double jeopardy protections under their state constitutions by mandating trial judges issue partial verdicts in cases where the jury has been given acquit-first instructions and have become deadlocked regarding a lesser included offense.[12] Such a conclusion can be justified by finding the jury's "decision" to transition an outright acquittal,[13] finding transition to be some form of quasi-acquittal requiring jury inquiry, or finding the "manifest necessity" doctrine bars the retrial of the greater charge absent the court's recognition of the jury's actions. Although not required under federal law, this solution provides more comprehensive double jeopardy protections, better adheres to established double jeopardy policy and jurisprudence, properly elevates substance over form, and removes the inherent prosecutorial advantages of acquit-first instruction.[14]

Part I of this comment explains how the intersection of the lesser included offense and the double jeopardy doctrines led to the development of this problem and how states have addressed this issue prior to the *Blueford* decision. Part II explains the Court's decision in *Blueford* and analyzes how it confounds our understanding of the transition problem. Part III argues that states address the transition problem by adopting procedures which require trial judges issue a partial verdict in these situations. Finally, Part IV outlines the means by which states may put the solution into practice.

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[12] For more on partial verdicts, see Whiteaker v. State, 808 P.2d 270, 274-75 (Alaska Ct. App. 1991).

[13] This theory is based in part on the implied acquittal doctrine, established by the Supreme Court in *Green v. United States*. The implied acquittal doctrine states that when defendant has been charged with a charge that includes lesser included charges and the jury convicts the defendant of a lesser included charge, the jury's decision to convict the defendant of the lesser charge necessarily means that the jury acquitted the defendant of the greater charge. *See Green*, 355 U.S. at 190-91. Therefore, even though the jury did not issue a verdict regarding the greater charge, the jury's decision acts as an implied acquittal. *See id.* at 191.

[14] It also takes into account the realities of jury deliberation. *See* Kara Larson, Note, *Ruling From a Vacuum: Using Common Sense, Psychology, and Statistics to Provide a More Realistic and Fair Basis for Deciding* Blueford v. Arkansas, 58 LOY. L. REV. 773, 788-91, 792-93 (2012) (arguing that the Court's holding both conflicts with the policies underlying the Double Jeopardy clause and fails to take into account the realities of jury decision-making).

I. BACKGROUND

A. The Lesser Included Offense Doctrine[15] and Transition Instruction[16]

When a prosecutor charges a defendant with an offense, the lesser included offense doctrine allows a jury to convict a defendant of any lesser included offense,[17] even though the defendant has not been charged with that specific offense.[18] This rule has been universally adopted in both state and federal courts.[19]

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[15] For more on the lesser included-offense doctrine, see generally Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351 (2005) (discussing the history of the lesser included offense doctrine); James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1 (1995) (same); *see also* David F. Abele, Comment, *Jury Deliberations and the Lesser Included Offense Rule: Getting the Court Back in Step*, 23 U.C. DAVIS L. REV. 375 (1989-1990).

[16] For more on transition instructions, see generally Abele, *supra* note 15, at 376-81; Laura Anne Cooper, *Should Juries Be Able to Agree to Disagree?* People v. Boettcher *and the 'Unanimous Acquittal First' Instruction*, 54 BROOK. L. REV. 1027 (1988-1989).

[17] "[O]ne offense is necessarily included in another when the elements of the lesser offense are a subset of the elements of the charged offense." 3 CHARLES ALAN WRIGHT & SARAH N. WELLING, FEDERAL PRACTICE AND PROCEDURE § 515 (4th ed. 2011). Although outside the scope of this comment, throughout history, courts have used different tests to define whether an offense is necessarily included. *See* Hoffheimer, *supra* note 15, at 364-65. One in particular, the elements test, states that "an offense is a lesser included offense when its statutory elements form a subset of the elements of the charged offense." *Id.* at 365. The Supreme Court, in the landmark case *Blockburger v. United States*, attempted to provide further clarity on this issue, holding "the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." 284 U.S. 299, 304 (1932).

[18] *See* Beck v. Alabama, 447 U.S. 625, 633 (1980). "At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged." *Id.* (footnote omitted); *see also* 3 WRIGHT, *supra* note 17, § 515. But, "[i]t can be beneficial to the defendant as well, because the jury may temper justice with mercy by acquitting the defendant of the offense charged and finding him guilty of the lesser offense." 3 WRIGHT, *supra* note 17, § 515.

[19] *Beck*, 447 U.S. at 635-36. ("In the federal courts, it has long been 'beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'") (quoting Keeble v. United States, 412 U.S. 205, 208 (1973)). The lesser included offense doctrine has been incorporated at the federal level through

In such cases, juries are often given transition instructions, which inform the jury how and when it should proceed from considering the greater charge to the lesser included charge.[20] In light of the lesser included offense doctrine, several different forms of transition instruction have developed in order to provide structure to the deliberation process.[21] Acquit-first transition instruction mandates that a jury begin by deliberating the greatest charge first, proceed from one charge to the next in descending order based on severity, and proceed to discussing the lesser charges only after the jury unanimously agrees to acquit the defendant of the greater charge.[22] For example, if a defendant

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rule 31 of the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 31(c) ("[The] defendant may be found guilty of . . . an offense necessarily included in the offense charged . . . ."). Similarly, the state courts that have addressed the issue have unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence warrants it." *Beck*, 447 U.S. at 635-36.

[20] *See supra* note 1 and accompanying text.

[21] For descriptions of each type of instruction and which states have adopted each form of instruction, see *infra* notes 22-26.

[22] Abele, *supra* note 15, at 376-77. This type of instruction is also called "step instruction," "step approach," and "hard transition" instruction. *Id.* at 376-77, 379 n.29; Blueford v. Arkansas, 132 S. Ct. 2044, 2054 (2012) (Sotomayor, J., dissenting) (citing People v. Richardson, 184 P.3d 755, 764, n.7 (Colo. 2008)). Most states have approved the use of "acquit first" instruction. *See, e.g.*, Lindsey v. State, 456 So. 2d 383, 387 (Ala. Crim. App. 1983); State v. Staatz, 768 P.2d 143, 148 (Ariz. 1988); Blueford v. State, 370 S.W.3d 496, 497-98 (Ark. 2011); People v. Padilla, 638 P.2d 15, 17-18 (Colo. 1981) (also allowing "has not been proved" instruction); Lamar v. State, 254 S.E.2d 353, 355 (Ga. 1979); State v. Townsend, 865 P.2d 972, 979 (Idaho 1993); State v. Sanders, 648 So. 2d 1272, 1278-79 (La. 1994) (approving instructions where if the jury is "*not* convinced that the defendant is guilty of the offense charged, [they] may find the defendant guilty of a lesser offense") (internal quotation marks omitted); State v. Woodson, 639 A.2d 710, 713 (Md. Ct. Spec. App. 1994) (upholding "acquit first" instruction for certain drug charges); Commonwealth v. Edgerly, 435 N.E.2d 641, 652-53 (Mass. App. Ct. 1982) (upholding step approach in rape case); Fulgham v. State, 46 So. 3d 315, 329, 330 (Miss. 2010); State v. Van Dyken, 791 P.2d 1350, 1361 (Mont. 1990); State v. Jones, 515 N.W.2d 654, 656 (Neb. 1994); State v. Pugliese, 422 A.2d 1319, 1320 (N.H. 1980); State v. Coyle, 574 A.2d 951, 965-66 (N.J. 1990) (approving in general acquit first instruction but cautioning phraseology in capital murder cases); State v. Fielder, 118 P.3d 752, 755 (N.M. Ct. App. 2005) (instructing the jury to consider the greater charge first, and "if they had a reasonable doubt as to that charge, they were to begin deliberating the [lesser] charge"); State v. Wilkins, 238 S.E.2d 659, 665 (N.C. Ct. App. 1977); State v. Horsley, 8 P.3d 1021, 1023-24 (Or. Ct. App. 2000) (noting that the state legislation mandates use of "acquit first"); Commonwealth v. Hart, 565 A.2d 1212, 1216 (Pa. Super. Ct. 1989); State v. Davis, 266 S.W.3d 896, 905 (Tenn. 2008); State v. Labanowski, 816 P.2d 26, 36 (Wash. 1991); State v. McNeal, 288 N.W.2d 874, 875-76 (Wis. Ct. App. 1980); Donald G. Alexander, MAINE JURY INSTRUCTION MANUAL § 6-61

has been charged with assault with a deadly weapon, which includes the lesser charge of assault, the acquit-first instruction requires the jury begin discussing assault with a deadly weapon. Only if the jury unanimously decides the defendant did not commit assault with a deadly weapon can the jury proceed to discuss the lesser charge of simple assault.

Other forms of transition instruction include "unable-to-agree,"[23] "has-not-been-proved,"[24] *Tsanas*,[25] and "modified acquit-

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(2013) (suggesting "acquit first" instruction be given when the defendant has been charged with murder); 2 Indiana Judges Association, INDIANA PATTERN JURY INSTRUCTIONS—CRIMINAL 13.27a (Matthew Bender) (advocating "has not been proved" instruction); PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SUPERIOR COURT OF THE STATE OF DELA. § 4.1 (2013), *available at* http://courts.delaware.gov/Superior/pattern/pattern_criminal_jury_rev_2012.pdf; STANDARD JURY INSTRUCTIONS FOR CRIMINAL CASES § 3.4 (1981), *available at* http://www.floridasupremecourt.org/jury_instructions/instructions.shtml# (recommending "reasonable doubt" instruction in the state of Florida). Further, some states require its use. *See, e.g.*, State v. Sawyer, 630 A.2d 1064, 1075 (Conn. 1993); State v. Keller, 695 N.W.2d 703, 711-12 (N.D. 2005); People v. Boettcher, 505 N.E.2d 594, 597-98 (N.Y. 1987) (rejecting disagreement instruction because it permits compromise verdicts).

[23] "Unable-to-agree" instruction, also referred to as "disagreement," "soft transition," or "reasonable efforts" instruction, "instruct[s] the jurors that they may consider a lesser included offense if they have reasonably tried, but failed, to reach a verdict on the primary charge." Green v. State, 80 P.3d 93, 95 (Nev. 2003). Many states allow unable-to-agree instruction. *See, e.g.*, Zackery v. State, 360 S.E.2d 269, 270-71 (Ga. 1987); State v. Korbel, 647 P.2d 1301, 1305 (Kan. 1982); Graham v. State, 27 P.3d 1026, 1027 (Okla. Crim. App. 2001). Additionally, some states provide that unable-to-agree instruction the only acceptable form of instruction, specifically disallowing acquit-first instruction. *See, e.g.*, Bragg v. State, 453 So. 2d 756, 759 (Ala. Ct. App. 1984) (holding step approach erroneous); People v. McGregor, 635 P.2d 912, 914 (Colo. App. 1981) (holding step approach erroneously limits deliberations); State v. Ferreira, 791 P.2d 407, 408-09 (Haw. Ct. App. 1990) (requiring unable-to-agree instruction); *Korbel*, 647 P.2d at 1305; People v. Handley, 329 N.W.2d 710, 712 (Mich. 1982); *Green*, 80 P.3d at 96 (disallowing acquit-first instruction and approving unable-to-agree instruction); Barrios v. State, 283 S.W.3d 348, 353 (Tex. Crim. App. 2009) (abrogating state requirement of acquit-first instruction); OFFICE OF THE DEFENDER GENERAL FORM JURY INSTRUCTIONS § Lesser Included Offense (2013), *available at* http://dgsearch.no-ip.biz/juryinst/LESSINCL.TXT (approving "reasonable efforts" instruction in Vermont).

[24] Some states draw a distinction between true acquit-first instructions, which instruct the jury that they must unanimously acquit the defendant of the greater charge before discussing the lesser charge, and has-not-been-proved or "reasonable doubt" instruction, which instructs a jury not to proceed from the greater to the lesser charge if the jury decides the greater charge has not been sufficiently proven or the jury has a reasonable doubt as to the charge. *See Graham*, 27 P.3d at 1027 n.3 (citing State v. Thomas, 533 N.E.2d 286, 293 (Ohio 1988)); *but cf. Blueford*, 370 S.W.3d at 497-98 (assuming "reasonable doubt" instruction the same as acquit-first instruction*)*;

first" instruction.[26] Finally, some states do not require courts give any form of transition instruction.[27]

B. The Double Jeopardy Clause

1. Why We Have It: The Policy Behind the Clause

The Double Jeopardy Clause provides that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[28] Put in place as one of many

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Padilla, 638 P.2d at 17 (same). For example, Ohio forbids acquit-first instruction, but allows "reasonable doubt" instruction. *See* State v. Muscatello, 387 N.E.2d 627, 641-42 (Ohio Ct. App. 1977) (rejecting step approach); *Thomas*, 533 N.E.2d at 293 (informing jury that if you have a reasonable doubt as to an element of the charged offense you will then proceed to lesser offense does not require unanimous acquittal on the charged crime and therefore, is not acquit-first instruction). For the purposes of this comment, there is no significant difference between these two types of instruction since both create the inference that by transitioning, the jury has de facto decided that the prosecutor has failed to carry his burden.

[25] *Tsanas* instruction combines several different types of instruction and allows a defendant to choose either acquit-first or unable-to-agree instruction. United States v. Tsanas, 572 F.2d 340, 346 (2d Cir. 1978). Further, the court is mandated to give the form of instruction elected by the defendant. *Id.* However, if the defendant fails to indicate a preference, the court may give either form of instruction. *Id.* This form of instruction is also known as "optional approach." *Green*, 80 P.3d at 95. In addition to advocating this approach, the court in *Tsanas* held that neither disagreement nor acquit-first transition instruction were wrong as a matter of law. *Tsanas*, 572 F.2d at 346.

