No. 19-

IN THE

Supreme Court of the United States

ANTONIO L. SAULSBERRY,

Petitioner,

v.

RANDY LEE, WARDEN

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSHUA M. KOPPEL
Counsel of Record
DANIEL S. VOLCHOK
ALLISON SCHULTZ
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000
joshua.koppel@wilmerhale.com

QUESTION PRESENTED

Whether this Court's precedent clearly establishes that the Double Jeopardy Clause bars retrial of a defendant on a charge that was submitted to a jury at a prior trial but as to which that jury did not render a verdict.

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Antonio L. Saulsberry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion (App. 1a-19a) was recommended for full-text publication but has not yet been assigned a citation in the Federal Reporter. It can be found at 2019 WL 4126667. The district court's order denying Saulsberry's petition for a writ of habeas corpus (App. 21a-37a) is unpublished. The order of the Tennessee Criminal Court denying Saulsberry's motion to dismiss based on double jeopardy (App. 53a-57a) is unpublished. The Tennessee Court of Criminal Appeals' decision affirming the denial of the motion to

dismiss (App. 41a-51a) is unreported but is available at 2006 WL 2596771. The Tennessee Supreme Court's order denying permission to appeal (App. 39a) is unreported.

JURISDICTION

The court of appeals entered judgment on August 30, 2019. App. 1a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]

The Antiterrorism and Effective Death Penalty Act (AEDPA) provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts

> in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

INTRODUCTION

This Court has consistently held that a criminal defendant's jeopardy on a particular count begins when a jury is empaneled and ends when that jury is discharged. That rule applies whether the jury acquits, convicts, or renders no verdict at all, unless there is manifest necessity for discharging the jury without a verdict (such as a deadlock). The rule even applies, the Court has squarely held, if the jury (for whatever reason) never even *considered* the particular charge.

Federal and state courts, however, frequently fail to adhere to the Court's decades of precedent applying that rule. Here, for example, the state court held that jeopardy on particular counts did not terminate when the jury was discharged because the jury did not consider those counts. And the federal district court and court of appeals then held that jeopardy did not terminate because the jury did not expressly or implicitly acquit on those counts. Although those decisions flout this Court's precedent, they are not unique. Where a jury rendered a verdict on one or more counts but not all of them—and particularly where there is reason to believe that the jury did not consider the count or counts on which it was silent—courts often permit the defendant to be retried on those remaining counts, unless the verdict constitutes an "implied acquittal." The lower courts' disregard of this Court's double-jeopardy precedent is spreading, moreover, and even courts that once rigorously applied that precedent have grown lax.

The Court should grant certiorari to correct the lower courts' departures from this Court's precedent because of the critical importance of the protection the Double Jeopardy Clause provides. That Clause, this Court has explained, prevents "the State with all its resources and power" from "mak[ing] 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." *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). A second prosecution may also be "grossly unfair" "[e]ven if the first trial is not completed." *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978). Thus, the Double Jeopardy Clause does not merely prevent the government from trying a defendant a second time after an acquittal; it also protects Americans from the risks and burdens of a second criminal tribunal after the government has already had its opportunity to prosecute once—regardless of the outcome of the first tribunal.

This case is a good vehicle to bring lower courts back in line with this Court's double-jeopardy holdings. Petitioner Antonio Saulsberry was initially tried on three counts of murder. The jury—which was instructed that it could convict on no more than one of the three counts—found Saulsberry guilty of premeditated murder and was silent on the two counts of felony murder. But when the premeditated-murder conviction was reversed on appeal for insufficient evidence, Tennessee sought to retry Saulsberry for felony murder. Saulsberry moved to dismiss on double-jeopardy grounds, and appealed when that motion was denied. The Tennessee Court of Criminal Appeals affirmed, however,

holding that Saulsberry could be retried for felony murder because the first jury did not consider those counts. On retrial, Saulsberry was convicted of felony murder and sentenced to life imprisonment.

A federal district court and a splintered panel of the Sixth Circuit subsequently denied federal habeas relief, with the Sixth Circuit's lead opinion reasoning that the jury's guilty verdict on premeditated murder did not implicitly acquit Saulsberry of felony murder. Both the state court and Sixth Circuit rulings are wrong—and in fact contrary to clearly established federal law—because this Court's precedent makes clear that jeopardy attaches when the jury is empaneled and terminates when the jury is discharged, regardless of whether the jury actually considered a charge, much less acquitted of the charge.

The Court should grant certiorari to reaffirm both the important protection the Double Jeopardy Clause provides, and other courts' obligation to honor this Court's precedent applying that clause.

