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Note

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INTRODUCTION

Formalism in judicial proceedings plays a vital role in criminal law—fair procedures, clear rules, and restricted discretion are all necessary.[1] Criminal sanctions are too severe to permit allocation in an unguided manner.[2] Nevertheless, while criminal law's commitment to formalism can help ensure justice, rigid reliance on formality over substance can also prove detrimental to those individuals whom the system purports to protect.

1. *See* David D. Cole, *Formalism, Realism, and the War on Drugs*, 35 SUFFOLK U. L. REV. 241 (2001). For example, once a verdict is rendered it is final and individual jurors may not go back and change their minds. Bullington v. Missouri, 451 U.S. 430, 445 (1981); Blueford v. State, 370 S.W.3d 496, 500 (Ark. 2011) (holding that a jury's verdict of acquittal may be amended before it is entered on record, but once the verdict is entered, it is absolutely final). Additionally, judgments are generally not valid until they are formally entered or filed on record. *Id.*

2. Criminal sanctions can take the form of serious punishment, such as death, incarceration, or severe fines. *See* U.S. SENTENCING GUIDELINES MANUAL (2012). Moreover, there are consequences beyond these severe penalties: "Collateral effects of a criminal conviction or guilty plea are, in many instances, wide-reaching and long-lasting." Christine Tramontano, *A Practitioner's Guide to Collateral Consequences of Conviction* 1 (Justice Action Center Student Capstone Journal, Project No. 05/06-03, 2006), *available at* http://www.nyls.edu/user_files/1/3/4/30/59/65/68/capstone050603.pdf. "Such consequences are growing in number, and can be debilitating, stigmatizing, long-lasting and may impede an ex-offender's reentry into the community." *Id.*

In *Blueford v. Arkansas*, the United States Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment[3] does not bar retrial when a jury does not formally acquit a defendant of all charges and the trial court, declining to accept a partial verdict of acquittal, declares a mistrial.[4] The Court specifically ruled that a jury foreperson's oral statement in open court that the jury was unanimous against guilt on two charges was insufficiently formal to constitute an acquittal,[5] and that unless a verdict is formally rendered, double jeopardy does not forbid re-prosecution.

The *Blueford* trial court instructed the jury to consider a "lesser included offense"[6] *only if* it found against guilt on the greater offense.[7] Accordingly, when the jury reported that it had deadlocked on the lesser offense of manslaughter, the jury *must* have been unanimous against capital and first-degree murder.[8] Nevertheless, despite the jury's unequivocal substantive acquittal on the greater offenses, the Supreme Court held that the mere reading in open court of the jury's votes was not sufficiently formal for double jeopardy to attach, and that in the absence of a formal verdict, the trial court's mistrial was necessary and appropriate.[9]

In permitting the State to further prosecute Blueford for the two charges on which the jury had substantively but informally acquitted him,[10] the Court violated its own precedent and traded Blueford's constitutional protection against double jeopardy for rigid formalism.[11] A retrial in this case, where the jury substantively but informally acquitted Blueford of the more serious

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3. The constitutional prohibition against double jeopardy protects individuals from being tried more than once for an alleged offense. U.S. CONST. amend. V ("No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb."). *But see* Bartkus v. Illinois, 359 U.S. 121, 136–37 (1959) (establishing that re-prosecutions may be allowed under the "dual sovereignty" doctrine, which says that state and federal governments are treated as different sovereigns and that double jeopardy only applies when one is prosecuted twice by the same sovereign); Heath v. Alabama, 474 U.S. 82, 92–93 (1985) (holding that successive prosecutions by two states for the same offense is not barred by the Double Jeopardy Clause).

4. Blueford v. Arkansas, No. 10-1320, slip op. at 10 (U.S. May 24, 2012).

5. *Id.* at 6.

6. *Id.*; *see generally* Sansone v. United States, 380 U.S. 343, 350 (1965) (explaining that a lesser included offense is defined within the elements of the greater offense); Mary S. O'Keefe, *Acceptance of Partial Verdicts as a Safeguard Against Double Jeopardy*, 53 FORDHAM L. REV. 889, 889 (1985) ("Homicide encompasses the greater crime of murder in the first degree and the lesser offenses of second degree murder and voluntary and involuntary manslaughter. Commission of the greater crime presupposes the simultaneous commission of the lesser offenses.").