[26] Alaska and California instruct juries that they are allowed to "deliberate on the charges in any order," but are "required to return a verdict on the greatest charge before . . . return[ing] a verdict on any lesser charge." Whiteaker v. State, 808 P.2d 270, 271 (Alaska Ct. App. 1991) (in accordance with Dresnek v. State, 697 P.2d 1059, 1063-64 (Alaska Ct. App. 1985)); *see also* People v. Berryman, 864 P.2d 40, 57 (Cal. 1993); CALIFORNIA CRIMINAL JURY INSTRUCTION, No. 3517-19 (2013). This form makes it possible for a jury to begin with any charge it wishes, and allows a jury to never deliberate the greater charge if it so chooses. *See* Abele, *supra* note 15, at 381.

[27] Although the vast majority of states appear to recommend, if not compel, giving transition instructions, based on their official criminal jury instructions, the states of Illinois, Kentucky, Utah and Virginia do not appear to require courts give transition instructions. *See* 1 William S. Cooper, KENTUCKY INSTRUCTIONS TO JURIES § 2.01B (Donald P. Cetrulo 2012); ILLINOIS PATTERN JURY INSTRUCTIONS §§ 26.01Q-X (2013) *available at* http://www.state.il.us/court/circuitcourt/CriminalJuryInstructions/CRIM%2026.00.pdf; MODEL UTAH JURY INSTRUCTIONS § CR505 (2d ed. 2011) *available at* http://www.utcourts.gov/resources/muji/index.asp?page=crim (explicitly stating that "[t]he law does not require you to [deliberate] in any particular order"); 2 VIRGINIA MODEL JURY INSTRUCTIONS—CRIMINAL G33.700 (2013).

[28] U.S. CONST. amend. V.

democratic safeguards of our modern court system, the double jeopardy clause exists to protect a defendant. Developed in response to the "abhorrent" practice of "acquittal avoidance" under the Stuart monarchs in England,[29] the Double Jeopardy Clause prevents the state from indefinitely retrying a defendant until conviction. In *Blueford v. Arkansas*, the court explains the purpose of the double jeopardy concept, saying,

> [It] guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense and ordeal of 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.[30]

Justice Stevens further expounded how a second trial violates a defendant's double jeopardy rights in *Arizona v. Washington*, saying,

> It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. . . . Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.[31]

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[29] Arizona v. Washington, 434 U.S. 497, 507-08 (1978) ("Although there was a time when English judges served the Stuart monarchs by exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict, the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice." (footnote omitted) (citing State v. Garrigues, 2 N.C. 188, 189 (1795))); *see also* Blueford v. Arkansas, 132 S. Ct. 2044, 2057 (2012) ("This rule evolved in response to the 'abhorrent' practice under the Stuart monarchs of terminating prosecutions, and thereby evading the bar on retrials, when it appeared that the Crown's proof might be insufficient." (citing Ireland's Case, 7 How. St. Tr. 79, 120 (1678))). For more on the history of the Double Jeopardy clause, see in general David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193 (2005); William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 414-18 (1993).

[30] *Blueford*, 132 S. Ct. at 2050 (quoting United States v. Martin Linen Supply, Co., 430 U.S. 564, 569 (1977)) (internal quotation marks omitted).

[31] *Washington*, 434 U.S. at 503-04, 505 (footnote omitted). Justice Stevens reinforced the importance of double jeopardy protection, noting that "[t]he danger of

Derivative of these policy considerations and the fact that "jeopardy" attaches prior to the termination of a trial, the Supreme Court has interpreted the Double Jeopardy Clause to impart on the defendant a "valued right to have his trial completed by a particular tribunal."[32]

But, as important as a defendant's double jeopardy rights are, these rights must be counterbalanced by the states' interest in serving justice.[33] In light of this countervailing policy consideration, the Double Jeopardy Clause does not bar retrial simply because a defendant has been once placed in jeopardy.[34] In particular, the law often allows a defendant to be retried when a trial results in an early termination, such as a hung jury where the court discharges the jury prior to delivering a verdict.[35] The difficulty, however, lies in determining when dismissal justifies double jeopardy protection.

2. How It Works: Double Jeopardy in Practice

A defendant cannot invoke the protection of the Double Jeopardy Clause without first satisfying certain procedural prerequisites. As an initial matter, a defendant must first have "actually been placed in jeopardy."[36] Once this threshold

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such unfairness to the defendant exists whenever a trial is aborted before it is completed" and that "[e]ven if the first trial is not completed, a second prosecution may be grossly unfair" because these consequences will result. *Id.* at 503-04.

[32] *Id.* at 503 (citing Wade v. Hunter, 336 U.S. 684, 689 (1949)).

[33] *See id.* at 505 ("[B]ecause [discharging a jury before the merits of the case have been resolved] do[es] not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.").

[34] *See* GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 2 (1998); *see also Washington*, 434 U.S. at 505 ("Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused."). A plain language reading of "twice in jeopardy" would imply that a trial judge could never declare a mistrial or an appellate court reverse and remand without violating the Double Jeopardy clause. THOMAS, *supra*, at 2. Such a strict rule would inhibit the proper functioning of the court system.

[35] *See Blueford*, 132 S. Ct. at 2052 (noting that a hung jury is the "classic basis" for dismissing a jury without barring a defendant's retrial).

[36] United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) ("The protections afforded by the Clause are implicated only when the accused has actually been placed in jeopardy.") (citing Serfass v. United States, 420 U.S. 377, 390-91 (1975)).

requirement has been satisfied, double jeopardy protection will become available to a defendant only after both attachment and termination of "jeopardy" occur. A defendant's period of "jeopardy" begins by "attach[ing] when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence."[37] Jeopardy terminates upon an acquittal,[38] or "if the judge declares a mistrial when there is neither manifest necessity nor the defendant's consent."[39] The difficulty of deciding whether double jeopardy bars a defendant's retrial lies in determining whether an acquittal has occurred, or in the alternative, whether the "manifest necessity" test was satisfied prior to the jury's dismissal.

a. Acquittal

Although typically not difficult to determine, it is not always clear whether a certain procedure or decision counts as an acquittal. As a result, over the years, the Supreme Court has attempted to provide clarity as to what constitutes an "acquittal" in cases such as *United States v. Martin Linen Supply Co.* and *Smith v. Massachusetts*.[40] In *Martin Linen*, the Court considered whether the dismissal of a case based on insufficient evidence acted as an acquittal for the purposes of double jeopardy.[41] In making this determination, the Court stated that an acquittal occurs when the jury's decision "actually represents a resolution . . . of some or all of the factual elements of the offense charged."[42] In particular, the Court emphasized that "what constitutes an 'acquittal' is not to be controlled by the form of the

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[37] *Id.* (citing Illinois v. Somerville, 410 U.S. 458, 471 (1973) (White, J., dissenting)).

[38] *See* Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 308 (1984) ("Acquittals . . . terminate the initial jeopardy."); *see also* Bullington v. Missouri, 451 U.S. 430, 445 (1981) ("A verdict of acquittal on the issue of guilt or innocence is . . . absolutely final."). The Court originally decided this issue in *Kepner v. United States*, 195 U.S. 100, 133-34 (1904). *See also* THOMAS, *supra* note 34, at 216.

[39] United States v. Peoples, 360 F.3d 892, 894 (8th Cir. 2004); *see also* Richardson v. United States, 468 U.S. 317, 323-24 (1984). "[R]etrial is barred if a jury is discharged before returning a verdict unless the defendant consents or there is a 'manifest necessity' for the discharge." *Blueford*, 132 S. Ct. at 2057-58 (2012) (Sotomayor, J., dissenting) (citing United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); King v. Perkins, [1698] 90 Eng. Rep. 1122 (K.B.) 1122-23).

[40] 543 U.S. 462 (2005).

[41] *Martin Linen*, 430 U.S. at 571-72.

[42] *Id.* at 571.

judge's action."[43] Further, in accordance with this definition, the Court has found that an acquittal does not require a formal verdict be entered to give it effect.[44]

The Court recently addressed the parameters of acquittal in *Smith*, articulating new "acquittal" language. In *Smith*, the state specifically attacked the *Martin Linen* language, arguing the trial judge's decision to dismiss the case midtrial did not constitute a "factual resolution."[45] In rejecting this argument, the Court defined an "acquittal" as "a substantive determination that the prosecution has failed to carry its burden."[46]

Even though the language used in cases like *Martin Linen* and *Smith* provides guidance in deciding whether an acquittal has occurred, the difficult and determinative issue remains deciding at what point the jury or judge has made a "resolution" or "determination." Precedent shows that this can be a relatively arbitrary determination, and turn almost solely on the facts of each individual case.[47]

b. Dismissal Absent Manifest Necessity

In addition to jeopardy terminating upon acquittal, jeopardy can also terminate absent a formal verdict.[48] This occurs when a jury is dismissed without the defendant's consent and absent a finding of "manifest necessity."[49] Notoriously vague and difficult to

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[43] *Id.*

[44] *See* United States v. Ball, 163 U.S. 662, 671 (1896) ("[A] verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense.").

[45] *Smith*, 543 U.S. at 468.

[46] *Id.*; *see also* Blueford v. Arkansas, 132 S. Ct. 2044, 2054 (2012) (Sotomayor, J., dissenting) ("In ascertaining whether an acquittal has occurred . . . we ask whether the factfinder [sic] has made a substantive determination that the prosecution has failed to carry its burden.") (internal quotation marks omitted).

[47] *See, e.g.*, *Smith*, 543 U.S. at 470 ("It is important to note, at the outset, that the facts of this case gave petitioner no reason to doubt the finality of the state court's ruling. . . . Nor did the court's ruling appear on its face to be tentative.").

[48] *See* Crist v. Bretz, 437 U.S. 28, 34 (1978) ("[I]t became firmly established by the end of the 19th century that a defendant could be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal, and this concept has been long established as an integral part of double jeopardy jurisprudence.").

[49] *See supra* note 39 and accompanying text.

define,[50] courts have struggled to consistently apply the "manifest necessity" doctrine.[51]

The manifest necessity test, first set forth in *United States v. Perez*,[52] states that a trial judge may dismiss a jury without terminating jeopardy "whenever . . . 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] In other words, the finding of manifest necessity allows the state to retry the defendant of the same charge "when particular circumstances manifest a necessity" for the trial judge to declare a mistrial.[54] Inversely, when a trial judge dismisses the jury without the defendant's consent and absent "manifest necessity," the defendant's period of jeopardy terminates and the defendant becomes entitled to double jeopardy protection.[55] The test is applied any time the trial judge dismisses a jury prior to verdict.

In *Perez*, Justice Story set forth guiding application principles to prevent judicial abuse of the manifest necessity doctrine.[56] Justice Story explained that "the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes."[57] Additionally, a judge must exercise "sound . . . discretion" in finding manifest necessity to discontinue the trial.[58]

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[50] *See* THOMAS, *supra* note 34, at 43-44.

[51] *Id.*

[52] 22 U.S. 579, 580 (1824).

[53] *Id.*; *see also Blueford*, 132 S. Ct. at 2053 ("[A] trial judge may not defeat a defendant's entitlement to 'the verdict of a tribunal he might believe to be favorably disposed to his fate' by declaring a mistrial before deliberations end, absent a defendant's consent or a 'manifest necessity' to do so." (quoting United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion))); *see also* Mary S. O'Keefe, *Acceptance of Partial Verdicts as a Safeguard Against Double Jeopardy*, 53 FORDHAM L. REV. 889, 893 (1985).

[54] Wade v. Hunter, 336 U.S. 684, 690 (1949).

[55] *See supra* note 39 and accompanying text.

[56] *Perez*, 22 U.S. at 580.

[57] *Id.*; *see also* Downum v. United States, 372 U.S. 734, 736 (1963) ("The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances.'" (quoting United States v. Coolidge, 25 F. Cas. 622, 623 (C.C.D. Mass. 1815) (No. 14,858))).

[58] *Perez*, 22 U.S. at 580. Sound discretion and the manifest necessity test work in tandem. While a trial judge is required to use sound discretion in finding manifest necessity, the *Perez* test can also be used to measure whether the trial judge has appropriately exercised his discretion. United States v. Jorn, 400 U.S. 471, 485 (1971).

In essence, the manifest necessity doctrine allows a defendant to be retried for the same offense only when forces beyond the power of the court leave the judge no other option but to discontinue the trial. But the doctrine remains especially difficult to apply since the manifest necessity doctrine leaves the determination of when "necessity" becomes "manifest" to the judge's discretion.

*C. Pre-*Blueford: *The Effect of the Double Jeopardy Clause on Cases Involving Acquit-First Transition Instruction*

The Double Jeopardy Clause creates a tension in cases involving the lesser included offense doctrine where the jury has been given acquit-first transition instructions. In such cases, if the jury becomes deadlocked regarding a lesser charge and the judge declares a mistrial, a question arises as to whether the double jeopardy clause bars the defendant's retrial regarding the greater charge.

Prior to *Blueford*, there was no clear answer to this question. States were split on the issue.[59] Some states resolved this tension by concluding double jeopardy required the trial judge issue a partial verdict in these circumstances.[60] In finding that double jeopardy bars the defendant's retrial, states relied primarily on two separate legal theories. California, relying in part on the doctrine of implied acquittal set forth in *Green v. United States*,[61] held that a jury's decision to transition equated to an acquittal.[62]

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[59] *See* Whiteaker v. State, 808 P.2d 270, 274-75 (Alaska 1991) ("Twelve other jurisdictions have considered the validity of double jeopardy claims based on partial verdicts involving greater and lesser offenses. Eight jurisdictions reject the notion of partial verdicts and four jurisdictions are in accord with our decision here today."); Stone v. Superior Court, 646 P.2d 809, 815 (Cal. 1982) ("[C]ases in other states are in disarray on the issue of giving effect to implied partial verdicts of acquittal on a charged offense when the jury is deadlocked as to an uncharged lesser included offense.").