STATEMENT

A. State Proceedings

1. First trial and appeal

In 1995, the manager of a Memphis restaurant was killed during a robbery committed by four of Saulsberry's acquaintances. App. 42a-44a. Saulsberry worked at the restaurant, and the day before the robbery he told the perpetrators when the restaurant closed and how to gain entry. App. 2a. Saulsberry was not at the restaurant during the robbery, however. *Id.*

Saulsberry was charged along with the four perpetrators in three indictments. The first indictment con-

tained three counts of first-degree homicide: (1) premeditated murder, (2) murder during a robbery, and (3) murder during a burglary. App. 2a. The other indictments charged conspiracy and especially aggravated robbery. *See id.*

Saulsberry was tried together with Franklin Howard, one of the four perpetrators. App. 44a-45a. The trial court instructed the jury to consider the charges in the first indictment (plus certain lesser-included offenses) in sequence. Dist. Ct. Dkt. 68-13 at 43-47. The court further instructed that if the jurors found guilt on any theory of murder, they should not consider any remaining murder theories, but instead skip to deliberate the charges in the other indictments, i.e., conspiracy and especially-aggravated robbery. *Id.* at 43-52; *see* App. 50a.

The jury found both defendants guilty of premeditated murder, especially aggravated robbery, and conspiracy to commit aggravated robbery. App. 45a. Consistent with the court's instructions, the jury was silent on the felony-murder counts. App. 3a.

On direct appeal, the Tennessee Court of Criminal Appeals reversed Saulsberry's premeditated-murder conviction for insufficient evidence because of his limited role in the crimes, but remanded for retrial on the felony-murder counts. App. 3a. Saulsberry's robbery and conspiracy convictions were affirmed along with the associated sentences, which total fifty consecutive years. *Id.*

2. Howard's double-jeopardy challenge is sustained

While Saulsberry was seeking state habeas relief from the remaining convictions (unsuccessfully, *see*

App. 45a-46a), the Tennessee Supreme Court reversed Howard's premeditated-murder conviction because of instructional error, *State* v. *Howard*, 30 S.W.3d 271, 277-278 (Tenn. 2000). In doing so, the court reiterated a point it had made before: "a trial court should instruct a jury to render a verdict as to each count of a multiple count indictment which requires specific jury findings on different theories of first-degree murder." *Id.* at 274 n.4 (emphasis omitted). One reason the court gave for this approach was "the double jeopardy problem of retrying a defendant after a subsequent appellate opinion reverses a conviction" for insufficient evidence. *Id.*

At Howard's retrial, the court followed the Tennessee Supreme Court's direction, instructing the jury to render a verdict on each first-degree-murder count. *State* v. *Howard*, 2004 WL 2715346, at *4, *11 (Tenn. Crim. App. Nov. 18, 2004). After the jury convicted on each count, Howard argued on appeal that his retrial on the felony-murder counts violated the Double Jeopardy Clause because he had already stood trial for those charges and not been convicted. *Id.* at *11.

The Tennessee Court of Criminal Appeals agreed, holding that Howard "suffered the attachment of jeopardy on the charges of felony murder in the first trial"—the trial at which Saulsberry had been Howard's co-defendant—and that that jeopardy had "ended upon the discharge of the jury without verdicts being rendered." *Howard*, 2004 WL 2715346, at *12. The court saw "no hint of a manifest necessity to discharge the original jury without verdicts on the felony-murder charges." *Id.* Accordingly, the court vacated Howard's felony-murder convictions and dismissed those charges. *Id.*

3. Saulsberry's identical double-jeopardy challenge is rejected

After Saulsberry's state-habeas proceedings challenging the robbery and conspiracy convictions concluded, Tennessee sought to retry him for felony murder. Saulsberry moved to dismiss on double-jeopardy grounds, citing the Tennessee Court of Criminal Appeals' then-recent decision in Howard's case. Dist. Ct. Dkt. 68-29 at 3-29.

The trial court denied the motion. App. 53a-57a. It made no attempt to distinguish *Howard* on any legal basis, instead expressing concern that sustaining Saulsberry's double-jeopardy claim would mean that Saulsberry could not be retried for murder: At oral argument, the court noted that Howard's case "wasn't as compelling a situation" because he had been retried for (and convicted of) premeditated murder since his original conviction on that count was reversed for instructional error rather than insufficient evidence. Dist. Ct. Dkt. 68-30 at 15-16.

Saulsberry took an interlocutory appeal, but the Tennessee Court of Criminal Appeals affirmed. App. 41a-51a. The court reasoned that, due to the sequential jury instructions—i.e., the instructions to consider the murder counts one at a time and to convict on no more than one—"the presumption is that the jury never considered whether the defendant was guilty of either of the felony murder charges." App. 50a. In that situation, the court asserted, "there are no double jeopardy concerns." *Id.* The court made no attempt to distinguish its contrary decision in *Howard*, simply noting that that decision was nonprecedential. App. 48a. The Tennessee Supreme Court denied leave to appeal. App. 39a.

On retrial, Saulsberry was convicted on both felony-murder counts. App. 3a. The court merged the felony-murder convictions and sentenced Saulsberry to life imprisonment, to be served consecutively to the fifty-year sentences for conspiracy and especially-aggravated robbery. *State* v. *Saulsberry*, 2011 WL 1327664, at *1 (Tenn. Crim. App. Apr. 7, 2011). The convictions were affirmed on appeal. *Id.*

B. Habeas Proceedings

1. After his double-jeopardy argument was rejected on interlocutory appeal but before his retrial, Saulsberry filed a pro se federal habeas petition raising the double-jeopardy issue. Dist. Ct. Dkt. 1. The district court (which had jurisdiction under 28 U.S.C. §§1331 and 2241) appointed counsel, who moved to hold the petition in abeyance pending Saulsberry's retrial. Dist. Ct. Dkt. 18. The court granted the stay. Dist. Ct. Dkt. 20.