7. *See Blueford*, No. 10-1320, slip op. at 2, 6–7. That is, the jury was required to reach unanimity on an offense before considering a lesser-included one. *Id.*

8. *Id.*

9. *Id.* at 6–8.

10. *See id.* at 2 (Sotomayor, J., dissenting).

11. *See* Andrew Cohen, *Does the Supreme Court Believe in Double Jeopardy Protections?*, THE ATLANTIC (May 25, 2012), http://www.theatlantic.com/national/archive/2012/05/does-the-supreme-court-believe-in-double-jeopardy-protections/257680/ (claiming the *Blueford* Court ignored established precedent and violated Blueford's Fifth Amendment protection against double jeopardy); *see generally* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (recognizing that formality in criminal proceedings must sometimes give way to permit fairness).

charges after the prosecution failed to prove them, would offend the very core of the double jeopardy protection.

I.
LEGAL BACKGROUND: DOUBLE JEOPARDY AND FORMALISM IN CRIMINAL LAW

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb."[12] This provision, known as the Double Jeopardy Clause, prohibits state[13] and federal governments from re-prosecuting individuals for the same crime once a conviction or acquittal has been rendered.[14] The underlying sense is that a trial for any one offense should be final, so that persons criminally tried should be free from fear and anxiety that the government might prosecute them again.[15] Hence, once a jury or judge acquits a defendant, the government may not, through appeal of the verdict[16] or institution of a new prosecution, try the defendant again.

Although the government is afforded "one, and only one" opportunity to present all of its evidence against a defendant,[17] standard criminal procedure allows the government to retry a defendant for any charges on which the jury could not agree.[18] Moreover, the Supreme Court has held that "double jeopardy may terminate on some charges even if it continues on others."[19] For instance,

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12. U.S. CONST. amend. V; *see* Ball v. United States, 163 U.S. 662, 669 (1896) (holding that the "twice put in jeopardy" language of the Constitution relates to the risk that an accused for a second time will be convicted of the same offense for which he was initially tried).

13. *See* Benton v. Maryland, 395 U.S. 784, 794 (1969) (determining that "the double jeopardy prohibition of the Fifth Amendment . . . should apply to the States through the Fourteenth Amendment").

14. *Blueford*, No. 10-1320, slip op. at 1; *see* Bullington v. Missouri, 451 U.S. 430, 445 (1981).

15. *Martin Linen Supply Co.*, 430 U.S. at 569 (quoting Green v. United States, 355 U.S. 184, 187–88 (1957)); *see* Oregon v. Kennedy, 456 U.S. 667, 676–77 (1982) (holding that the protection against double jeopardy frees defendants from "extended anxiety" caused by trials); Downum v. United States, 372 U.S. 734, 736 (1963) (ruling that the Double Jeopardy Clause protects defendants from the harassment of successive prosecutions).

16. *See Martin Linen Supply Co.*, 430 U.S. at 568 (holding that the federal government "cannot appeal in a criminal case without express congressional authorization").

17. Arizona v. Washington, 434 U.S. 497, 505 (1978); *Green*, 355 U.S. at 188.

18. *See* FED. R. CRIM. P. 31(b)(3). When the jury is unable to reach a unanimous verdict, the trial court declares a mistrial (i.e., hung jury). "The decision to order a mistrial due to a jury's inability to reach a verdict is within the sound discretion of the circuit court, and will be upheld absent an abuse of discretion." Blueford v. State, 370 S.W.3d 496, 500 (Ark. 2011). The Supreme Court has recognized that a trial ending in a hung jury is not the equivalent of an acquittal for purposes of establishing former jeopardy. Richardson v. United States, 468 U.S. 317, 324 (1984) (explaining that a trial court's declaration of a mistrial because of a hung jury is not an event that terminates the original jeopardy to which a defendant is subjected); United States v. Perez, 22 U.S. 579, 580 (1824) (finding that a person is not put in jeopardy by a trial resulting in a discharge of the jury for failure to agree).

19. *See* Smith v. Massachusetts, 543 U.S. 462, 469 n.3 (2005) (citing Price v. Georgia, 398 U.S. 323, 329 (1970)).