[60] *See infra* notes 62-63 and accompanying text.

[61] 355 U.S. 184, 190 (1957).

[62] *Stone*, 646 P.2d at 817. The court in *Stone* reasoned that by indicating to the judge its intent to acquit for a greater charge, the jury's action constituted an outright acquittal even though the jury remained deadlocked regarding a lesser charge. *Id.* The court also disposed of the state's concerns that the jury's decision was tentative, saying, "[i]n these circumstances there is no realistic basis for the sheer speculation that the jurors may have been merely 'temporarily compromising in an effort to achieve unanimity.'" *Id.* (quoting People v. Griffin, 426 P.2d 507, 510 (Cal. 1967)). Finally, the

Other states found that the manifest necessity test could not be satisfied without giving effect to the jury's decision to transition.[63]

Other states held the opposite, finding double jeopardy did not require a trial judge grant a defendant's partial verdict request.[64] In coming to this decision, courts primarily concluded that the jury's decision to transition represented an incomplete step towards a final decision.[65]

II. BLUEFORD V. ARKANSAS

In *Blueford*, the Supreme Court addressed several issues by holding that the double jeopardy clause does not bar the retrial of a defendant after an acquit-first jury deadlocks regarding a lesser included charge.[66] In coming to this conclusion, the Court held that a jury's explicit announcement in open court acquitting the defendant of a greater charge does not act as an acquittal for the purposes of double jeopardy when the jury later deadlocks regarding a lesser charge.[67] The Court also held that federal double jeopardy law does not impose a requirement on a trial judge to grant a defendant's motion for partial verdict in this situation.[68]

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court concluded that the sole reason their decision regarding the greater charge was not given effect was "the lack of an established procedure for giving formal effect to the jury's conclusion." *Id.*

[63] *See, e.g.*, *id.* at 819; *Whiteaker*, 808 P.2d at 277-78; State v. Tate, 773 A.2d 308, 325 (Conn. 2001); State v. Pugliese, 422 A.2d 1319,1320-21 (N.H. 1980) (per curium); State v. Fielder, 118 P.3d 752, 758 (N.M. Ct. App. 2005). Although each court came to the same conclusion, each court did so for different reasons.

[64] *See, e.g.*, Walters v. State, 503 S.W.2d 895, 897 (Ark. 1974); People v. Hall, 324 N.E.2d 50, 52 (Ill. App. Ct. 1975); State v. Bell, 322 N.W.2d 93, 95-96 (Iowa 1982); A Juvenile v. Commonwealth, 465 N.E.2d 240, 243-44 (Mass. 1984); People v. Hickey, 303 N.W.2d 19, 21 (Mich. Ct. App. 1981); State v. Hutter, 18 N.W.2d 203, 209 (Neb. 1945); State v. Booker, 293 S.E.2d 78, 79-80 (N.C. 1982); Fitzgerald v. Lile, 732 F. Supp. 784, 790 (N.D. Ohio 1990).

[65] *See, e.g.*, *Hickey*, 303 N.W.2d at 21 (holding such a requirement "constitute[d] an unwarranted and unwise intrusion into the province of the jury" and that "jury votes on included offenses may be the result of a temporary compromise in an effort to reach unanimity").

[66] Blueford v. Arkansas, 132 S. Ct. 2044, 2052 (2012).

[67] *Id.* at 2051.

[68] *Id.* at 2053.

In *Blueford*, the state of Arkansas charged Alex Blueford with capital murder.[69] The charge necessarily included the lesser charges of first degree murder, manslaughter, and negligent homicide.[70] Before beginning to deliberate, the judge instructed the jury as to acquit-first transition instruction,[71] and provided the jury with five verdict forms.[72] After several hours of deliberations, the jury informed the judge that they were "unanimously against" capital murder and murder, but deadlocked regarding manslaughter.[73]

In response to the forewoman's announcement, Blueford's counsel requested new verdict forms to be submitted to the jury, allowing acquittal for separate charges.[74] The trial judge denied this request, stating that to allow a partial verdict would be akin to "changing horses in the middle of the stream."[75] Once it became clear that the jury would not reach a verdict, the judge declared a mistrial.[76] The state then sought to retry Blueford for capital

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[69] *Id.* at 2048. Blueford was accused of murdering his girlfriend's son. *Id.* Although the state chose to charge Blueford with capital murder, the state did not seek the death penalty. Petition for a Writ of Certiorari at 2 n.1, *Blueford*, 132 S. Ct. 2044 (No. 10-1320).

[70] *Blueford*, 132 S. Ct. at 2048.

[71] *Id.* ("If you have a reasonable doubt of the defendant's guilt on the charge of capital murder, you will consider the charge of murder in the first degree. . . . If you have a reasonable doubt of the defendant's guilt on the charge of murder in the first degree, you will then consider the charge of manslaughter. . . . If you have a reasonable doubt of the defendant's guilt on the charge of manslaughter, you will then consider the charge of negligent homicide.").

[72] *Id.* at 2048-49. Four of the forms allowed for the separate conviction, but not separate acquittal, of each charge and the final form allowed the jury to acquit the defendant of all charges. *Id.* at 2049.

[73] *Id.* After several hours of deliberations, the jury sent a note to the court, asking what to do if they could not agree. *Id.* The judge subsequently called the jury back into the courtroom and issued an *Allen* charge. *Id.* Once again, the jury informed the court it could not come to an agreement. *Id.* The trial judge asked the jury forewoman how the jury had voted on each charge with which the jury could not decide. *Id.* The forewoman subsequently announced to the court that the jury was "unanimously against" both capital and first-degree murder. *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* After thirty-one minutes of additional deliberations, the forewoman returned to the court and stated that the jury was still deadlocked. *Id.*

murder.[77] Blueford subsequently appealed the issue to the Supreme Court.[78]

On appeal, Blueford made two arguments. First, Blueford argued that the jury forewoman's announcement in open court was an acquittal for the purposes of double jeopardy.[79] Second, Blueford argued that the circumstances of the trial did not satisfy the manifest necessity test, and as a result, the trial judge erred in declaring a mistrial without giving effect to the jury's decisions regarding the greater charges.[80]

A. "Acquittal" Holding

In the first part of the majority's opinion, Justice Roberts addressed the issue of whether the jury forewoman's informal, open-court announcement acquitted the defendant for the purposes of double jeopardy.[81] Recognizing that a "resolution of . . . some or all of the factual elements of the offense charged" constitutes an acquittal,[82] the Court nevertheless held the jury

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[77] *Id.*

[78] *Id.* at 2050. Blueford first appealed to the Arkansas Supreme Court, arguing his jeopardy terminated upon the open-court announcement. Blueford v. State, 370 S.W.3d 496, 499 (Ark. 2011). In upholding the lower court's decision, the Arkansas Supreme Court held both that the jury forewoman's open-court announcement did not constitute an acquittal and that there existed sufficient necessity to satisfy the state's "overruling necessity" requirement. *Id.* at 500. Relying on both the Supreme Court and Arkansas precedent, the court reasoned that a hung jury on any charge is sufficient to declare a general mistrial. *Id.* Additionally, the court held that a verdict is not valid until entered in the record. *Id.*

[79] *Blueford*, 132 S. Ct. at 2050. Blueford provided several legal justifications supporting this argument. First, Blueford claimed the jury's announcement in open court represents an express acquittal. *Id.* Second, even if the open court announcement is not an express acquittal, Blueford argued the jury's decision to not convict given the opportunity constituted an implied acquittal under *Green* and *Price*. *Id.* at 2051-52; *see also* Price v. Georgia, 398 U.S. 323 (1970); *infra* notes 87-88 and accompanying text; Green v. United States, 355 U.S. 184 (1957). Finally, Blueford made a technical argument that the instructions given to the jury prevented it from reconsidering a greater charge once the jury proceeded to discuss a lesser charge. *Blueford*, 132 S. Ct. at 2050-51.

[80] *Id.* at 2052. Blueford contends the Double Jeopardy clause required the trial judge to "have taken 'some action,' whether through partial verdict forms or other means, to allow the jury to give effect to those votes, and then considered mistrial only as to those remaining charges." *Id.* (citing Reply Brief for Petitioner, at 11 n.8, *Blueford*, 132 S. Ct. 2044 (No. 10-1320)).

[81] *See id.* at 2050–52.

[82] *Id.* at 2050 (citation omitted) (internal quotation marks omitted).

forewoman's announcement in open court was not an acquittal because it "was not a final resolution of anything."[83]

The Court reasoned that since the jury instructions did not explicitly state the jury was forbidden to re-discuss the greater charges, the jury could have and potentially did revisit deliberations of the capital and first-degree murder charges.[84] As a result, this possibility meant that "the foreperson's report . . . lacked the finality necessary to amount to an acquittal" on the greater offenses.[85]

The Court additionally held the jury's actions did not constitute an acquittal under the implied acquittal doctrine.[86] As part of his acquittal argument, Blueford, relying on *Green v. United States*[87] and *Price v. Georgia*,[88] argued the jury's failure to convict regarding either greater charge amounted to an implied

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[83] *Id.*

[84] *Id.* at 2051.

[85] *Id.* Although there is no evidence to support such a conclusion, the Court concludes the hypothetical possibility is enough to prevent the jury's open court statements from constituting an outright acquittal. *Id.* The dissent specifically rebuts this conclusion. *See id.* at 2056 ("Putting to one side the lack of record evidence to support this speculation—by far the more plausible inference is that the jurors spent those [thirty-one] minutes attempting to resolve their deadlock on manslaughter.").

[86] *Id.* at 2052.

[87] 355 U.S. 184 (1957). In *Green*, the defendant was charged with arson and first-degree murder. *Id.* at 185. The jury convicted Green of arson and murder in the second degree. *Id.* at 186. Green appealed the conviction of second degree murder and the Court of Appeals reversed the conviction. *Id.* Green was retried for first-degree murder and found guilty. *Id.* He subsequently appealed, claiming former jeopardy. *Id.* The Supreme Court found for Green, holding that when a defendant is charged with a crime that includes lesser offenses, and the jury convicts the defendant of a lesser offense, the jury has impliedly acquitted the defendant of the greater charge. *Id.* at 191-92.

[88] 398 U.S. 323 (1970). In *Price*, the defendant was originally charged with murder and convicted of the lesser included crime of voluntary manslaughter. *Id.* at 324. Then the Georgia Court of Appeals overturned the conviction on grounds of erroneous jury instruction and the state retried the defendant on all charges. *Id.* The defendant appealed, claiming that in light of *Green*, double jeopardy barred the retrial. *Id.* at 325–26. In analyzing the issue, the Court held that when a defendant's conviction is overturned, double jeopardy allows retrial of the defendant. *Id.* at 326 (relying on Ball v. United States, 163 U.S. 662, 669, (1896)). This concept is called the "continuing jeopardy" principle. *See id.* at 326. Additionally, although the Court determined the principle of continuing jeopardy allows retrial, the Court held that the retrial must be limited to the charge upon which the defendant was originally convicted and any lesser charges. *Id.* at 327 ("[T]he first verdict, limited as it was to the lesser included offense, required that the retrial be limited to that lesser offense.").

acquittal. Distinguishing *Green* and *Price*,[89] the Court limited the implied acquittal doctrine to situations where a "final" verdict has been returned.[90] The Court opined that since the jury in this case had not returned a "final" verdict, *Green* and *Price* were inapplicable.[91]

Strongly disagreeing with the majority, Justice Sotomayor argued that the forewoman's announcement constituted an acquittal in its own right.[92] Since "[j]eopardy terminates upon a determination, however characterized, that the evidence is insufficient to prove the defendant's factual guilt,"[93] Justice Sotomayor reasoned that when a decision is announced in open court, "it be[comes] entitled to full double jeopardy protection."[94] By declining to grant effect to the open court announcement by the jury forewoman, the dissent argued the Court "elevat[ed] form over substance."[95]

B. "Manifest Necessity" Holding

In the second part of the majority's opinion, Justice Roberts addressed the issue of whether the manifest necessity test could be satisfied with regard to the greater charges.[96] Blueford argued that, even assuming the jury's open court announcement was not an acquittal, the manifest necessity requirement could not be satisfied without the trial judge giving effect to the jury's decision.[97]

The Court disagreed, concluding that double jeopardy does not require a judge to grant a defendant's motion for partial

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[89] The Court stated that both *Green* and *Price* were not controlling because of the "same lack of finality." *Blueford*, 132 S. Ct. at 2051-52.

[90] *Id.* at 2052.

[91] *Id.*

[92] *Id.* at 2054-55 (Sotomayor, J., dissenting) ("[T]he 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.") (citation omitted).

[93] *Id.* at 2054 (quoting Smalis v. Pennsylvania, 476 U.S. 140, 144 (1986)) (internal quotation marks omitted).

[94] *Id.* at 2056 (citing Commonwealth v. Roth, 776 N.E.2d 437, 450-51 (Mass. 2002)).

[95] *Id.* (quoting *Roth*, 776 N.E.2d at 451).

[96] *Id.* at 2052-53.

[97] *Id.* at 2052. Blueford, however, conceded that "a second trial in manslaughter and negligent homicide would pose no double jeopardy problem." *Id.*

verdict.[98] The Court reasoned that since trial courts have never before been required "to consider any particular means of breaking [an] impasse—let alone to consider giving the jury new options for a verdict,"[99] the trial judge is not required to grant a defendant's partial verdict request when a jury has become deadlocked regarding a lesser included charge in an acquit-first case.[100]

Once again, the dissent strongly disagreed, arguing that "the Double Jeopardy Clause requires a trial judge, in an acquittal-first jurisdiction, to honor a defendant's request for a partial verdict before declaring a mistrial on the ground of jury deadlock."[101] The dissent reasoned that only "[a] jury's genuine inability to reach a verdict constitutes manifest necessity," and accordingly, the jury had not displayed a genuine inability to reach a verdict regarding the greater charges.[102] Further, Justice Sotomayor argued that since the inquiry required to determine if the jury had reconsidered the greater charges was minimally invasive, no necessity existed to declare a mistrial without making such an inquiry.[103]

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[98] *Id.* at 2053.