Following his second trial, Saulsberry filed an amended petition. Dist. Ct. Dkt. 69. He argued that he had been put "in jeopardy of conviction [on] the felony murder counts in his first trial," and that the Double Jeopardy Clause protected him from being "'subjected to the hazards of trial and possible conviction more than once.'" *Id.* at 7 (quoting *Green*, 355 U.S. at 187). This Court, Saulsberry wrote, has established that "[t]his constitutional safeguard applies 'even where no final determination of guilt or innocence has been made'" at the prior trial. *Id.* (quoting *United States* v. *Scott*, 437 U.S. 82, 92 (1978)).

Reviewing the state-court decision under the deferential standard in 28 U.S.C. §2254(d), the district court denied Saulsberry's petition. App. 21a-37a. The

court ruled that when a jury is silent on a particular count, retrial is barred only if "an implicit acquittal can be determined by [the] jury['s] silence," such as when a jury is instructed to find a defendant guilty of either a greater or lesser-included offense and finds the defendant guilty of the lesser offense. App. 31a. The court further stated that there was "little clear federal authority concerning … whether jury silence as to an alternative means [of committing an offense] constitutes an implicit acquittal for double jeopardy purposes," App. 32a, and thus ruled that the Tennessee Court of Criminal Appeals had not acted contrary to, or unreasonably applied, clearly established federal law, App. 33a.

2. On appeal, Saulsberry argued that his double-jeopardy claim should be reviewed de novo because he had filed his habeas petition before his retrial, and the deference that AEDPA requires applies only where the petitioner is "in custody pursuant to the judgment of a State court," 28 U.S.C. §2254(d); *see Phillips* v. *Court of Common Pleas*, 668 F.3d 804, 810 (6th Cir. 2012) (habeas petitions by pretrial detainees are brought under 28 U.S.C. §2241 and reviewed de novo). Saulsberry also explained, however, that he was entitled to habeas relief even under AEDPA, because this Court's precedents clearly establish that the Double Jeopardy Clause prohibits retrial any time a first trial is discontinued (and the jury discharged) without a verdict, unless there was manifest necessity for terminating the trial.

A divided panel of the Sixth Circuit affirmed. Each judge wrote separately, with no opinion for the court.

Judge Sutton stated that Saulsberry's habeas petition should be evaluated under the deferential standard of §2254(d) because Saulsberry was convicted after fil-

ing the petition and is currently "in custody under a state judgment." App. 5a. On the merits, Judge Sutton considered whether Saulsberry had been implicitly acquitted of felony murder. App. 9a. He explained that the jury at Saulsberry's first trial had "never considered" the felony-murder counts because it was instructed to stop deliberations on the murder indictment if it found guilt on premeditated murder. *Id.* Therefore, he reasoned, the jury's silence on the felony-murder counts could not be viewed as an implied acquittal. *Id.* Judge Sutton concluded that "[i]n a case in which the jury never considered whether the government had proven its case as to [some] counts, no cognizable double jeopardy claim arises." *Id.* Judge Sutton recognized that, under this Court's precedent, jeopardy terminates when a court declares a mistrial absent manifest necessity—even though the jury may not have a chance to consider the charges in such a case—but he stated that "there was no mistrial here." App. 12a. He did not explain why the outcome in Saulsberry's case differed in any relevant way from a mistrial or why Saulsberry's right not to be twice put through the risk and ordeal of trial is not implicated in these circumstances.

Judge White wrote a one-page opinion concurring in the judgment. She agreed with Judge Sutton that Saulsberry's petition should be reviewed under the deferential standard of §2254(d). App. 13a. On the merits, she recognized that "double-jeopardy concerns are raised in circumstances other than where there is an implied acquittal," and that "[a] defendant has a recognized interest in having his fate decided by the jury first impaneled to try him, absent manifest necessity." *Id.* Nevertheless, she stated that AEDPA required af-

firmance because "the Supreme Court has not clearly addressed the circumstances presented here." *Id.*

Judge Donald dissented. She would have reviewed Saulsberry's petition de novo because he was a pretrial detainee when he filed his habeas petition. App. 14a-15a. But she also wrote that Saulsberry should prevail even applying AEDPA deference. App. 15a. This Court, Judge Donald explained, "has held—in categorical terms—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 tried again.'" App. 16a (quoting *Green*, 355 U.S. at 188). The only exception to this rule "is when 'unforeseeable circumstances arise during the first trial making its completion impossible, such as the failure of a jury to agree on a verdict.'" *Id.* (quoting *Green*, 355 U.S. at 188). Because there were no unforeseeable circumstances preventing a verdict on felony murder at the first trial, Judge Donald wrote, "Saulsberry should not have been put through the ordeal of a second trial on the same charges." *Id.* Judge Donald explained that in *Green* v. *United States*, this Court expressly rejected the notion—adopted by Judge Sutton—that jeopardy terminates on a charge as to which the jury was silent only if there can be discerned an implied acquittal. App. 16a-17a. Rather, Judge Donald wrote, jeopardy terminates *whenever* "the court dismisses the jury without sufficient reason." App. 18a.