> Determining when jeopardy terminates is no less important than determining when it begins . . . . Once jeopardy has terminated, the government cannot detain someone for additional court proceedings on the same matter without raising double jeopardy questions. If

in jurisdictions that allow juries to return a partial verdict,[20] double jeopardy attaches only to the charges for which the jury acquitted a defendant charged with multiple crimes. The government may subsequently retry the accused for other charges without violating double jeopardy principles.

In criminal jury trials, courts generally place great emphasis on formality. Some formalities may seem trivial—for example, placing the prosecutor's table on the side closer to the jury[21] or ensuring the jury is sworn before trial begins.[22] Other judicial formalities, however, carry much more significant weight in the resolution of criminal matters. In considering the reasonable doubt standard,[23] the Supreme Court in *In re Winship* held that formalism is historically grounded and was developed to safeguard individuals from "dubious and unjust convictions."[24] "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt" dates back centuries, and it is now accepted as the "measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt."[25]

Jury verdicts also rely on formulaic procedures. For instance, "[a] verdict of acquittal on the issue of guilt or innocence is . . . absolutely final," and a defendant is protected against retrials only *after* a jury has rendered such a "final decision" on the charges.[26] In *United States v. Martin Linen Supply Co.*, the Supreme Court considered what constitutes a formal and final verdict. The Court held that a trial court's ruling constitutes an acquittal *only* when "the ruling . . . *actually* represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the charged offense."[27] Importantly, the *Martin Linen* Court recognized that formality must sometimes give way to permit fairness, and held that an acquittal for double jeopardy purposes must be assessed on the substance, not the form, of the acquittal.[28]

> jeopardy does not terminate at the conclusion of one proceeding, jeopardy is said to be "continuing," and further criminal proceedings are permitted. . . . [Further,] [a] jury's verdict of acquittal terminates jeopardy.

When Double Jeopardy Protection Ends, FINDLAW.COM, http://criminal.findlaw.com/criminal-rights/when-double-jeopardy-protection-ends.html (last visited Apr. 2, 2013).

20. Daniel J. Kornstein, *Impeachment of Partial Verdicts*, 54 ST. JOHN'S L. REV. 663, 678 (1980) ("A partial verdict is generally understood as a decision by a jury, before its deliberations are fully completed, on less than all the issues presented to it."). A partial verdict relates *only* to that portion of the charge on which the jury has unanimously agreed. *See Blueford*, 370 S.W.3d at 502 n.2. A minority of states holds that "double jeopardy requires a partial verdict of acquittal as to the greater offenses if the jury is deadlocked on the lesser offenses." *Id.*

21. *See* Nora Lockwood Tooher, *Proximity to Jury Helps—or Does It?*, WIS. L.J. (Oct. 29, 2010 09:51 AM), http://wislawjournal.com/2010/10/29/proximity-to-jury-helps-or-does-it/ (stating that the general rule in criminal cases is that the prosecution sits nearest the jury).

22. Crist v. Bretz, 437 U.S. 28, 38 (1978) (holding that under federal law jeopardy attaches in a criminal trial when the jury is empaneled and sworn).

23. *In re Winship*, 397 U.S. 358, 361–64 (1970).

24. *Id.* at 362.

25. *Id.* at 361–62.

26. Bullington v. Missouri, 451 U.S. 430, 445 (1981).

27. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (emphasis added).

28. *Id.* at 571–72.

II.
FACTS AND PROCEDURE: *BLUEFORD V. ARKANSAS*

In January 2007, Alex Blueford was charged with capital murder and the lesser-included offenses of first-degree murder, manslaughter, and negligent homicide for the death of his girlfriend's one-year-old son.[29] After arguments, the court instructed the jury to consider the charges against Blueford in descending order and to either convict on one or acquit on all.[30] That is, the jurors were to consider the most serious charge first and move to the next lesser charge only after unanimously concluding that Blueford was not guilty of the more serious crime. In this way, the jurors were to work their way down the list to the appropriate conviction or to an acquittal of all four charges.[31]