[99] *Id.* at 2052 (citing Renico v. Lett, 559 U.S. 766, 775 (2010)). Additionally the court reemphasized the importance of the fact that the jury's "decision" regarding the capital murder and first-degree murder charges were not final and that the trial judge followed accepted Arkansas law when he declared a mistrial. *Id.* at 2052-53.

[100] *Id.* at 2053 ("The jury in this case did not convict Blueford of any offense, but it did not acquit him of any either . . . . As a consequence, the Double Jeopardy Clause does not stand in the way of a second trial on the same offenses.").

[101] *Id.* at 2058.

[102] *Id.* ("[I]n an acquittal-first jurisdiction, a jury that advances to the consideration of a lesser included offense has not demonstrated an inability to decide a defendant's guilt or innocence on a greater—it has acquitted on the greater.").

[103] *Id.* at 2059. "There was no reason for the judge not to have asked the jury, prior to discharge, whether it remained "unanimous against" conviction on capital and first-degree murder. There would have been no intrusion on the jury's deliberative process . . . . Because the judge failed to take even this modest step—or indeed, to explore any alternatives to a mistrial , . . . there was an abuse of discretion." *Id.*

III. STATES SHOULD ADOPT A POLICY REQUIRING PARTIAL VERDICTS IN ACQUIT-FIRST CASES

*A. Double Jeopardy and Acquit-First Cases Post-*Blueford*: A Live Issue in the States*

The Court in *Blueford* held that under the Constitution, the Double Jeopardy clause does not require a trial judge to recognize a jury's decision to transition during deliberations, nor grant a defendant's motion for partial verdict in this circumstance.[104] The court analyzed this issue under two theories, concluding both that transition does not constitute an acquittal, and that the manifest necessity doctrine does compel judicial recognition.[105]

The court's decision, while in some ways helpful, provides little guidance to resolving a number of outstanding issues. First, the Court's decision leaves unresolved the partial verdict issue at the state level. In construing acquittal narrowly and manifest necessity broadly,[106] the Court's decision leaves undisturbed state decisions that require transition recognition and those that do not. Had a majority of the court agreed with Justice Sotomayor that transition constitutes an acquittal and that manifest necessity requires the issuance of a partial verdict, the *Blueford* decision would have overruled those state courts holding to the contrary. However, since a state may choose to provide greater protections to their citizens than the Constitution mandates,[107] the issue must now be decided on a state-by-state basis.

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[104] *Id.* at 2052 ("We have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict.").

[105] *Id.* at 2052-53. Although the court's holding avoided going into manifest necessity jurisprudence, it nevertheless can be understood that the manifest necessity doctrine does not limit the state's ability to retry a defendant under these circumstances. *Id.*

[106] *See id.* at 2053. The Court construed the manifest necessity doctrine broadly by implying that any hung jury, regardless of circumstances, satisfies the manifest necessity test. *See id.* ("When the jury was unable to return a verdict, the trial court properly declared a mistrial and discharged the jury.").

[107] *See, e.g.*, Stone v. Superior Court, 646 P.2d 809, 814 (Cal. 1982) (en banc) ("Of course, we remain free to delineate a higher level of protection under [our state] Constitution." (citing Curry v. Superior Court, 470 P.2d 345, 350-51 (Cal. 1970) and Burnell v. Superior Court, 531 P.2d 1086, 1092 (Cal. 1975) (en banc)) (alteration in original).

Second, the Court's decision failed to provide states a compelling answer why manifest necessity does not require a trial judge to give effect to a jury's transition decision. In analyzing Blueford's acquittal argument, the Court provided a robust explanation justifying its acquittal holding.[108] However, in analyzing Blueford's manifest necessity argument, the Court glossed over the issue, simply stating that judges have never been required to take additional steps prior to declaring a mistrial. Given that most states requiring recognition of jury transition base their decision on manifest necessity, the Court's inadequate explanation of why manifest necessity does not prevent retrial in this situation does little to help state courts addressing this issue in the future.

Finally, the Court's decision creates a new problem for states that had adopted a policy requiring trial judges grant a defendant's request for a partial verdict prior to the *Blueford* decision. In analyzing the partial verdict issue, some states applied federal double jeopardy clause principles, concluding that double jeopardy and "manifest necessity" required judicial recognition of transition.[109] By distinguishing cases such as *Green* and *Price* and holding as it did in *Blueford*, the Court eroded the federal double jeopardy precedent on which these decisions had been based. As a result, it has become unclear in these states whether these holdings, which rely on federal manifest necessity jurisprudence, remain good law.

As a result, this comment advocates that states, in light of *Blueford*, adopt broader double jeopardy protections by mandating that a trial judge grant a defendant's motion for partial verdict when a jury is deadlocked regarding a lesser-included charge in a acquit-first case.

In tackling this problem, states fall into three categories. States that have previously addressed this issue and held that double jeopardy requires recognition of a jury's decision to transition should revisit their previous holdings and reaffirm the

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[108] *See supra* notes 81-91 and accompanying text.

[109] *See, e.g.*, *Stone*, 646 P.2d 809, 818 (relying on Supreme Court precedent); State v. Pugliese, 422 A.2d 1319, 1320 (N.H. 1980) (per curium) (relying on Arizona v. Washington, 434 U.S. 497 (1978)) ("[W]e draw upon decisions of the Supreme Court of the United States . . . [in] decid[ing] this case . . . .").

double jeopardy protection provided to its citizens. States that have not yet addressed this issue should adopt the broader view of the Double Jeopardy clause advocated in this paper so as to provide greater individual protections. Finally, for states in which courts have found that double jeopardy principles do not mandate a trial judge grant a defendant's motion for partial verdict, state legislation should be adopted to change either the substantive double jeopardy law or the state rules of criminal procedure to incorporate this solution, thereby circumventing current court decisions.

Finally, it is important to note that this proposed solution only applies in trial situations where juries have been specifically given acquit-first instructions, as opposed to another form of transition instruction. Therefore, this comment principally applies to states that have approved acquit-first instruction as an acceptable form of jury instruction[110] and that have either previously held that double jeopardy requires a trial judge grant a motion for partial verdict,[111] or have not addressed the issue yet.[112]

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[110] *See supra* notes 22-27 and accompanying text.

[111] *See supra* notes 59, 62-64 and accompanying text.

[112] States that permit acquit-first instruction in some context but do not appear to have addressed the issue yet include Alabama, Arizona, Colorado, Delaware, Georgia, Florida, Indiana, Idaho, Louisiana, Maine, Maryland, Mississippi, Montana, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Tennessee, Washington, and Wisconsin.

However, courts in Illinois, Nebraska, Tennessee, and Washington have previously presumed transition equates to an acquittal without formally addressing the issue. Whiteaker v. State, 808 P.2d 270, 275 n.8 (Ala. 1991) (citing State v. Halsey, 441 N.W.2d 877 (Neb. 1989); State v. Seagroves, 691 S.W.2d 537 (Tenn. 1985); State v. Russell, 678 P.2d 332 (1984); People v. Krogul, 450 N.E.2d 20 (1983)) ("[F]our cases [exist] in which the courts assume the validity of a partial verdict. In all four cases, a defendant was acquitted of a greater offense while the jury hung on a lesser included. The validity of the acquittal was not at issue in any of the cases. The *Halsey* and *Krogul* decisions indicate that Nebraska and Illinois accept partial verdicts despite the holdings in *State v. Hutter*, 145 Neb. 798, 18 N.W.2d 203 (Neb. 1945), and *People v. Hall*, 324 N.E.2d 50 (1975).").

B. A Jury's Transition From Discussing the Greater to the Lesser Charge Deserves Procedural Recognition for the Purposes of Double Jeopardy

1. Jury Transition Is A Presumed Acquittal

a. Where Blueford *Leaves Us: The Outright Acquittal Theory*

Blueford's first holding provides clarity regarding whether a jury's decision to transition constitutes an outright acquittal by holding that the jury forewoman's announcement in open court did not constitute an outright acquittal.[113] The majority reasoned that such a declaration in open court, and by proxy, the action of transition, failed to satisfy the inherent finality requirement of acquittal.[114] Although vociferously contested by the dissent,[115] the majority's well-supported treatment of the outright-acquittal theory clearly expresses the view of the Court regarding constitutional implications transition: the action of transition does not constitute an automatic acquittal under the Constitution.

However, the decision that jury transition falls short of acquittal has a greater impact in theory than in reality. First, states may still adopt or affirm the theory under state constitutions. Additionally, only courts in one state, California, have adopted the position that transition constitutes an outright-acquittal.[116] As a result, even though the Court's outright

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[113] *See* Blueford v. Arkansas, 132 S. Ct. 2044, 2050-52 (2012).

[114] *Id.*

[115] The dissent makes strong arguments based on several different legal theories why the jury's decision constitutes an outright acquittal. *See id.* at 2058. First, the dissent argues that simply by "advanc[ing] to the consideration of a lesser included offense," the jury, "in essence," acquitted the defendant of the greater charges. *Id.* at 2055, 2058 (citation omitted) (internal quotation marks omitted). Additionally, applying *Green* and *Price*, according to Justice Sotomayor, the jury implicitly acquitted Blueford of the greater charges. *Id.* at 2055; *see also* Stone v. Superior Court, 646 P.2d 809, 819 (Cal. 1982) ("[W]hen a jury convicts the defendant of a lesser included offense, although it may not expressly reach a verdict on the greater offense, it acquits on the greater offense by implication." (citing Green v. United States, 355 U.S. 184, 190 (1957))).

[116] *See supra* note 62 and accompanying text. Regardless, California has also found transition to be the functional equivalent of acquittal under the manifest necessity doctrine. *See Stone*, 646 P.2d at 820 ("Failure to [afford the jury an opportunity to render a partial verdict of acquittal on a greater offense when the jury is deadlocked

acquittal holding expressly rejects the concept of a "jury transition acquittal" in these circumstances, this holding has little practical effect on the states. Finally, many of the policies supporting outright acquittal also justify the presumed acquittal theory I propose later in this comment.[117] Therefore, although the Court discredits the outright acquittal theory in *Blueford*, the outright acquittal theory remains salient.[118]

b. Defining Acquittal: "Substantive" versus "Procedural" Finality

As a preface to the presumed acquittal theory, it is important to highlight a subtle distinction the Court makes regarding finality in the *Blueford* decision. In determining that the jury's actions in *Blueford* did not constitute an outright acquittal, the Court wrestles with both the definition of acquittal and the parameters of finality.[119]

Quoting *Martin Linen*, the Court notes that an acquittal occurs when an action, "whatever its label, actually represents a resolution . . . of some or all of the factual elements of the offense charged."[120] Although the majority does not dispute whether the definition of acquittal stated in *Martin Linen* is correct formulation of the rule for determining when an acquittal

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only on an uncharged lesser included offense] will cause a subsequently declared mistrial to be without legal necessity.").

[117] Under the presumed acquittal theory, a jury's transition will be given the effect of an acquittal present certain factual circumstances and after the court has followed certain procedural steps. *See supra* Section III.B.1.c.

[118] Regardless, for the purposes of this comment, the outright acquittal theory will not be further explored as a viable legal theory on which to justify transition acquittal treatment.

[119] *See* Blueford v. Arkansas, 132 S. Ct. 2044, 2050-52 (2012). The primary distinction between the majority and dissent regarding the acquittal holding relates to the issue of finality. *See id.* at 2053–57.

[120] *Id.* at 2050 (quoting Brief for Petitioner at 21, Blueford v. Arkansas, 132 S. Ct. 2044 (2012) (No. 10–1320) (internal quotation marks omitted)).

occurs,[121] it does dispute the meaning and scope of this definition.[122]

In *Blueford*, the majority interprets "resolution," and therefore "acquittal," to require a certain level of "finality."[123] In explaining the inherent finality requirement in the word "resolution," the Court distinguishes between two different types of finality, stating that "the foreperson's report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses, quite apart from any requirement that a formal verdict be returned or judgment entered."[124] For simplicity's sake, this paper will refer to these two types of finality as "substantive finality" and "procedural finality."

"Substantive finality," as opposed to "procedural finality,"[125] refers to the point at which a jury's decision becomes certain enough to deserve legal recognition, even though the court may not yet have taken the steps to formalize the decision.[126] Although

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[121] By citing the language used in Blueford's brief and choosing not to cite a separate definition, the majority presumably accepted the defendant's initial formulation of the rule and agreed to use the language from *Martin Linen* as a starting point for the Court's analysis. *See id.*

[122] *See id.* at 2050-52. Citing language from *Smith v. Massachusetts*, Justice Sotomayor defines acquittal as "a substantive determination that the prosecution has failed to carry its burden." *Id.* at 2054 (quoting Smith v. Massachusetts, 543 U.S. 462, 468 (2005)). Subsequently, she argues that the decision to transition is a "substantive determination." *Id.* at 2054-55.

[123] *Id.* at 2050.

[124] *Id.* at 2050-51. It is well established that an acquittal does not require procedural finality. *See* United States v. Ball, 163 U.S. 662, 669-70 (1896). Had the majority determined that the jury's "decision" been a resolution or a substantive determination then it would have been an acquittal, regardless of whether it is entered or a final verdict. *See Blueford*, 132 S. Ct. at 2057 (Sotomayor, J., dissenting) (citing Hudson v. Louisiana, 450 U.S. 40, 41, n.1 (1981)) ("The lack of a state procedural vehicle for the entry of a judgment of acquittal does not prevent the recognition of an acquittal for constitutional purposes."); *see also* Evans v. Michigan, 133 S. Ct. 1069, 1075 (2013) (noting the difference between substantive rulings and procedural dismissals).