REASONS FOR GRANTING THE PETITION

This Court has long held that when a jury is discharged without rendering a verdict on a particular count, the Double Jeopardy Clause prohibits retrial on that count unless there was manifest necessity for the discharge. The Court has applied that rule even where

the jury never considered the relevant count (for example, because a prejudicial comment during opening statements caused a mistrial). The Court has also applied that rule where, as here, the jury rendered a verdict on some charges but was silent on others.

Under this clearly established rule, Saulsberry's jeopardy for felony murder terminated when the jury at his first trial was discharged without rendering a verdict on the felony-murder counts. The Tennessee Court of Criminal Appeals' decision to allow Saulsberry to be tried for felony murder a second time is contrary to this Court's precedent and violates the Double Jeopardy Clause.

The Tennessee courts are not alone in disregarding this Court's rule that, absent manifest necessity, jeopardy terminates when the jury is discharged. At least eight state appellate courts and four federal courts of appeals have permitted defendants to be retried in similar circumstances. And even some courts that once strictly applied the Court's Double Jeopardy Clause jurisprudence (including both the Tennessee courts and the Sixth Circuit) have stopped adhering to this Court's precedent in favor of allowing the State a second bite at the apple.

These circumstances warrant the Court's attention, and this case is the right vehicle. There is nothing to prevent or unduly complicate this Court's consideration of the issue presented. The state court and lower federal courts considered Saulsberry's double-jeopardy claim, and rejected it by applying rules flatly inconsistent with those adopted by this Court. The Court should grant review.

I. THE REJECTION OF SAULSBERRY'S DOUBLE-JEOPARDY CLAIM CONFLICTS WITH THIS COURT'S PRECEDENT

A. Under Clearly Established Federal Law, Saulsberry Could Not Be Put In Jeopardy For Felony Murder A Second Time After His First Trial Ended Without A Verdict On Those Charges

1. The Double Jeopardy Clause provides that no person shall be "twice put in jeopardy of life or limb" for "the same offence." U.S. Const. amend. V. Accordingly, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may [not] be tried … a second time for the same offense." *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 106 (2003). Although the clause's relevance is particularly clear where the defendant is actually acquitted at the first trial, "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." *Green*, 355 U.S. at 188. Rather, the Double Jeopardy Clause bars retrial even when a trial "is discontinued without a verdict" at all. *Wade* v. *Hunter*, 336 U.S. 684, 688 (1949).

This rule exists because the purpose of the Double Jeopardy Clause is not merely to deny the government a second chance after a jury affirmatively rejects its charges the first time. Its much broader and more fundamental purpose is to protect all Americans against the risks and burdens of successive prosecutions. "Even if the first trial is not completed," the Court has explained, "a second prosecution … 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." *Arizona*, 434 U.S. at 503-504 (footnotes omitted). A second prosecution can also be "grossly unfair," *id.* at 503, because "if the Government may 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." *United States* v. *DiFrancesco*, 449 U.S. 117, 128 (1980); *see also Downum* v. *United States*, 372 U.S. 734, 736 (1963) ("[T]he prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.'").

The prohibition against retrying a defendant whose earlier trial ended without a verdict is not absolute. The government may bring a second prosecution where the court discharged the first jury without a verdict due to some "manifest necessity." *Arizona*, 434 U.S. at 505; *see also Wade*, 336 U.S. at 690 (a trial can be discontinued only "when particular circumstances manifest a necessity for doing so"); *United States* v. *Perez*, 22 U.S. 579, 580 (1824) (a trial court has the "authority to discharge a jury from giving any verdict" only when "there is a manifest necessity for the act"). The "classic" example of manifest necessity for discharging a jury without a verdict is when the jury cannot agree on a verdict. *Arizona*, 434 U.S. at 509. Courts have also found manifest necessity when the jury is found to be biased, *e.g.*, *Thompson* v. *United States*, 155 U.S. 271, 273-274 (1894); when a procedural error would require that any conviction be overturned on appeal, *e.g.*, *Illinois* v. *Somerville*, 410 U.S. 458, 459 (1973); or when an attorney has engaged in prejudicial misconduct, *e.g.*, *Arizona*, 434 U.S. at 510-516. "Yet in view of the importance of the [double-jeopardy] right, and the fact that it is frustrated by any mistrial," the Court has held that "the prosecutor must shoulder" the "heavy" "bur-

den" of justifying the declaration of a mistrial or other premature discharge of the jury. *Id.* at 505; *see also United States* v. *Jorn*, 400 U.S. 470, 487 (1971) (plurality opinion) (retrial would violate the Double Jeopardy Clause where "the trial judge made no effort to exercise a sound discretion to assure that … there was a manifest necessity for the *sua sponte* declaration of [a] mistrial"); *Downum*, 372 U.S. at 736-738 (reversing a conviction where the defendant was retried after his first trial was discontinued without manifest necessity).[1]

2. As the State has not disputed, Saulsberry was placed in jeopardy on the felony-murder charges "when the jury [wa]s empaneled and sworn" at his first trial, *Crist* v. *Bretz*, 437 U.S. 28, 38 (1978). At that point, the State's one chance to try Saulsberry had begun, as he was at risk of conviction on any of the counts charged in the three indictments, including felony murder. *See Arizona*, 434 U.S. at 503, 505. He was therefore entitled to have any verdict on the felony-murder charges come from the empaneled jury, and no other.