After several hours of deliberation, the jury reported it was having difficulty coming to a verdict, and the court inquired about the jurors' votes on each offense.[32] The foreperson reported that the jury voted unanimously against both capital and first-degree murder, that it was divided nine-to-three on manslaughter, and that it had not yet considered negligent homicide.[33] Ultimately, the jury was unable to reach a verdict after further deliberations, and the trial court, refusing to issue a partial verdict of acquittal on the two offenses that the jury had unanimously agreed to acquit, declared a mistrial on all four charges.[34] There was no entry of a formal verdict.[35]

The State subsequently sought to retry Blueford on all charges, and Blueford "moved to dismiss the capital and first-degree murder charges on double jeopardy grounds" because, he argued, the jury had acquitted him of these two charges.[36] The trial court denied Blueford's motion, and the Supreme Court of Arkansas affirmed.[37] The United States Supreme Court granted certiorari.

Before the Supreme Court, Blueford argued that the jury foreperson's announcement as to the capital and first-degree murder charges represented an explicit "resolution of some or all of the elements of those offenses in [his] favor."[38] The Court disagreed and by a six-to-three vote ruled that Blueford could be retried on all four charges because the jury foreperson's statement that the jury was unanimous against conviction on the two most serious charges was

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29. Blueford v. Arkansas, No. 10-1320, slip op. at 1–2 (U.S. May 24, 2012). At trial, the evidence established that the child was injured while in Blueford's care, leading to his death two days later. *Id.* at 1.

30. *Id.* at 3 (majority opinion).

31. *See* O'Keefe, *supra* note 6, at 889–90 n.6 (stating that this jury instruction has been approved in most jurisdictions).

32. *Blueford*, No. 10-1320, slip op. at 3–4.

33. *Id*.

34. *Id.* at 4. Blueford asked the judge to issue a verdict of acquittal for murder, which the judge denied. Blueford v. State, 370 S.W.3d 496, 498–99 (Ark. 2011).

35. *Blueford*, No. 10-1320, slip op. at 8.

36. *Id.* at 4.

37. *Id.* at 4–5.

38. *Id.* at 6.

never translated into a formal acquittal.[39] The Court also held that the trial court did not err in refusing to grant a partial verdict of acquittal as an alternative to declaring a mistrial.[40] In so deciding, the Court adhered to what has become a bedrock principle of criminal trials: formalism.

III.
CASE ANALYSIS: SACRIFICING DOUBLE JEOPARDY FOR FORMALITY

Much can be said about formalism in the criminal field. In criminal jury trials, where there is generally a dispute about the facts of some earlier event, the jury cannot obtain accurate knowledge of everything that happened. At most, all the jury can acquire is a strong belief of what *probably* took place. This way, established fundamental requirements like "proof beyond a reasonable doubt" play an important role in the criminal justice system. In essence, "proof beyond a reasonable doubt" helps reduce the risk of erroneous convictions, and adherence to this principle compels fairness. Similarly, the Sixth Amendment's effective assistance of counsel guarantee ensures that defendants receive a fair trial,[41] and meaningful rights as to the evidence that may be introduced at trial help protect criminal defendants from government misconduct.[42]

Rigid formalism, however, can be largely ineffective in protecting criminal defendants. Given the circumstances surrounding *Blueford*, where the trial court explicitly instructed the jury to proceed to a lesser offense only after finding against guilt on a greater offense, the Supreme Court erred in holding that the mere reading of the jury's verdict in open court did not constitute an acquittal. A retrial in *Blueford*, where the jury's acquittal may not have been formally entered but where the jury nevertheless unanimously agreed that Blueford was not guilty of capital and first-degree murder, would contradict the purpose of the Double Jeopardy Clause. Instead of eschewing Blueford's constitutional protection against double jeopardy with an unwarranted mistrial,[43] the Court should have accepted a partial verdict in his favor.

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39. *Id.*

40. *Id.* at 9–10.

41. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."); Strickland v. Washington, 466 U.S. 668, 689 (1984).