[125] "Procedural finality" refers to the moment at which certain court procedures are satisfied regarding the disposition of the court. A decision by a judge or jury becomes "procedurally final" when it is entered, and a judgment is ordered.

[126] Although ideally an objective determination, the point at which a decision becomes certain enough is a subjective determination by the judge based upon relevant factual circumstantial criteria. In theory, procedural finality should never occur without substantive finality being present; however, substantive finality can exist absent procedural finality.

not given the term "substantive finality" in the opinion, it is clear that the Court's acquittal holding rests on this distinction.

After referencing the concept of "substantive finality," the Court then provided guidance as to when a jury's "decision" becomes substantively final,[127] stating that there must no longer exist an opportunity for the jury to revisit deliberations of the greater charges.[128] Applying this definition, the Court concluded the jury's decision did not act as an acquittal for lack of finality.[129]

As a result of *Blueford*, jury transition is not "final enough" by itself to give rise to an acquittal for the purposes of double jeopardy.[130] But if a jury's decision to transition to discussing the lesser charge in an acquit-first case is not an acquittal, what is it?

c. Transition Presumes Acquittal: The Jury's Decision to Proceed From the Greater to the Lesser Charge is a Presumed Acquittal

This comment proposes to treat jury transition as a presumed acquittal. A presumed acquittal is an action that infers the intent to acquit, and which has then been subsequently confirmed by some procedural mechanism. The presumed acquittal theory provides a theory on which states can give effect to decisions that fall outside the strict bounds of the double jeopardy doctrine but that nevertheless deserve double jeopardy protection. For example, when a jury has been given acquit-first transition instructions, and has subsequently proceeded past discussing the greater charge—assuming the jury followed the instructions given—such an action deserves recognition. As a result, if the

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[127] *Blueford*, 132 S. Ct. at 2052-53. Justice Sotomayor argues for a different definition of "substantive finality." *Id.* at 2057. Justice Sotomayor argued that since the jury's decision to not convict the defendant of the greater charges were not "tentative, compromises, or mere steps en route to a final verdict," the decisions deserved legal recognition. *Id.* Further, the dissent argued that "the jury's silence on the greater offense spoke with sufficient clarity to justify the assumption of acquittal." *Id.*

[128] *Id.* at 2051. The majority noted that since the transition instructions did not specifically prohibit the jury from redeliberating the two greater charges, there existed a possibility that the jury re-discussed the greater charges and were no longer "unanimous against" the greater charges. *Id.*

[129] *Id.* at 2052.

[130] By holding that an open court announcement is not an acquittal, the Court necessarily concluded that transition would not count as an acquittal either. *See supra* note 9 and accompanying text.

court later discovers that the jury did in fact follow their instruction by deliberating the greater charge and unanimously acquitting before considering the lesser charge, then this transition should be given finality under the law.

A presumed acquittal differs from an outright acquittal in several important ways. First, a presumed acquittal only occurs when a jury takes an action that implies their intent to acquit as opposed to an express statement. Additionally, a presumed acquittal is not in itself a final decision, unlike an outright acquittal. For example, suppose in a first-degree murder trial, the jury becomes deadlocked regarding the lesser-included charge of manslaughter. Assuming the jury followed its instructions, the jury acquitted the defendant of the greater charge. Under *Blueford*, this "decision" only represents a tentative conclusion since the jury still has the option of returning to deliberate the greater charge if it so chooses.[131] However, under the presumed acquittal theory, this "decision" is given special significance. Since an acquittal can be inferred, the jury's action cannot simply be dismissed as inconsequential. Finally, a presumed acquittal, unlike a true acquittal, can be rebutted by judicial inquiry. Since a presumed acquittal lacks the finality of a true acquittal, a presumed acquittal can be proven false should inquiry show that the jury did not adhere to the acquit-first instructions.[132]

Several reasons support treating a jury's decision to transition as a presumed acquittal. First, a number of states hold that such a presumption is justified.[133] Secondly, the Supreme Court's own precedent supports making such a presumption in

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[131] *See supra* note 84 and accompanying text.

[132] Although we presume the jury, by proceeding to discuss the lesser charge, has followed the instructions given, if evidence demonstrates the jury did not follow the instruction, then it may be improper to recognize the jury's action to proceed past the greater charge. For example, if after being given acquit-first instructions, the jury began by immediately deliberating the lesser charge, bypassing the greater charge completely, then the presumption of acquittal was invalid. Assuming the jury is deadlocked regarding the lesser charge, the proper action would be for the judge to declare a mistrial on all charges.

[133] *Blueford*, 132 S. Ct. at 2055 ("Courts in several acquittal-first jurisdictions have held that a jury's deadlock on a lesser included offense justifies the assumption that the jury acquitted on any greater offenses.").

similar circumstances,[134] and that such presumptions are not per se improper.[135]

Thirdly, the plain language of the jury instructions forbids discussing any lesser charge without first *acquitting* the defendant of the greater charge. As a result, a jury that follows the instructions given can only proceed after acquitting the defendant of the greater charge, and failing to treat jury transition as some form of acquittal necessarily implies multiple definitions of "acquittal." Arguing the jury's decision to "acquit" does not count as an acquittal necessarily advocates for two separate definitions of "acquit": a legal definition and a separate lay definition for the purposes of deliberation. This inconsistency will only lead to more confusion regarding acquittals and jury instruction. Therefore, courts at the very least should interpret transition in acquit-first cases as an action akin to an acquittal.

Additionally, as a result of the clarity provided by acquit-first instructions, the act of transition itself creates an "expectation of finality."[136] The act of transitioning naturally creates this expectation in both the jury and the defendant since the decision to transition is one made upon the merits of the case, and not a procedural formality.

Finally, it is logically inconsistent to treat the decision to transition the same as a deadlock or a jury transition after being given unable-to-agree instruction. Even assuming transition lacks the finality of an outright acquittal, a jury's decision to transition deserves different treatment than a deadlock because the act of

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[134] *Id.* ("Notably, *Green* acknowledged that its finding of an 'implicit acquittal' was an 'assumption,' because the jury had made no express statement with respect to the greater offense." (quoting Green v. United States, 355 U.S. 184, 190-91 (1957))). In *Green*, the Court specifically stated that although the acquittal was not express, it nevertheless was a "legitimate" assumption to make. *Green*, 355 U.S. at 190-91 ("But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree.").

[135] *See* Evans v. Michigan, 133 S. Ct. 1069, 1080 (2013).

[136] *Evans*, 133 S. Ct. at 1075 ("[A] termination of the proceedings against a defendant on a basis unrelated to factual guilt or innocence of the offense of which he is accused . . . does not pose the same [double jeopardy] concerns, because no expectation of finality attaches to a properly granted mistrial.") (internal quotation marks omitted). In *Evans*, the defendant was judicially acquitted based upon an "erroneous addition of a statutory element," which the court compares to an "erroneous misconstruction" from a prior case. *See id.* at 1073-74.

transitioning is itself a decision. For example, when a jury deadlocks regarding a charge, it is unequivocal that the jury cannot come to a consensus, and therefore, has not made a decision. Correspondingly, when a jury transitions after being given unable-to-agree instruction, the act of transitioning as a result of the instruction fails to create an inference of acquittal. In both these situations, where the jury has either not made a decision or its decision fails to provide any insight into the jury's collective mentality, the jury's action, or lack thereof, should not be given any significance.

But in the case of transition in an acquit-first case, unlike a deadlock or a jury transition after being given unable-to-agree instruction, transition is both a decision and an action that implies the jury's intent to acquit. The instructions themselves bolster this conclusion, allowing the jury's decision to be easily inferred since the instruction specifically forbids a jury from advancing without unanimously acquitting the defendant of the greater charge.[137] Therefore, based on the specific instructions given and the fact that juries are presumed to follow the instructions given to them,[138] the action of transitioning from a greater to a lesser charge presumes acquittal, and should be treated as a presumed acquittal.

Once an acquittal can be inferred, the only element lacking for that decision to be given double jeopardy effect is finality. But does a presumed acquittal deserve finality? And if it does, under what circumstances should a court finalize a presumed acquittal?

d. Presumed Acquittals Deserve Finality

Presumed acquittals deserve procedural finality since the jury's action creates a strong presumption of acquittal, making it substantially different than a normal jury deadlock. However, since presumed acquittals are not themselves final decisions under *Blueford*, an additional step of procedural finalization must

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[137] Acquit-first instructions typically instruct the jury to proceed to the lesser charges only upon "unanimously acquitting" the defendant of the greater charge, or upon finding "reasonable doubt" as to the defendant's guilt. *See supra* note 22 and accompanying text.

[138] Weeks v. Angelone, 528 U.S. 225, 234 (2000) (citing Richardson v. Marsh, 481 U.S. 200, 211 (1987)).

be taken in order to give it effect. The procedural mechanisms for implementing finality are discussed in Part IV.

Presumed acquittals deserve procedural finality for several reasons. First, the technical requirement of finality should not dictate an outcome that is inconsistent with purpose of a fundamental right as important as double jeopardy.[139] A jury composed of laymen does not define its decision by the technical procedures of the court. In substance, by transitioning, the jury makes a sufficiently certain decision regarding the merits of the greater charge. As a result, the jury's action to transition speaks with sufficient clarity to deserve finality. By failing to give effect to transition, the Court elevates form over substance, thereby abridging the substantive rights of the defendant.[140]

Further, by mandating procedural finality in this situation, the policies underlying double jeopardy are better served. By recognizing such decisions, a defendant will not be subjected to the additional embarrassment, expense and anxiety associated with that specific charge. Additionally, since a jury's decision to transition differs markedly from deadlock, the defendant's interests in not being subjected to these guaranteed, additional consequences outweigh the state's interest in seeking an uncertain, harsher penalty.

Opponents argue that dictating a court to take such an action forces the finalization of a decision where it would not otherwise have happened.[141] In particular, opponents are concerned that

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[139] *See Blueford*, 132 S. Ct. at 2054 (Sotomayor, J., dissenting). "In ascertaining whether an acquittal has occurred, form is not to be exalted over substance." *Id.* (quoting Sanabria v. United States, 437 U.S. 54, 66 (1978)) (internal quotation marks omitted).

[140] *See supra* note 95 and accompanying text. The Court has applied this principle in many different areas of the law. *See, e.g.*, Bd. of Cnty. Com'rs, Wabaunsee Cnty., Kan. v. Umbehr, 518 U.S. 668, 679 (First Amendment protections); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 773 (1984) (corporate form and antitrust liability); Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158 (1981) (statutory interpretation of "creditor"); Frank Lyon Co. v. United States, 435 U.S. 561, 573 (1978) (taxation); Escobedo v. Illinois, 378 U.S. 478, 486 (1964) (Sixth Amendment protections); Chi., B. & Q.R. Co. v. Chi., 166 U.S. 226, 235 (1897) (due process of law).

[141] *See, e.g.*, Green v. State, 80 P.3d 93, 96 (Nev. 2003) ("In our view, use of an 'acquittal first' instruction improperly invites compromise verdicts. If members of a jury believe that the defendant is guilty of some offense, an inability to unanimously agree to convict or acquit manifestly increases the likelihood that the jury will

such a decision is tentative or only represents a compromise amongst jury members in order to reach the lesser included charge.[142]

The acquit-first instructions given, which the jury has presumptively followed, disallows a tentative decision. Simply assuming the jury's decision is tentative imbues the jury's actions with illogical and unfounded uncertainty.[143] Unless proof exists to support such an assertion, precedent dictates courts rebuttably presume the jury followed its instructions. Simply put, absent contrary evidence, we must give the jury the benefit of the doubt that they will do the right thing.

Additionally, arguing that an opportunity to redeliberate an already decided issue destroys finality fails to take into account the realities of the jury deliberation process.[144] First, a jury would not redeliberate the greater charge because acquit-first instructions unambiguously instruct a jury to acquit before prior to discussing lesser charges. An acquittal by any definition is final, and therefore, it makes no sense to assume a jury would act consciously in violation of the common definition of "acquit." Secondly, "[a]ccording to a study of juries, a jury's verdict will match the first vote taken on the charges 89% of the time."[145] Therefore, even if a jury chose to ignore the transition

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compromise by convicting the defendant of the primary or charged offense, rather than risk a mistrial and free a guilty defendant by returning no verdict at all.").

[142] *Id.*; *see also* Stone v. Super. Ct. of San Diego Cnty., 646 P.2d 809, 815 (Cal. 1982) ("We may not infer from the foreman's statement that the jury had unanimously agreed to acquit of first degree murder. There is no reliable basis in fact for such an implication, for the jurors had not completed their deliberations and those voting for second degree murder may have been temporarily compromising in an effort to reach unanimity." (quoting People v. Griffin, 426 P.2d 507, 510 (1967))).

[143] *See* Stone, 646 P.2d at 817 ("In these circumstances there is no realistic basis for the sheer speculation that the jurors may have been merely 'temporarily compromising in an effort to achieve unanimity.' Thus, although clear and uncontradicted evidence revealed that the jury was prepared to render a partial verdict of acquittal of murder and the court was inclined to accept the verdict, it was only the lack of an established procedure for giving formal effect to the jury's conclusion that prevented the court from receiving such a verdict.").

[144] *See* Larson, *supra* note 14, at 787-88; *see also Blueford*, 132 S. Ct. at 2056 (Sotomayor, J., dissenting) (noting the extreme unlikelihood that the jury reconsidered the greater charge after returning to deliberations).