Jeopardy on the felony-murder charges then terminated when the jury was discharged without rendering a verdict on those charges, because there was no manifest necessity for that discharge. The Tennessee

[1] The government may also retry a defendant who requested or consented to the early termination of a trial, such as by moving for a mistrial. *DiFrancesco*, 449 U.S. at 130; *Green*, 355 U.S. at 188. Tennessee has never argued that Saulsberry consented to the jury being discharged without rendering a verdict on felony murder, and no court has suggested otherwise. In fact, in *Howard*, the Tennessee Court of Criminal Appeals held that Saulsberry's identically situated co-defendant could not "be deemed to have consented to the termination of the trial on the felony-murder charges." *Howard*, 2004 WL 2715346, at *12.

trial court did not find any manifest necessity for discharging the jury without a verdict, nor did the Tennessee Court of Criminal Appeals or the Sixth Circuit. Even the State has never argued that there was manifest necessity. All for good reason: The record shows no barrier to the jury considering and rendering a verdict on the felony-murder counts except that the court instructed the jury not to render a verdict on those counts unless it acquitted on premeditated murder.

That instruction does not constitute "manifest necessity" for the simple reason that there was no need for it. As the Tennessee Supreme Court said in Howard's first appeal, "a trial court should instruct a jury to render a verdict *as to each count* of a multiple count indictment [charging] different theories of first-degree murder"—in part to avoid any double-jeopardy problem if a conviction on one count is reversed for insufficient evidence. *Howard*, 30 S.W.3d at 274 n.4 (emphasis altered); *accord State* v. *Cribbs*, 967 S.W.2d 773, 787-788 (Tenn. 1998). There could be no manifest necessity for the court discharging the jury without a verdict based on the use of instructions that the state supreme court has repeatedly emphasized should *not* be used. Indeed, the Tennessee Court of Criminal Appeals itself reached this exact conclusion in resolving Howard's second appeal, stating that "on direct appeal from the original trial, the supreme court saw no reason for discharging the jury without verdicts on the felony-murder charges, and neither do we see a reason—much less a necessity—in the record before us." *Howard*, 2004 WL 2715346, at *12. That conclusion was correct, and it confirms that clearly established double-jeopardy principles barred retrying Saulsberry on the felony-murder charges.

B. The Tennessee Court Of Criminal Appeals' Decision Was Contrary To This Court's Precedent

Saulsberry is entitled to habeas relief because the Tennessee Court of Criminal Appeals' decision rejecting his double-jeopardy challenge was "contrary to … clearly established Federal law, as determined by" this Court. 28 U.S.C. §2254(d)(1). A state court acts "contrary to … clearly established Federal law," *id.*, if it "arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams* v. *Taylor*, 529 U.S. 362, 413 (2000). That standard is satisfied here.[2]

Without citing any of this Court's cases discussed in the prior section, the Tennessee Court of Criminal Appeals held that a defendant may "be retried on charges that were not reached by the jury when sequential instructions on the charges were given," because in that circumstance "the presumption is that the jury never considered" those charges. App. 50a. That conclusion was contrary to this Court's cases, which clearly establish that there is no exception in the Double Jeopardy Clause allowing a second trial because a count was not considered by the first jury.

On more than one occasion, this Court has applied the rule explained above—that retrial is barred when a trial is discontinued absent manifest necessity—where

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[2] Saulsberry argued below that his habeas petition should be reviewed de novo because it was filed when he was a pretrial detainee. For purposes of this Court's review, however, he does not challenge the conclusion of the two judges who applied the deferential AEDPA standard.

the jury had no opportunity to consider the relevant charge or charges. For example, the Court held in *Downum* that retrial was barred after the trial court discharged the jury before the prosecution had begun presenting evidence (due to the unavailability of the prosecution's key witness)—i.e., before the case was even *sent* to the jury. *See* 372 U.S. at 735, 737-738; *see also Arizona*, 434 U.S. at 498-501, 505-514 (considering whether there was manifest necessity for terminating a trial before charges were submitted to the jury due to defense counsel's prejudicial comments). Similarly, the Court in *Jorn* held that the Double Jeopardy Clause prohibited retrial after the trial court unnecessarily declared a mistrial in the middle of the government's case. *See* 400 U.S. at 472-473, 487.[3]

This precedent clearly establishes that when a trial is terminated without a verdict, the defendant may not be retried—whether or not the jury considered the charges—absent manifest necessity for the termina-