42. For instance, evidence obtained through an unconstitutional search and seizure may not be admitted against a defendant (Mapp v. Ohio, 367 U.S. 643, 655–56 (1961)); a defendant may not be forced to testify against himself (U.S. CONST. amend. V; *see* Fisher v. United States, 425 U.S. 391, 409 (1976) (holding that the Fifth Amendment "protects a person . . . against being incriminated by his own compelled testimonial communications")). Furthermore, the government must disclose to the defendant material evidence upon request. Brady v. Maryland, 373 U.S. 83, 87 (1963). Certain statements may not be admitted against a defendant unless he has had an opportunity to cross-examine the witness. U.S. CONST. amend. VI; *see also* Crawford v. Washington, 541 U.S. 36, 67–68 (2004) (holding that cross-examination is required for all "testimonial" statements).

43. *See* Renico v. Lett, No. 09-338, slip op. at 6 (U.S. May 3, 2010) (finding that a mistrial is *only* appropriate when "there is a high degree of necessity") (internal quotation marks omitted).

A.The Jury Unambiguously Acquitted Blueford

In *Blueford*, the jury foreperson's statement in open court that the jury had unanimously agreed against guilt on the greater charges was substantively an acquittal. The foreperson's statement may not have been sufficiently formal for the majority, but it was nevertheless sufficient under prior precedent. Supreme Court precedent shows that formality in verdicts is not in itself dispositive.[44] In fact, the Court holds that what really matters is whether the jury's announcement "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[45]

The foreperson's announcement clearly met this requirement for acquittal.[46] Under Arkansas law and the instructions given, the jury had to acquit Blueford of a greater offense before deliberating on a lesser-included charge,[47] and the foreperson's conversation with the judge indicated that the jurors understood this.[48] When the judge asked why they had not yet considered the negligent homicide charge, the foreperson replied that they had not yet resolved the manslaughter offense above it.[49] This conversation shows that the jury had clearly evaluated the State's evidence and determined it insufficient to sustain a conviction for the capital and first-degree murder charges.[50]

In addition to criticizing the verdict's form, namely the foreperson's open court announcement, the *Blueford* Court challenged the acquittal's lack of finality as another way it lacked sufficient formality. It held that the jury never finalized a verdict on either of the greater charges and that the jurors were free

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44. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (finding that an acquittal is not to be controlled exclusively by its form because its substance should also be considered).

45. *Id.*

46. "[A]n acquittal . . . encompass[es] any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." Evans v. Michigan, No. 11-1327, slip op. at 4–5 (U.S. Feb. 20, 2013). "A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, . . . terminates the prosecution." United States v. Scott, 437 U.S. 82, 91 (1978).

47. Blueford v. Arkansas, No. 10-1320, slip op. at 3 (U.S. May 24, 2012).

48. *See id.* at 3–4.

When the court summoned the jury again, the jury foreperson reported that the jury was "hopelessly" deadlocked. . . . The court asked the foreperson to disclose the jury's votes on each offense:

> THE COURT: All right. . . . I would like to know what your count was on capital murder.
> JUROR NUMBER ONE: That was unanimous against that. No.
> THE COURT: Okay, on murder in the first degree?
> JUROR NUMBER ONE: That was unanimous against that.
> THE COURT: Okay. Manslaughter?
> JUROR NUMBER ONE: Nine for, three against.
> THE COURT: Okay. And negligent homicide?
> JUROR NUMBER ONE: We did not vote on that, sir.
> THE COURT: Did not vote on that.
> JUROR NUMBER ONE: No, sir. We couldn't get past the manslaughter. Were we supposed to go past that? I thought we were supposed to go one at a time."

Id. (internal quotations omitted).

49. *Id.*

50. *Id.*

to revisit their votes on these when they went back to the jury room.[51] However, the foreperson's conversation with the judge left no doubt that the jury had considered all of the evidence and that it understood the judge's instructions to consider *and dispose of* the charges one at a time and in order.[52] To presume otherwise requires a belief that the jury deliberately disregarded the judge's instructions, which would run counter to the well-established presumption that juries follow instructions.[53] And in fact, the circumstances here show that the jury did exactly as instructed.[54] Having unanimously agreed on the more serious charges as instructed, the jury reported that it had acquitted Blueford on the murder charges.[55] There is nothing in the record indicating that the jury would have returned to those charges or that further deliberations would have changed its mind. All evidence suggests that the jury resolved some or all of the factual elements of the murder charges, and its statement should have been considered its final decision.