[145] Larson, *supra* note 14, at 788.

instructions, it is very unlikely they would have altered their decision.

Finally, even though acquit-first instructions generally do not specifically prohibit rediscussion, they also do not expressly permit rediscussion, and as a result, may be interpreted to prohibit rediscussion of the greater charge post-transition.[146] Therefore, since transition in an acquit-first case constitutes a sufficiently clear and certain action, such a decision deserves finality.

Although a presumed acquittal deserves finality, the process by which a court may effectuate such finality must conform with state law and current double jeopardy precedent. By implementing a procedural element that provides clarity as to whether a jury followed its instructions, such as those discussed in Part IV, solves the problems created by the intersection of the lesser included offense and double jeopardy doctrine. Such a solution gives recognition to the jury's action to proceed past the greater charge, and treats that decision differently than any other non-decision, while not disrupting the "finality" requirement of acquittal.

e. Ambiguity Demands Resolution in the Defendant's Favor

Finally, regardless of whether the jury's decision to transition from a greater to a lesser charge is an outright acquittal, a presumed acquittal, or something short of acquittal, it is difficult to define. However, when a court can infer a jury's intent to acquit, regardless of whether procedure allows that intent to be given effect, the scales of justice shift in favor of the defendant. Therefore, in a situation where a jury has been given acquit-first instruction and the jury has transitioned to discussing the lesser charge, the potential violation of the defendant's due process rights and consequences of conviction outweigh the state's interest in seeking justice. In light of these compelling factors, ambiguity should be resolved in the defendant's favor.[147]

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[146] *Blueford*, 132 S. Ct. at 2057 (Sotomayor, J., dissenting).

[147] *See id.* at 2057 ("[T]he Double Jeopardy Clause demands that ambiguity be resolved in favor of the defendant."); *see also* Downum v. United States, 372 U.S. 734, 738 (1963) ("We resolve any doubt in favor of the liberty of the citizen, rather than

2. The Manifest Necessity Test Cannot Be Satisfied Regarding the Greater Charge Once the Jury Has Proceeded to Consider a Lesser Charge

a. Manifest Necessity Applies to Each Charge Individually

In addition—or as an alternative—to the presumed acquittal theory, states should also choose to hold that manifest necessity cannot be satisfied without the issuance of a partial verdict prior to declaring a mistrial. In *Blueford*, the Court held that the manifest necessity doctrine does not bar retrial when the trial judge declares a mistrial without giving recognition to the jury's decision to transition.[148] Relying on *Renico v. Lett*, the Court noted that it has never forced a trial judge to "consider any particular means of breaking the impasse" when a jury is deadlocked, and therefore, the trial judge did not err in declaring a general mistrial.[149]

Although the Court refused to interpret manifest necessity as a bar to retrial in these circumstances, language in other manifest necessity opinions supports a finding that the manifest necessity test cannot be satisfied in regards to the greater charge when a jury has been given acquit-first instructions and has proceeded to deliberating a lesser charge. As a result, states should hold that manifest necessity cannot be satisfied absent the trial judge exploring alternatives to mistrial.

In applying the manifest necessity test, a judge must exercise "sound discretion"[150] and consider possible alternatives prior to declaring a mistrial.[151] Additionally, a trial judge may not apply

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exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." (internal quotation marks omitted)).

[148] *See Blueford*, 132 S. Ct. at 2052; *see also id.* at 2057-60 (Sotomayor, J., dissenting).

[149] *Id.* at 2052 (citing Renico v. Lett, 559 U.S. 766, 1863-64 (2010)).

[150] United States v. Jorn, 400 U.S. 470, 486-87 (1971); United States v. Perez, 22 U.S. 579, 580 (1824).

[151] *See* Arizona v. Washington, 434 U.S. 497, 525 (1978). "What the 'manifest necessity' doctrine does require, in my view, is that the record make clear either that there were no meaningful and practical alternatives to a mistrial, or that the trial court scrupulously considered available alternatives and found all wanting but a termination of the proceedings." *Id.* (citing *Jorn*, 400 U.S. at 485; Illinois v. Somerville, 410 U.S. 458, 478-79 (1973)).

the manifest necessity test in a mechanical method that does not take into account relevant circumstances.[152]

Although admittedly, trial judges "have the right to order . . . discharge" should discharge be manifestly necessary,[153] and a jury's inability to reach a verdict has "long [been] considered the classic basis" for establishing such necessity.[154] Additionally, a "trial judge's decision to declare a mistrial when he considers the jury deadlocked is accorded great deference by a reviewing court."[155]

However, a reviewing court should not afford absolute deference to a judge's decision to declare a mistrial.[156] A judge's responsibility to exercise sound discretion and consider all possible alternatives prior to declaring a mistrial tempers this power in order to protect "the liberty of the citizen" from "an unlimited, uncertain, and arbitrary judicial discretion."[157]

Applying these rules, it is an abuse of discretion for a trial judge to use the manifest necessity rule as a pretense to ignore the jury's "acquittal" by a declaring a general mistrial. As a result, states should hold that the manifest necessity doctrine cannot be satisfied when a trial judge declares a general mistrial after a jury has transitioned to discussing lesser charges after being given acquit-first instructions. This action should be considered an abuse of discretion for two reasons: it is prima facie evidence of a failure to consider possible alternatives, and it applies the manifest necessity rule in a rigid, mechanical fashion.

First, declaring a general mistrial without recognizing a jury's transition evinces a failure to act reasonably. In light of the defendant's valued right to a verdict from a particular tribunal,[158] and the policy advocating careful and limited invocation of

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[152] *Renico*, 559 U.S. at 775 ("We have expressly declined to require the 'mechanical application' of any 'rigid formula' when trial judges decide whether jury deadlock warrants a mistrial."); *Somerville*, 410 U.S. at 462; Downum v. United States, 372 U.S. 734, 740 (1963); Wade v. Hunter 336 U.S. 684, 691 (1949).

[153] *Perez*, 22 U.S. at 580.

[154] *Washington*, 434 U.S. at 509.

[155] *Renico*, 559 U.S. at 774.

[156] *Id.* at 775 ("This is not to say that we grant *absolute* deference to trial judges in this context.").

[157] *Downum*, 372 U.S. at 738 (1963) (internal quotation marks omitted).

[158] *See supra* note 32 and accompanying text.

manifest necessity,[159] absent a compelling reason to the contrary,[160] "sound discretion" compels a trial judge to recognize the jury's decision to transition prior to declaring a mistrial. Relying on Supreme Court precedent, many lower courts have held that failure to consider available alternatives prior to declaring a mistrial constitutes reversible error.[161] As a result, by applying the manifest necessity rule to a trial on the whole when the rule logically only applies to a portion of the trial a trial judge fails to exercise sound discretion.

Additionally, finding manifest necessity and declaring a general mistrial without recognizing the jury's conscious decision to forego convicting the defendant of a greater charge improperly applies the manifest necessity test in an illogical, mechanical manner. Since *Perez*, courts have consistently emphasized the importance of applying the manifest necessity test in a manner that does not allow procedure to dictate an outcome inconsistent with common sense.[162] In applying the manifest necessity test, the Court in *Arizona v. Washington* explained that the phrase "manifest necessity" does not "describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge."[163] In other words, the manifest necessity test requires a judge to determine whether the state's interest in seeing justice served, viewed in light of the

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[159] *See infra* note 180 and accompanying text.

[160] Certainly, evidence showing that a judge considered the possibility of issuing a partial verdict—or that the judge was unable to issue a partial verdict because of state law—would act to rebut a claim that the judge abused his discretion in failing to grant a partial verdict.

[161] *See, e.g.*, State v. Pugliese, 422 A.2d 1319, 1321 (N.H. 1980) (per curium) ("All possible alternatives to a mistrial must be considered, employed and found wanting before declaration of a mistrial over the defendant's objection is justified." (citing United States v. Jorn, 400 U.S. at 486-87; United States v. Kin Ping Cheung, 485 F.2d 689, 691 (5th Cir. 1973))); State v. Fennell, 66 A.3d 630, 640-41 (Md. Ct. App. 2013) (citing Hubbard v. State 395 Md. 73, 92 (2006) (holding manifest necessity requires a trial judge explore "reasonable alternatives" before being allowed to declare mistrial).

[162] Illinois v. Somerville, 410 U.S. 458, 462 (1973); Arizona v. Washington, 434 U.S. 497, 505-06 (1978); Wade v. Hunter, 336 U.S. 690, 691 (1949) ("Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula.").

[163] *Washington*, 434 U.S. at 505-06.

totality of the circumstances, outweighs the defendant's right in receiving a verdict from a particular tribunal.[164]

Illinois v. Somerville provides an example of the importance of applying the manifest necessity test non-mechanically. In *Somerville*, the state indicted the defendant for theft.[165] After the jury was impaneled and sworn in, but before evidence had been presented, the prosecutor discovered a fatal deficiency in the indictment.[166] Under Illinois law,[167] the only way of curing the defect was to dismiss the jury and re-indict the defendant.[168] As a result, the judge granted the state's request for a mistrial.[169] The defendant was re-indicted and subsequently convicted.[170] The defendant appealed his conviction, claiming the Double Jeopardy clause barred his second trial.[171]

The defendant advocated for a formalistic application of the manifest necessity test, arguing his case was similar to *United States v. Ball*.[172] Relying on *Ball*[173] and *Downum v. United States*,[174] the defendant argued that since the jury had been impaneled, and a subsequent mistrial had been granted without his consent, "the Double Jeopardy Clause precluded the State from instituting the second proceeding that resulted in [the] respondent's conviction."[175]

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[164] "At times the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest-when there is an imperious necessity to do so." Downum v. United States, 372 U.S. 734, 736 (1963) (citing *Wade*, 336 U.S. at 690); *see also Jorn*, 400 U.S. at 486 (Harlan, J.) ("[M]ust always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.").

[165] *Somerville*, 410 U.S. at 459.

[166] *Id.*

[167] *Id.* at 459-60. Illinois law required the indictment to allege that the "respondent intended to permanently deprive the owner of his property." *Id.* at 459.

[168] *See id.* at 459-60.

[169] *Id.* at 460.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 466.

[173] *Ball* "held that jeopardy obtained even though the indictment upon which the defendant was first acquitted had been defective." *Id.*

[174] *Downum* "held that jeopardy 'attaches' when a jury has been selected and sworn." *Id.*

[175] *Id.*

The Court, in an opinion written by Justice Rehnquist, declined to adopt the defendant's formalistic application of the manifest necessity rule, noting that the defendant's interpretation "is precisely the type of rigid, mechanical rule which the Court has eschewed since the seminal decision in *Perez*."[176]

As advanced by the Court in *Somerville*, a mechanical application of the manifest necessity rule allows procedure to dictate an outcome inconsistent with the underlying substance of the hearing. Had the Court applied the manifest necessity rule mechanically in *Somerville*, the defendant would have received a windfall as a result of procedure, even though in substance, his trial had not begun.

To apply the manifest necessity rule to a trial as a whole as opposed to individual charges allows procedure to dictate the outcome of a trial and denies the defendant's right to a verdict from a particular tribunal.[177]

As a result, manifest necessity should apply to each individual charge, and not to all charges collectively.[178] Such an application of the test is simply a matter of procedure and no compelling reason exists as to why the test should be applied to a case whole sale as opposed to on a charge by charge basis.

b. A "High Degree of Necessity" Cannot Be Satisfied Without A Partial Verdict

Regardless of whether a finding of manifest necessity applies to a trial on the whole, the manifest necessity test cannot be satisfied with regard to a greater charge once a jury has proceeded to deliberating a lesser charge. As noted in the *Blueford* dissent, since its inception through today, the manifest necessity doctrine has required a court to satisfy a "high bar" before declaring mistrial.[179] In *Perez*, Justice Story emphasized that "[manifest necessity] ought to be used with the greatest caution, under

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[176] *Id.*

[177] Downum v. United States, 372 U.S. 734, 737-38 (1963).

[178] *See, e.g.*, Whiteaker v. State, 808 P.2d 270, 274 (Ala. 1991) ("Thus, when the jury is unanimous as to the disposition of the greatest charge, manifest necessity for a mistrial on that charge will not arise from its inability to agree as to lesser included charges.").

[179] Blueford v. Arkansas, 132 S. Ct. 2044, 2058 (2012).

urgent circumstances, and for very plain and obvious causes."[180] In *Arizona v. Washington*, the Court further emphasized Justice Story's application guidelines by holding that manifest necessity "require[s] a 'high degree' [of necessity] before concluding that a mistrial is appropriate."[181]

Although the meaning of "high degree of necessity" is arguably unclear,[182] it is apparent from current manifest necessity jurisprudence that a court's finding of "manifest necessity" and the suspension of a defendant's right not to be tried twice presents a high threshold for a court to overcome. To better understand the requirements of finding manifest necessity, exploring the purpose of the doctrine is a useful exercise.

Manifest necessity provides an equitable solution in favor of the government to a structural problem created as a result of the double jeopardy doctrine. Applied broadly and absent the manifest necessity doctrine, a defendant would technically have his life placed in jeopardy twice anytime a trial concluded and the prosecutor initiated a second trial based on the same charge, regardless of whether a verdict was reached in the first trial.[183] As a result courts developed the concept of "continuing jeopardy" in conjunction with the manifest necessity rule in order to redress the problem of overly-broad application of the double jeopardy principle. However, a new problem arises with the advent of

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[180] United States v. Perez, 22 U.S. 579, 580 (1824).

[181] Arizona v. Washington, 434 U.S. 497, 506 (1978); *see also* United States v. Coolidge, 25 F Cas. 622, 623 (1815) (only to be used in extraordinary and striking circumstances).

[182] *See* THOMAS, *supra* note 34, at 91.