[3] Although the plurality opinion in *Jorn* is not "clearly established" law for purposes of §2254(d), the Court's *holding* that the Double Jeopardy Clause prohibited retrial in the circumstances of that case *is* clearly established law: It was joined by the four Justices in the plurality as well as by Justices Black and Brennan, who "join[ed] the judgment of the Court" although they "believe[d] that the Court lack[ed] jurisdiction over th[e] appeal under 18 U.S.C. § 3731 because the action of the trial judge amounted to an acquittal … and therefore there was no discretion left to the trial judge to put appellee again in jeopardy." 400 U.S. at 488. That is, the plurality and the concurring Justices disagreed only as to the proper form of the Court's judgment (affirmance on the merits versus dismissal for lack of jurisdiction). *See also* Brief of Appellee 2, *Jorn*, No. 19 (U.S. Dec. 27, 1969) ("[T]he issue presented with regard to jurisdiction and the issue presented by the merits of the case are identical."). They agreed regarding the effect of the Double Jeopardy Clause—which is the issue here.

tion. The Tennessee Court of Criminal Appeals reached the opposite conclusion on that "question of law," *Williams*, 529 U.S. at 413, holding that because the first jury apparently "never considered" the felony-murder counts, App. 50a, Saulsberry *could* be retried on those counts even though there was no manifest necessity for terminating the first trial without a verdict on them.[4]

The Tennessee court's decision is also "contrary to … clearly established Federal law" because this case is materially indistinguishable from *Jorn* and *Downum*, yet the Tennessee Court of Criminal Appeals reached a different decision. That Saulsberry's first trial ended without a verdict because the judge gave sequential instructions is not a material distinction from *Jorn*, where the trial court improperly terminated trial because it thought key witnesses may not have been adequately warned of their constitutional rights, 400 U.S. at 486-487. In both circumstances, the jury was equally prevented from considering the relevant charge due to the trial court's improper or unnecessary action. Similarly, in *Downum*, the trial court discharged jurors shortly after they were empaneled because the prosecution's key witness was not present. *See* 372 U.S. at 735. As here, then, jeopardy had attached because the jury had been sworn, and the fact that the jury did not have an opportunity to consider the charges did not prevent jeopardy from terminating.

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[4] The Tennessee court's "never considered" rule would also eviscerate this Court's clear "rule that jeopardy attaches when the jury is empaneled and sworn," *Crist*, 437 U.S. at 38, as well as transform the right "'against being twice *put in jeopardy*,'" *Downum*, 372 U.S. at 736 (emphasis added), into a right only against having charges twice *considered*.

Because the Tennessee Court of Criminal Appeals applied a legal rule contrary to that established by this Court and reached a result different than this Court has in materially indistinguishable cases, AEDPA poses no bar to habeas relief. And because Saulsberry's retrial for felony murder violated the Double Jeopardy Clause for all the reasons given above, habeas relief is warranted.[5]

C. The Sixth Circuit Improperly Limited The Protections Of The Double Jeopardy Clause To Cases Of Implied Acquittal

The reasons that Judges Sutton and White gave in their separate opinions for affirming the district court's denial of habeas relief are themselves wholly inconsistent with this Court's precedent.

1. Judge Sutton applied the wrong framework in reviewing Saulsberry's habeas petition, reasoning that there could not have been a double-jeopardy violation unless Saulsberry was implicitly acquitted of felony murder at his first trial. App. 8a-9a. But Saulsberry did not (and does not) contend that retrial was impermissible because he was implicitly acquitted of felony murder at his first trial. As explained, a second trial was prohibited for a different reason: Saulsberry was put in jeopardy on the felony-murder counts and the trial was terminated without the jury rendering a verdict on those counts (and without manifest necessity).

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[5] For good reason, the State has never argued (and neither the Tennessee Court of Criminal Appeals nor the Sixth Circuit held) that Saulsberry's appeal of his conviction for premeditated murder continued his jeopardy on the separate felony-murder counts. *Green* and *Benton* v. *Maryland* foreclose such an argument. *See Green*, 355 U.S. at 193-194; *Benton* v. *Maryland*, 395 U.S. 784, 796-797 (1969).

To be sure, this Court has sometimes used language suggesting that acquittal is an important factor in applying the Double Jeopardy Clause. For example, in *Dealy* v. *United States*, 152 U.S. 539 (1894), the jury found the defendant guilty of most charged counts, but was silent on one, *id.* at 541. No reason was given for the silence on that count, and this Court noted that "[i]t may have been simply overlooked by the jury." *Id.* at 542. Nevertheless, the Court explained that "the discharge of the jury under the circumstances was doubtless equivalent to a verdict of not guilty as to that count." *Id.*; *see also Jolly* v. *United States*, 170 U.S. 402, 408 (1898) ("The action of the jury in returning a verdict of guilty upon the first and second counts and being silent as to the fifth was equivalent to a verdict of not guilty as to that count.").

The Court has long made clear, however, that the formal termination of jeopardy—not the inference of acquittal—is what bars retrial. And a jury's silence on a count is "equivalent to" an acquittal not because that silence may *imply* an acquittal, but because the jury's silence is just as effective in terminating jeopardy when the jury is discharged. For example, in *Selvester* v. *United States*, 170 U.S. 262 (1898), the jury had convicted the defendant on three counts but disagreed on a fourth. *Id.* at 262-263. The Court stated that when the jury's "disagreement [on a count] is formally entered on the record," the deadlock "justifies the discharge of the jury"—i.e., there is manifest necessity for a mistrial—"and therefore a subsequent prosecution … would not constitute second jeopardy." *Id.* at 269. But retrial is prohibited, the Court explained, when the jury is silent on a count rather than expressly deadlocking:

> [W]here [jurors], although convicting as to some, are silent as to other, counts in an in-

> dictment, and are discharged without the consent of the accused, … the effect of such discharge is 'equivalent to acquittal,' because, as the record affords no adequate legal cause for the discharge of the jury, any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent.