B.The Court Should Have Considered Alternatives

Under Arkansas law and the jury instructions given in *Blueford*, the jury had only two options: acquit Blueford on all charges or find him guilty on one.[56] The outcome here—where the jury foreperson described to the judge that they were unanimous against the two more serious charges, hung on the third, and had not yet deliberated on the fourth—did not fit in either of these scenarios. Nevertheless, where the foreperson's report represented a clear resolution of the factual elements of two offenses for which a mistrial was therefore not "manifestly necessary,"[57] the *Blueford* trial court should have recognized the jury's unanimous determination by issuing a partial verdict of acquittal on the capital and first-degree murder charges.

1. There Was No "Manifest Necessity" for Mistrial

A mistrial here was unwarranted. In *United States v. Perez*, the Supreme Court held that trial courts have discretionary authority to discharge a jury whenever there is a "manifest necessity" for it, or when failure to do so would defeat the "ends of public justice."[58] Nevertheless, trial courts are to exercise

51. *Id.* at 6–8 ("The fact that deliberations continued after the report deprives that report of the finality necessary to constitute an acquittal on the murder offenses.").

52. Arkansas law precluded deliberation on manslaughter absent unanimity in favor of acquittal on capital and first-degree murder. *Id.* at 3. Justice Sotomayor reasoned that the trial court's instructions combined with the foreperson's announcement were enough to constitute an acquittal for double jeopardy purposes. *Id.* at 2–5 (Sotomayor, J., dissenting).

53. *Id.* at 6 (quoting Weeks v. Angelone, 528 U.S. 225, 234 (2000) (holding that "[t]o presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance")).

54. *See id.* at 3–4.

55. *Id.*

56. *See id.* at 3 (majority opinion).

57. *See* United States v. Perez, 22 U.S. 579, 580 (1824).

58. *Id.*

sound discretion in discharging a jury, and because a mistrial may subsequently place a defendant on trial again, the power should be used "with the greatest caution under urgent circumstances and for very plain and obvious causes."[59] In capital cases, especially, "Courts should be extremely careful how they interfere with any of the chances of life, in favour of the [defendant]."[60]

The rule announced in *Perez* has been the basis for all later Supreme Court decisions on double jeopardy.[61] Under *Perez*'s manifest necessity standard, the Court has repeatedly held that a mistrial is *only* appropriate when "there is a high degree of necessity."[62] A mistrial that could have been reasonably avoided given the circumstances would terminate jeopardy and bar the state from trying the defendant a second time.[63]

In *Blueford*, mere formalism dictated the mistrial. The trial court declared a mistrial because the foreperson's open-court statement, while expressly and implicitly acquitting Blueford of murder, lacked the form of a formal verdict. In affirming the decision, the majority characterized the foreperson's statement as a tentative report of ongoing deliberations that only conveyed the jury was having trouble coming to a consensus.[64] However, Blueford's mistrial for murder lacked the requisite high degree of necessity necessary under the "manifest necessity" and "substance over form" standards advanced in *Perez* and *Martin Linen* respectively. Despite lacking the form of a formal verdict, the foreperson's statement substantively demonstrated that the jury found Blueford

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59. *Id.*

60. *Id.*

61. Wade v. Hunter, 336 U.S. 684, 690 (1949); *see also*, *e.g.*, Simmons v. United States, 142 U.S. 148, 154 (1891) ("The general rule of law upon the power of the court to discharge the jury in a criminal case before verdict was laid down by this court more than 60 years ago, in [*Perez*]."); Renico v. Lett, No. 09-338, slip op. at 6 (U.S. May 3, 2010).

62. *Renico*, No. 09-338, slip op. at 6 ("Since *Perez*, we have clarified that . . . a mistrial is appropriate when there is a 'high degree' of necessity.") (internal quotations omitted); Arizona v. Washington, 434 U.S. 497, 506 ("[T]here are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate."); *see* Downum v. United States, 372 U.S. 734, 736 (1963) (holding that the power to discharge the jury prior to verdict should be reserved for "extraordinary and striking circumstances").