[183] The Court has articulated three specific constitutional protections of double jeopardy: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." U.S. v. DiFrancesco, 449 U.S. 117, 129 (1980) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). A fourth protection not as succinctly articulated consists of the situation we are most concerned about regarding manifest necessity: acquittal avoidance and the improper declaration of a mistrial under the guise of manifest necessity. This protection is embodied in the Court's language stating that the Double Jeopardy Clause protects a defendant's "'valued right to have his trial completed by a particular tribunal.'" McAninch, *supra* note 29, at 416 (quoting Arizona v. Washington, 434 U.S. 497, 503 (1978)).

continuing jeopardy: under what circumstances can a defendant's jeopardy "continue."[184]

The manifest necessity rule provides an equitable solution to this problem. By proposing manifest necessity, the Court in *Perez* created a legal fiction that when a jury becomes genuinely deadlocked regarding a charge and the judge dismisses the jury, the defendant's period is not terminated, but rather continues into the next trial.[185] By establishing this procedure, a court can now discharge the jury without fear that such discharge will result in a technical violation of the double jeopardy principle.

The concept of fairness and equity underlying the creation of the manifest necessity rule implies that the rule must also be applied equally, to the advantage of both prosecutors and defendants.[186] As a result, in light of the standard laid out in *Washington* and the equitable considerations inherent in the manifest necessity, courts should not be allowed to find the requisite "necessity" when such a finding would lead to an inequitable result.

Applying these principles to a fact pattern where a jury has been given acquit-first transition, has become deadlocked regarding a lesser included charge, the court cannot satisfy the high degree of necessity required by the manifest necessity doctrine without taking some action to give effect to the jury's decision. Further, by not recognizing the jury's action to proceed from the greater to the lesser charge, the court sanctions a profoundly inequitable result by which the prosecutor may de facto try the defendant a second time for the same offense. Therefore, regardless of whether transition constitutes an acquittal, and regardless of whether the manifest necessity rule applies to all offenses together or must be applied to each separately, states should hold manifest necessity requires the issuance of a partial verdict prior to a valid mistrial being declared.

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[184] *See generally* Lissa Griffin, *Untangling Double Jeopardy in Mixed-Verdict Cases*, 63 SMU L. REV. 1033 (2010) (noting the difficulty and inconsistency with which the Court applied this principle in *United States v. Yeager*, 557 U.S. 110 (2009)).

[185] *See Perez*, 22 U.S. at 580.

[186] *But see* THOMAS, *supra* note 34, at 253-55 (arguing acquittal equivalent mistrials and fairness mistrials must be treated separately).

C. Jury Instructions Should Benefit the Prosecution and Defense Equally

1. Acquit-First Instructions Disproportionately Benefit the Prosecution

Acquit-first transition instructions favor the state in two distinct ways: increasing the likelihood of conviction in general and increasing the likelihood of the defendant's conviction of the greater charge. Even though acquit-first instruction admittedly confers limited benefits to a defendant,[187] it "increases the likelihood of conviction on the greater offenses"[188] by providing the state with an opportunity to perform a trial run, guaranteeing discussion of the greater charge, and potentially biasing the jury's decision by "anchoring" their initial point of discussion to the greater charge. Further, acquit-first instruction incentivizes a prosecutor to "overcharge" the defendant, increasing the effect of these advantages. Therefore, acquit-first instructions benefit the state substantially more than the defendant.

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[187] *See* United States v. Tsanas, 572 F.2d 340, 345-46 (2d Cir. 1978). Acquit-first instructions benefit a defendant by potentially preventing a conviction of any charge. *Id.* at 346. ("[I]t may prevent any conviction at all; a jury unable either to convict or acquit on the greater charge will not be able to reach a lesser charge on which it might have been able to agree."). Acquit-first instructions, however, also disadvantage a defendant by creating an environment wherein a minority of jurors who are against conviction of the greater charge may be pressured to side with the majority and convict. *Id.* ("If the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge."). Similarly, acquit-first instructions can be both a benefit and detriment to the prosecution. It advantages the prosecution by guaranteeing a comprehensive deliberation of the greater charge, and disadvantages the prosecution by risking an outright acquittal even though the jury may have been more predisposed to convict on the lesser charge. *Id.* ("[Acquit-first] instruction . . . has the merit . . . of tending to avoid the danger that the jury will not adequately discharge its duties with respect to the greater offense, and instead will move too quickly to the lesser one . . . . [But] [b]y insisting on unanimity with respect to acquittal on the greater charge before the jury can move to the lesser, it may prevent the Government from obtaining a conviction on the lesser charge that would otherwise have been forthcoming and thus require the expense of a retrial."); *see also Cooper*, *supra* note 16, at 1044-45 (explaining how acquit-first instructions benefit the prosecution).

[188] *Blueford*, 132 S. Ct. at 2058 (Sotomayor, J., dissenting) (citing People v. Boettcher, 505 N.E.2d 594, 597 (N.Y. 1987)).

First, acquit-first instructions increase the chances that a jury will deadlock.[189] Acquit-first instructions increase the likelihood of a mistrial by forcing the jury to meet the higher bar of unanimous acquittal, as opposed to simple disagreement, in order to discuss a lesser charge. As a result, should a mistrial occur and "the Government [chooses to] reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own."[190] A "trial run" informs the state that its arguments lack persuasiveness, and with this additional knowledge, the state can strengthen its argument in anticipation of another trial.[191] Therefore, since acquit-first instructions increase the likelihood that the state will get to use an initial trial as a "test run," acquit-first transition instruction comparatively disadvantages the defendant.

Second, acquit-first instruction disadvantages defendants by encouraging "overcharging." A prosecutor "overcharges" a defendant is charged with a more severe offense "than what the evidence reasonably supports."[192] This can be done intentionally in order to gain an advantage in the plea bargaining process,[193] or

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[189] *See* State v. Mays, 582 S.E.2d 360, 367 (N.C. Ct. App. 2003) (noting that some states reject acquit-first instruction because of "the possible increase in hung juries"); *see also* State v. LeBlanc, 924 P.2d 441, 442-43 (1996) ("The 'reasonable efforts' approach . . . diminishes the likelihood of a hung jury, and the significant costs of retrial, by providing options that enable the fact finder to better gauge the fit between the state's proof and the offenses being considered.").

[190] United States v. DiFrancesco, 449 U.S. 117, 128 (1980) (Brennan, J., dissenting) (citing United States v. Scott, 437 U.S. 82, 105 n.4 (1978); United States v. Wilson, 420 U.S. 332, 352 (1975)); *see also* Crist v. Bretz, 437 U.S. 28, 52 (1978) ("[R]etrial will mean repeating painful and embarrassing testimony, together with the possibility that the earlier "trial run" will strengthen the prosecution's case.").

[191] *Crist*, 437 U.S. at 52.

[192] Colin Miller, *Anchors Away: Why The Anchoring Effect Suggests That Judges Should Be Able To Participate In Plea Discussions*, 54 B.C. L. REV. 1667, 1703-04 (2013). "Prosecutors specifically engage in both vertical and horizontal overcharging. Prosecutors horizontally overcharge by padding charges against the defendant with nonoverlapping counts of a similar offense type, or with multiple counts of the same offense type, where the underlying criminal conduct sought to be punished is adequately penalized by a single count. Vertical overcharging is simpler, with the prosecutor merely charging an offense greater than what the evidence reasonably supports." *Id.* at 1704 (internal quotation marks omitted).

[193] *Id.* ("[T]o secure a desirable plea agreement, it is well established that prosecutors will resort to deliberately overcharging a defendant.").

unintentionally as a result of, for example, "belief perseverance" cognitive bias.[194]

Overcharging disadvantages a defendant in several ways. First, by overcharging a defendant, prosecutors can leverage a more advantageous plea agreement than would have been possible absent the overcharge. This is made possible by "anchoring"[195] the initial negotiations to an artificially high starting point set by the prosecutor based on the artificially inflated charge.[196] Second, should the case go to trial as opposed to settle, overcharging creates a disadvantageous by-product of forcing a defendant to defend an improper charge, and subjecting him to the stress of potential conviction of that more severe charge.

Acquit-first instruction aggravates the problem of overcharging by giving greater effect to the prosecutor's action. For example, in an unable-to-agree jurisdiction, overcharging a defendant has less of an effect on deliberations since all that is required to transition to a lesser charge is disagreement amongst the jurors. But in an acquit-first jurisdiction, acquit-first instruction increases the length of deliberations and forces discussion of a charge that might not get discussed in other circumstances,[197] thereby increasing the chances of the

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[194] *Id.* at 1703 (citing Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512, 518 (2007)). "Belief perseverance is a phenomenon 'in which people adhere to their beliefs even when the evidence that initially supported the belief is proven to be incorrect.'" *Id.* at 1703 n.268 (quoting Burke, *supra*, at 518).

[195] "The 'anchoring effect' is a cognitive bias by which individuals evaluate numbers in relation to a reference point—the anchor—and then modify those numbers based on that 'anchor.' The bias manifests itself in three particular ways: (1) the selection of an anchor; (2) under adjustment; and (3) the fact that even arbitrary, random, or irrelevant numbers can serve as anchors and distort calculations." *Id.* at 1693 (quoting Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2516 (2004)); *see also* WARD FARNSWORTH, THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW 230-36 (2007); Daniel M. Issacs, Note, *Baseline Framing in Sentencing*, 121 YALE L.J. 426 (2011) (discussing the related concept of framing bias and how differences in sentencing can be the result of judges' decisions being "anchored" to the baseline sentencing guidelines).

[196] *See* Miller, *supra* note 192, at 1702.

[197] It can be logically concluded that forcing deliberations that are more thorough will also prolong deliberations. *See* Abele, *supra* note 15, at 397 ("The step approach . . . insures that a jury deliberates thoroughly on each offense."); *see also* State v. Horsley, 8 P.3d 1021, 1023 (Or. Ct. App. 2000) ("[T]he 'acquittal first' instruction tends to avoid

defendant's conviction. Therefore, acquit-first instruction makes more profound the impact of overcharging.

Consider the following example of vertical overcharging in an acquit-first case. The evidence gathered against a defendant best fits a charge of manslaughter, but regardless, the state charges the defendant with first-degree murder. In this situation, the jury will be forced to first consider the charge of first-degree murder and unanimously acquit the defendant before proceeding to the lesser included charge of manslaughter. The jury at this point has three options: to convict, to acquit and move on to the lesser charges, or to deadlock.[198] Should the jury convict, justice is served. Should the jury deadlock, all charges are preserved and the only consequence to the state is the added expense of another trial.[199] And should the jury acquit of the greater charge, the state is in the same position it would have been had it properly charged the defendant in the first place.

Although the law disallows overcharging in theory, "[c]ourts seldom use supervisory powers to usurp the prosecutorial charging decision."[200] Therefore, since the likelihood of being punished for overcharging is minimal, prosecutors will only be more encouraged to use it as a strategic tool to the disadvantage of a defendant in acquit-first jurisdictions.

Finally, acquit-first instruction advantages the state by exacerbating the problem of jury exhaustion. Unlike other forms of instruction that allow for cursory discussion of the greater charge,[201] or even no discussion of the greater charge at all,[202]

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the danger that the jury will not fully discharge its duty with respect to its deliberation on the greater charge but will move too quickly to the lesser charge.").

[198] State v. Allen, 717 P.2d 1178, 1180 (1986) ("When the jury is instructed in accordance with the 'acquittal first' instruction, a juror voting in the minority probably is limited to three options upon deadlock: (1) try to persuade the majority to change its opinion; (2) change his or her vote; or (3) hold out and create a hung jury.").

[199] Blueford v. Arkansas, 132 S. Ct. 2044, 2058 (2012) (Sotomayor, J., dissenting).

[200] Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 464 (2009) ("Although courts may mention improper conduct on the part of the prosecutor when dismissing charges, the prosecutorial conduct is seldom the exclusive basis for the dismissal of the charges.").

[201] *See supra* note 23.

[202] *See supra* notes 26-27. The unstructured approach espoused by Alaska and California does not require the jury to discuss the greater charge at all. *See* Abele, *supra* note 15, at 381. Additionally, in states that require no transition instruction, charges may be discussed in any order.

acquit-first instruction charges the jury with coming to a unanimous decision prior to discussing any other charge.[203] The longer a jury deliberates, the more exhausted it will become. As a jury tires, "[c]oercion of an already exhausted jury to continue deliberations may induce jurors to accommodate a verdict which they would not otherwise support."[204] By forcing a jury to deliberate and reach a decision regarding the greater charge first, as acquit-first instructions do, the jury spends more time deliberating against the backdrop of the greatest charge.[205] Combining these two factors, the longer a jury deliberates, the more likely they will be coerced into settling on a greater charge in an acquit-first case. Therefore, acquit-first instruction benefits the prosecution by increasing the length of deliberations and potentially coercing the jury into convicting the defendant of a greater charge than in cases involving different transition instructions.

Although, there are admittedly some inherent prosecutorial risks in acquit-first instruction,[206] the benefits explained above far outweigh the risks. Although it is not possible to remove inequity entirely from the transition instruction issue, it is detrimental to the legal system to have a form of jury instruction lop-sidedly favor one party, especially when solutions to remedy the problem can easily be implemented.

2. Requiring Partial Verdicts Removes the Prosecutorial Advantage of Acquit-First Instruction

The law should strive to make transition instructions balanced, advantaging and disadvantaging both sides equally. Justice Sotomayor articulated this policy, saying: "If a State wants the benefits of requiring a jury to acquit before compromising, it should not be permitted to deprive a defendant of the

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[203] Acquit-first instruction ensures discussion of the greatest charge. *See supra* note 22 and accompanying text.

[204] Arnold v. McCarthy, 566 F.2d 1377, 1387 (9th Cir. 1978).