Id.

The Court confronted a similar situation in *Green*. The jury there found the defendant (Green) guilty of second-degree murder, but was silent on the greater offense of first-degree murder. 355 U.S. at 186. Green's conviction was reversed on appeal, Green was retried, and the second jury convicted of first-degree murder. *Id.* This Court reversed, holding that the Double Jeopardy Clause prohibited Green's retrial for first-degree murder even though the first jury had been silent on that count. *Id.* at 190. In particular, the Court explained that "it is not … 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." *Id.* at 188. Rather, "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 tried again." *Id.* The only exception to this rule is "where 'unforeseeable circumstances … arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict'"—i.e., where there is manifest necessity for a mistrial. *Id.* (alterations in original) (quoting *Wade*, 336 U.S. at 689). Because Green's "jeopardy for first degree murder came to an end when the jury was discharged[,] … he could not be retried for that offense." *Id.* at 191. The jury's silence, the Court held, could "be

treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict" of acquittal. *Id.*

Judge Sutton asserted that *Green* was an implied-acquittal case because the jury's finding of guilt on the lesser-included count of second-degree murder implied an acquittal on the greater offense of first-degree murder. App. 10a. But while *Green* recognized that the jury's silence on the greater offense *could* be construed as an implied acquittal, the Court specifically abjured such a narrow interpretation of its holding:

> [T]he result in this case need not rest alone on the assumption … that the jury … acquitted Green of murder in the first degree…. [T]he jury was dismissed without returning any express verdict on that charge…. Yet it 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.

355 U.S. at 190-191 (citing *Wade*); *see also United States* v. *Ewell*, 383 U.S. 116, 125 n.9 (1966) (confirming *Green*'s "alternative" holdings). *Green* thus applied the Court's ordinary—and clearly established—rule that any time a jury is discharged without rendering a verdict and absent manifest necessity, the defendant cannot be retried. And Judge Sutton's conclusion that Saulsberry was not implicitly acquitted of felony murder at his first trial does nothing to take this case outside *Green*'s second holding—or of the Court's similar holdings, discussed above, in *Jorn* and *Downum*.

Judge Sutton also reasoned that this case is different from *Green* because the jury there had a "'full opportunity'" to render a verdict on first-degree murder. App. 10a (quoting *Green*, 355 U.S. at 191). But in using that phrase, *Green* was simply explaining that there was no manifest necessity preventing the jury from reaching a verdict on that count. It was not subtly rewriting decades of its double-jeopardy precedent (in a way the Court has never since reiterated, no less) by holding that jeopardy cannot terminate on a count unless it has been presented to the jury for consideration. Indeed, as explained, this Court's precedent is to the contrary.

Judge Sutton himself seemed to recognize as much, which is why he conceded that this Court has held that "jeopardy terminates absent manifest necessity" even when the jury did "not have a chance to consider any charges." App. 12a. But he declared that rule inapplicable because, he said, "there was no mistrial here." *Id.* That is irrelevant under this Court's precedent. The rule explained above—that jeopardy terminates absent manifest necessity—applies any time "the jury impaneled for the first trial [is] discharged without reaching a verdict and without the defendant's consent." *Downum*, 372 U.S. at 736. And as explained, the Court in *Green*, *Dealy*, and *Jolly* applied that rule where there was, as here, a verdict on some counts but not others and no declaration of a mistrial.

One of the foundational cases applying the manifest-necessity standard, moreover, *Wade* v. *Hunter*, did not use the term "mistrial." And certainly the values underlying the Double Jeopardy Clause—including the "defendant's 'valued right to have his trial completed by a particular tribunal'" and the protection against being twice put through the risk, expense, and ordeal of trial,

Arizona, 434 U.S. at 503—apply as much in Saulsberry's case as in any case where the court used the term "mistrial" when discharging the jury. Judge Sutton's effort to engraft a "declares a mistrial" requirement on this Court's double-jeopardy rule, App. 12a, finds no support in this Court's precedent—which is why Judge Sutton cited no authority in support of such a requirement.

2. Judge White's concurrence in the judgment correctly acknowledged a defendant's "interest in having his fate decided by the jury first impaneled to try him." App. 13a. She also recognized that "double-jeopardy concerns are raised in circumstances other than where there is an implied acquittal." *Id.* Nevertheless, Judge White joined in the denial of habeas relief because, she wrote, "the Supreme Court has not clearly addressed the circumstances presented here." *Id.* That conclusion is unsupportable.

"AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007). Rather, "Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer* v. *Andrade*, 538 U.S. 63, 76 (2003). It is thus irrelevant that this Court has never addressed a case involving the termination of trial without a verdict because of instructions that the jury consider multiple counts in sequence and stop after a guilty verdict on any count. The Court *has* clearly established the rule that the Double Jeopardy Clause bars retrial after a trial is terminated without a verdict unless there was manifest necessity for terminating the trial. That clearly established federal law mandated reversal here.