63. *See* Harris v. Young, 607 F.2d 1081, 1087 (4th Cir. 1979) (finding no manifest necessity because there were less dramatic alternatives). Courts have held the manifest necessity standard to not be satisfied where mistrials have resulted from a trial judge declaring a mistrial to enable the government's witness to consult with their attorneys (United States v. Jorn, 400 U.S. 470, 473, 487 (1971)) or from the defendant's illness (Dunkerley v. Hogan, 579 F.2d 141, 147–48 (2d Cir. 1978)). But courts have found mistrials to satisfy the standard when involving defective indictments (Illinois v. Somerville, 410 U.S. 458, 468–69 (1973)), bias and prejudice of jurors (*Simmons*, 142 U.S. at 153–54), and inadequate defense representation (United States v. Dinitz, 424 U.S. 600, 611–12 (1976)). In *Green v. United States*, the Court wrote:

> "Moreover it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be retried again."

355 U.S. 184, 188 (1957).

64. Blueford v. Arkansas, No. 10-1320, slip op. at 8 (U.S. May 24, 2012).

not guilty of the two greater charges, rendering a mistrial manifestly unnecessary.[65] If the trial court was dissatisfied with the verdict's clarity, it should have taken steps to clarify it instead of declaring a mistrial.[66]

2. A Partial Verdict Was Warranted

Failure to render a partial verdict on the murder charges violated Blueford's double jeopardy protection because it afforded the government the opportunity to retry him for offenses of which—as explained above—he had been substantively acquitted. Although not accepted by all jurisdictions,[67] partial verdicts are common in criminal trials.[68] Courts have recognized that partial verdicts "provide a useful way for judges and juries to whittle away at complex criminal cases involving more than one [charge]."[69] Accordingly, standard criminal procedure often allows a jury to return a verdict on any offense upon which the jurors have unanimously agreed, even while still deliberating others.[70] Receipt of such a verdict neither ends the jury's deliberations nor precludes a retrial on any offense upon which the jury was unable to agree.[71] Hence, a partial verdict of acquittal in Blueford's case would have applied only to the murder charges on which the jury had clearly and unanimously agreed, and the government could have retried Blueford for manslaughter and negligent homicide.

A partial verdict here would have protected Blueford from the detriments of double jeopardy on the capital and first-degree murder charges. The Supreme Court held in *Green v. United States* 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 . . . compelling him to live in a continuing state of anxiety, . . . as well as enhancing the possibility that

65. After the jury reported that it was deadlocked, Blueford's counsel asked the judge to issue a partial verdict of acquittal (by having the jurors fill out verdict forms) on the first and second charges of capital and first-degree murder, to reflect the fact that the jury had voted unanimously to acquit Blueford of these two most serious charges. Blueford v. State, 370 S.W.3d 496, 498–99 (Ark. 2011). The judge, however, refused the request, choosing instead to declare a mistrial. *Id.*

66. The Ninth Circuit has held that trial courts have discretion to ask the jury to clarify its verdict instead of declaring a mistrial. *See, e.g.*, United States v. McCaleb, 552 F.3d 1053, 1058 (9th Cir. 2009) (holding that the district court "does not plainly err by asking the jury to clarify its verdict"); Larson v. Neimi, 9 F.3d 1397, 1402 (9th Cir. 1993) (holding that the district court may ask the jury to clarify an inconsistent or ambiguous verdict and that such practice "comports with common sense as well as efficiency and fairness").

67. *Blueford*, 370 S.W.3d at 502 (stating that jurisdictions are divided on the issue of partial verdicts, with the majority not allowing them). While the Arkansas Supreme Court acknowledged that jurisdictions that accept partial verdicts do so because there can be "no 'manifest necessity' warranting . . . a mistrial where the . . . court makes no inquiry into the jury's deliberations as to the greater offenses," the Court was not persuaded and held that partial verdicts are not accepted under Arkansas law. *Id.*

68. *See* Kornstein, *supra* note 20, at 663.

69. *Id.* at 664.