[205] *See* Larson, *supra* note 14, at 788 n.104 (2012) (citing 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)).

[206] *See supra* note 187.

corresponding benefits of having been acquitted."[207] In the end, trial should not be a game of chance, where the prosecution's the chances of a favorable outcome increase based on procedure.[208] Prosecutors and the state should be forced to take the "bitter with the sweet."[209]

Compelling judges to recognize a jury's decision to proceed from the greater charge to the lesser charge for the purposes of double jeopardy through a partial verdict negates the prosecutorial advantages inherent in the acquit-first structure. Although not perfect,[210] the partial verdict solution counter-balances the negatives of acquit-first instruction, such as increasing likelihood of conviction of the greater charge and incentivizing overcharging, with a permanent and beneficial outcome should the jury transition to discussing a lesser charge prior to deadlock. As a result, states should adopt a rule mandating trial judges to grant partial verdict requests in order to promote procedural equity.

D. Partial Verdicts Promote Judicial Efficiency

Taking into account the relative costs and benefits of criminal trials to the defendant and the state, partial verdicts make economic and judicial sense. Because a defendant has far less money to spend and resources at his disposal, the cost of defense is comparatively severe to that of the state. Also, the potential consequences as a result of conviction are personally far more severe for a defendant than the countervailing state interest in a single conviction and punishment. In light of these cost disparities, when a jury has transitioned to a lesser included

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[207] Blueford v. Arkansas, 132 S. Ct. 2044, 2058 (Sotomayor, J., dissenting).

[208] State v. Sawyer, 630 A.2d 1064, 1071 (Conn. 1993). In declining to adopt the *Tsanas* rule, the Connecticut Supreme Court articulated an important policy regarding the choice of transition instruction, saying "[a] criminal trial is not a game of chance. Allowing the defendant to choose the transitional instruction and to gamble on its consequences slights the desirable goals of thorough deliberations and finality and neglects the state's interest in the resolution of the charges on which it presented the defendant." *Id.* This policy applies to both parties, not just the defendant.

[209] *Blueford*, 132 S. Ct. at 2058 (Sotomayor, J., dissenting).

[210] Such a solution admittedly will significantly reduce the prosecutor's ability to negotiate an advantageous plea agreement post-mistrial since the prosecutor will no longer be able to recharge the defendant with the charges resolved by the partial verdict.

charge, the defendant's interest in liberty should trump the state's interest in justice holding all other variables constant.

Further, it is far less efficient and will take substantially more time should the court not recognize those transitions made in a prior trial. Retrying all charges as opposed to only those lesser included charges with which the jury was deadlocked or did not reach will take far more time, money, and resources than the alternative.[211] Attorneys will be forced to prepare arguments for more charges and courts will be forced oversee longer trials. Considering the state's comparatively mitigated interest in conviction, judicial efficiency advocates holding that manifest necessity requires a trial judge grant a defendant's partial verdict motion before declaring a mistrial.

IV. IMPLEMENTING THE SOLUTION

As in initial point, regardless under which legal theory a state adopts the partial verdict rule, putting it into practice might require a state to establish a procedure for implementing partial verdicts.[212] But if a state justifies the adoption of this rule under either the outright acquittal or manifest necessity theories, procedures for implementing a partial verdict are not required in order to effectuate the jury's decision to transition for double jeopardy purposes.[213] Under the outright acquittal theory, a transition would constitute an acquittal in its own right, and "[t]he lack of a state procedural vehicle for the entry of a judgment of acquittal does not prevent the recognition of an acquittal for

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[211] Missy Mordy, *Dodging Mistrials With A Mandatory Jury Inquiry Rule*, 32 SEATTLE U. L. REV. 971, 995 ("An additional rationale for [mandating partial verdicts] is efficiency: partial verdicts extinguish certain counts, and even certain defendants, from being retried, sparing time and resources.").

[212] *See, e.g.*, Com. v. Roth, 776 N.E.2d 437, 450 (Mass. 2002).

[213] Even though partial verdicts are not required to effectuate the jury's decision under these two theories, requiring the trial judge to issue an order explicitly acquitting the defendant of the greater charge would be a good policy for a state to adopt to reduce confusion and ensure the protection of a defendant's rights. Requiring a trial judge to issue a partial verdict under either of these theories removes any risk of a trial judge's ignorance of the change in law, thereby streamlining the policy's implementation. Otherwise, a state runs the risk that if the trial judge or prosecutor is unaware of the change in the law, the defendant may be forced to enforce his rights through appeal. This is an undesirable consequence since unnecessary appeals create judicial inefficiency.

constitutional purposes."[214] Under the manifest necessity theory, without recognizing transition via a partial verdict, the manifest necessity required to continue a defendant's jeopardy cannot be satisfied.[215]

On the other hand, the presumed acquittal theory requires some additional step to finalize the transition for the purposes of double jeopardy. States can accomplish this by polling the jury, performing a procedural inquiry, or, prior to the outset of deliberations, give the jury separate verdict forms.[216]

Jurisdictions that allow partial verdicts often poll the jury to determine the appropriateness of issuing a partial verdict.[217] However, polling the jury regarding the substance of their decision has been widely criticized for its potential to influence and coerce the jury into either changing its decision, or finalize a decision that may not otherwise have been finalized.[218] As a result, some states have discredited the concept.[219]

Another method available to states to implement partial verdicts is to require trial judges give separate verdict forms to the jury, allowing for separate acquittals.[220] This solution also has its

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[214] *See Blueford*, 132 S. Ct. at 2057 (citing Hudson v. Louisiana, 450 U.S. 40, 41 n.1 (1981)). An outright acquittal requires no additional procedural steps in order for double jeopardy to bar retrial. *Id.*; *see also* Ball v. United States, 163 U.S. 662, 671 (1896) ("[A] verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense.").

[215] *See supra* Section II.B.2.

[216] *See* O'Keefe, *supra* note 53, at 898-99.

[217] *See, e.g.*, Stone v. Super. Ct. of San Diego Cnty., 646 P.2d 809, 820 (Cal. 1982) ("Alternatively, the court may decide to wait and see whether the jury is unable to reach a verdict; if it is, the court should then inquire whether the jury has been able to eliminate any offense. If the jury declares itself hopelessly deadlocked on the lesser offense yet unanimous for acquittal on the greater offense, and the court is satisfied that the jury is not merely expressing a tentative vote but has completed its deliberations, the court must formally accept a partial verdict on the greater offense. It is within the discretion of the court to order further deliberations if it perceives a reasonable probability that a verdict will be reached that will dispose of the entire proceeding."); State v. Castrillo, 566 P.2d 1146, 1149 (N.M. 1977).

[218] *See* People v. Hickey, 303 N.W.2d 19, 21 (Mich. App. 1981) ("We conclude that polling the jury . . . would constitute an unwarranted and unwise intrusion into the province of the jury.").

[219] *See, e.g.*, *id.*

[220] *See Stone*, 646 P.2d at 820 ("When a trial judge has instructed a jury on a charged offense and on an uncharged lesser included offense, one appropriate course of action would be to provide the jury with forms for a verdict of guilty or not guilty as to each offense. The jury must be cautioned, of course, that it should first decide whether

critics,[221] but, on the other hand, has the advantage of leaving the issue of finality in the hands of the jury. For example, should the jury announce to the court it is deadlocked regarding a lesser charge, the judge need only instruct the jury to submit any completed forms prior to declaring a mistrial.[222] Should the jury decline to return a form, or returns an uncompleted form, then double jeopardy would not bar the retrial of the defendant regarding that charge. This solution also "assures the court that a jury's decision is based upon full knowledge of its options" and protects against unjust convictions.[223]

An alternative and potentially more practical way of implementing this solution would be requiring a procedural inquiry as to whether the jury followed the transition instructions given.[224] This type of inquiry differs from polling the jury in that it only probes whether the jury followed certain procedures, as opposed to the substance of the jury's decision. The necessary inquiry does not require a judge to ask whether the jury's decision was founded in the underlying facts or how it came to its decision. The only question a judge would be required to ask prior to discharging the jury would be one of procedure: whether the jury had discussed the jury had followed the transition instruction and discussed the charges in the correct order.[225] By phrasing the

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the defendant is guilty of the greater offense before considering the lesser offense, and that if it finds the defendant guilty of the greater offense, or if it is unable to agree on that offense, it should not return a verdict on the lesser offense.").

[221] O'Keefe, *supra* note 53, at 899 ("[T]his procedure may be perceived as coercive because it suggests that the jury compromise for the sake of reaching a conclusion.").

[222] Upon giving the jury its verdict forms, the court would instruct the jury to fill out the forms as they go, marking each decision prior to deliberating the next lesser-included charge.

[223] O'Keefe, *supra* note 53, at 899 ("[A] jury unaware of its alternatives might return an unwarranted conviction on the greater crime if the option to convict on the lesser offense is not apparent. Thus, providing the jury with forms for all offenses is a procedural safeguard against unjust convictions.").

[224] Both an inquiry and a formal finalization procedure may potentially be necessary depending on state law. But a state may choose to combine the inquiry and finality steps together by holding an inquiry that results in a positive determination that the jury followed the instructions given sufficient to finalize an acquittal of the greater charge.

[225] Sample inquiry language: "Did the jury discuss the charge of first-degree murder? Please answer with a simple 'yes' or 'no.'" If answered in the affirmative, the judge would then ask the following: "Did the jury then discuss the charge of manslaughter? Please answer with a simple 'yes' or 'no.'"

question in this way, the court finds out only whether the jury followed the acquit-first instructions given and nothing more. This solution minimizes the influence associated with questioning the jury, and is far less intrusive than polling the jury for its verdict. Should the jury answer the question in the affirmative, the court's suspicions of acquittal are confirmed and the judge would then issue a partial verdict order.

However, should the jury answer in the negative, indicating jury did not follow the instructions given and did not deliberate the charges in the correct order, a judge may then discharge the jury without issuing a partial verdict. By failing to follow the acquit-first instructions, double jeopardy in this case would not bar the defendant's retrial regarding any greater charge since the court cannot infer the jury's disposition based on its action of transitioning.

Although opponents of partial verdicts emphasize the importance of minimizing judicial contact with juries for fear of influencing decisions,[226] such fears are unfounded for several reasons. First, some degree of judicial influence is inevitable, and simply dismissing a useful procedural tool based on the tentative fear that it might coerce jurors is premature. The utility of partial verdicts must be measured against the inherent risks.

Second, some forms of jury instruction actively encourage judicial influence, and help facilitate judicial efficiency.[227] Third, "[c]oercion is only a concern when the jury is still considering its verdict" and "inquiry into whether a partial verdict has been reached will therefore not be intrusive" because "[a] deadlocked jury has completed its deliberations."[228]

Finally and most importantly, this type of jury inquiry differs from normal jury polling in that it does not ask an open-ended question regarding the jury's decision. Rather, the question is tailored to only provide a specific answer regarding whether the

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[226] *See supra* notes 218-19 and accompanying text; *see also* Commonwealth v. Roth, 776 N.E.2d 437, 447-48 (Mass. 2002) (discussing the dangers of coercion and compromise verdicts posed by partial verdicts and jury polling).

[227] For example, *Allen* charges are an example of jury instructions founded on the principle of judicial interference. *See supra* note 3.

[228] O'Keefe, *supra* note 53, at 898.

jury has followed procedure, allowing the court to deduce the meaning of the jury's answer.

Although neither jury inquiry nor separate verdict forms present a perfect solution, both options provide for a less intrusive form of implementing partial verdicts than polling the jury because both minimize contact and discussion between the judge and the jury, reducing concerns of judicial persuasion.

CONCLUSION

With its decision in *Blueford*, the Supreme Court held that when (1) the state charges a defendant with a crime that necessarily includes lesser offenses, (2) gives the jury acquit-first transition instruction, and (3) the jury becomes deadlocked regarding a lesser included offense, the federal Double Jeopardy Clause does not preclude the defendant's retrial regarding the greater offense. This conclusion violates the spirit of the double jeopardy doctrine. Consequently, since states have the power to provide broader protections under their state constitutions than the Constitution requires, states should hold that a jury's decision to transition from a greater to a lesser charge acts as a bar to reprosecution of the greater charge should there be a subsequent dismissal.

This Comment provides several legal bases on which a state may adopt this proposal. Authority exists to support a finding that a transition constitutes either an outright acquittal, or that the manifest necessity rule cannot be satisfied without recognizing transition in acquit-first cases. Additionally, this Comment advocates a third theory: treating the jury's decision as a rebuttable presumed acquittal. The presumed acquittal theory differs from an outright acquittal in that it does not become an acquittal for the purposes of double jeopardy until the court takes a required additional step to affirm or disaffirm the validity of that presumption. Regardless of whichever theory on which a state bases its adoption of this rule, a partial verdict requirement better serves the policies underpinning the concept of double jeopardy, provides a more equitable trial experience by removing tactical advantages inherent to acquit-first jury transition instruction, and promotes more efficient criminal trials.

Although states and the Supreme Court remain divided as to whether we should require judicial recognition of transition, putting this solution into practice requires little additional work of a court. The most straightforward way to implement this solution is through a change in procedure that requires a trial judge issue a partial verdict regarding the greater charges prior to the declaration of a mistrial. Further, the existence of several partial verdict methods provides flexibility to states wishing to adopt this solution.

Under the guise of finality, the Court in *Blueford* used legal fictions and procedural technicalities to continue to chip away the fundamental protection provided by the Double Jeopardy Clause, and failed to provide a satisfactory resolution the partial verdict split at the state level. But even though the Court declined the opportunity to provide broader double jeopardy protections in *Blueford*, states now have an opportunity to raise the standard of double jeopardy protection afforded its citizens and to demand more of their courts before putting a defendant through the extreme pressures of a second trial.

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