70. Selvester v. United States, 170 U.S. 262, 269–70 (1898).

71. *See* Kornstein, *supra* note 20, at 678 (stating that after rendering a partial verdict or decision, a jury "resumes its deliberations on the remaining issues").

even though innocent he may be found guilty."[72] The *Blueford* Court did not heed *Green*'s admonition that the government should not be allowed to strengthen its evidence against a defendant through re-prosecution. At trial, the State failed to prove the murder charges beyond a reasonable doubt, and a jury of Blueford's peers found him not guilty of these offenses. In fact, the trial judge even acknowledged that the government's case was "circumstantial at best."[73] Nevertheless, the Court gave the government a second shot to prove the same rejected charges, thereby granting it the time and opportunity to find more evidence, better witnesses, and a more compelling case altogether.[74] Retrying Blueford for charges of which he had previously been acquitted contradicts the history and purpose of the Double Jeopardy Clause.

CONCLUSION

Supreme Court precedent indicates that formalism is a necessary element in criminal law.[75] In *Blueford*, the Supreme Court held that the mere reading of the jury's verdict in open court did not constitute an acquittal and that the trial court did not err in refusing to render a partial verdict on the greater crimes of which the jury acquitted Blueford. In so holding, the Court affords states that require jurors to render a single verdict—either acquittal on all charges or conviction on one—the ability to re-prosecute defendants for offenses of which they have been substantively acquitted.

Multiple trials for the same charges cause the accused continued anxiety and embarrassment, and increase the possibility that a defendant, although innocent, will be found guilty.[76] With these concerns in mind, the majority's

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72. Green v. United States, 355 U.S. 184, 188 (1957).

73. Blueford v. Arkansas, No. 10-1320, slip op. at 4 n.2 (U.S. May 24, 2012) (Sotomayor, J., dissenting).

74. *Id.* at 14 (In her dissent, Sotomayor added that the protections of the Double Jeopardy Clause were needed in light of "the threat to individual freedom from reprosecutions that favor States and unfairly rescue them from weak cases."). In fact, "the Government is not limited at a new trial to the evidence presented at the first trial, [and] is free to strengthen its case in any way it can by the introduction of new evidence." Tims v. State, 770 S.W.2d 211, 214 (Ark. Ct. App. 1989) (citing United States v. Shotwell Mfg. Co., 355 U.S. 233, 243 (1957)).

75. *See generally* In re Winship, 397 U.S. 358, 362 (1970); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

76. *See* Ronald J. Allen & John P. Ratnaswamy, *Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801, 826 (1985) (citing Benton v. Maryland, 395 U.S. 784, 795–96 (1969)), for the proposition that the Supreme Court recognized "three fundamental principles underlying the prohibition of double jeopardy: (1) an individual should not repeatedly be subjected to the 'embarrassment, expense and ordeal' of defending against a particular criminal charge; (2) an individual should not live 'in a continuing state of anxiety and insecurity' not knowing if he or she again will be prosecuted for the same offense; and (3) the state should not increase the probability of conviction of the innocent by repeated prosecution of the same charges"). William S. Neilson & Harold Winter, *The Elimination of Hung Juries: Retrials and Nonunanimous Verdicts*, 25 INT'L REV. L. & ECON. 1, 6 (2005) ("In considering retrials with a specific verdict rule, such as a unanimous rule, the key difference between trials is that for any prior probability of guilt the defendant is assumed to have in the first trial, the posterior probability of guilt, given a hung jury, increases with each successive trial.").

willingness to weaken the constitutional protection against multiple trials in favor of formalism is troubling. Nevertheless, given the unique facts surrounding the jury deliberations in *Blueford*, it is hard to imagine that many cases involve a trial court declaring a mistrial following a jury's informal but unequivocal acquittal on greater offenses. Of course, states may seek retrial of charges when a jury is clearly unable to agree on a verdict, even a partial one, so *Blueford* likely will not arise where a state's case is too weak to obtain a conviction. Instead, *Blueford*'s greatest implications will be where a jury's verdict does not meet a given form and the court declines to take further steps to formalize it. More than anything, the Court's decision affects the burden placed on juries when rendering a verdict.

In the end, *Blueford* reinforces the concepts that, to count, jury verdicts must be sufficiently formal, and that the United States Constitution itself must yield to that inherent rigid formalism requirement. Although *Blueford* may not generate substantial precedential value in a plethora of cases, a retrial here or where the jury plainly and unmistakably, albeit informally, finds that the prosecution failed to prove elements of the offense would constitute a violation of the defendants' constitutional rights against double jeopardy.