II. STATE AND LOWER FEDERAL COURTS COMMONLY FAIL TO FOLLOW THIS COURT'S PRECEDENT IN THE SAME WAY THE TENNESSEE COURT AND SIXTH CIRCUIT DID HERE

1. The lower courts' departure here from this Court's precedent is no isolated incident. Numerous courts have likewise refused to apply the rule discussed above where (as here) the jury rendered a verdict on some but not all charges. Other courts have also (like Judge Sutton) refused to take *Green* at its word, interpreting that case to hold only that a defendant cannot be retried on a charge on which he has been implicitly acquitted, i.e., refusing to apply *Green*'s clear holding that jeopardy terminates on *any* charge on which a jury is silent if the jury has been discharged without manifest necessity.

For example, in *Commonwealth* v. *Carlino*, 865 N.E.2d 767 (Mass. 2007), the jury had convicted the defendant (Carlino) of first-degree murder by premeditation and by extreme atrocity or cruelty, while remaining silent on a felony-murder charge, *id.* at 769. The convictions were reversed on appeal, and Carlino was retried on all three theories of first-degree murder. *Id.* at 769-770. After being convicted, he contended that his retrial for felony murder violated the Double Jeopardy Clause. *Id.* at 772. The Massachusetts Supreme Judicial Court disagreed. Citing *Green*, the court stated that "[c]ourts have refused to imply an acquittal" of a charge on which the jury was silent "unless a conviction of one crime logically excludes guilt of another crime." *Id.* at 774. Because the first jury's guilty verdicts did not "logically require[] the conclusion that the jury … acquitted the defendant of felony-murder," the court held, there was no error in retrying the defendant on that theory. *Id.* By thus focusing only on whether

the jury had implicitly acquitted the defendant of felony murder, the court disregarded *Green*'s pellucid explanation that "the result in th[at] case need not rest alone on the assumption" of an implied acquittal, because it was enough that "the jury was dismissed without returning any express verdict on [first-degree murder] and without Green's consent" or manifest necessity for terminating the trial. 355 U.S. at 190-191.

Such holdings are fairly common. *See, e.g.*, *State* v. *Ben*, 362 P.3d 180, 183-184 (N.M. Ct. App. 2015); *State* v. *Kent*, 678 S.E.2d 26, 31-33 (W. Va. 2009); *State* v. *Wright*, 203 P.3d 1027, 1031-1040 (Wash. 2009); *State* v. *Wade*, 161 P.3d 704, 715 (Kan. 2007); *State* v. *Pexa*, 574 N.W.2d 344, 347 (Iowa 1998); *United States* v. *Ham*, 58 F.3d 78, 84-86 (4th Cir. 1995); *United States* v. *Wood*, 958 F.2d 963, 971-972 (10th Cir. 1992); *United States ex rel. Jackson* v. *Follette*, 462 F.2d 1041, 1049-1050 (2d Cir. 1972); *People* v. *Jackson*, 231 N.E.2d 722, 730-731 (N.Y. 1967). The Court should grant certiorari to correct this widespread disregard for the Court's double-jeopardy precedents and reaffirm that the double-jeopardy protection rests on the formal steps of empaneling and discharging the jury, not on inferences about what charges a jury considered or what it might have concluded about those charges.

2. Other courts, by contrast, have properly applied the Court's precedent. The Arizona Supreme Court, for example, recently held that a defendant could not be retried for first-degree murder after a jury had previously been unable to agree on that charge (and therefore convicted of second-degree murder instead), because the trial court had not found the "genuine deadlock" that would constitute manifest necessity. *State* v. *Martin*, 446 P.3d 806, 809-810 (Ariz. 2019); *see also, e.g.*, *Livingston* v. *Murdaugh*, 183 F.3d 300, 301-

302 (4th Cir. 1999) (granting habeas relief where the defendant was retried for reckless homicide after a prior jury had been silent on that count while convicting on another); *Boyd* v. *State*, 118 S.E. 705, 705 (Ga. 1923) ("[T]he effect of silence as to one count will prevent another trial on the same count under the constitutional ground of former jeopardy.").[6]

As this Court's precedents have aged, however, even courts that once adhered to them have now taken a contrary approach. The Sixth Circuit is a prime example. In *Saylor* v. *Cornelius*, 845 F.2d 1401 (6th Cir. 1988), the defendant (Saylor) had been charged with murder as a principal, as an accomplice, and by conspiracy, *id.* at 1402. The jury found Saylor guilty after being instructed only on the conspiracy theory. *Id.* at 1402, 1408. The conviction was reversed on appeal for insufficient evidence, but the state court ruled that Saylor could be retried on the theory of accomplice liability. *Id.* at 1402-1403. Relying on *Green*, the Sixth Circuit granted habeas relief, holding that the Double Jeopardy Clause barred retrial. *Id.* at 1409. The court explained that "jeopardy had attached in Saylor's trial and … right up until the moment that the jury's verdict was announced, Saylor was in considerable jeopardy of being convicted of murder as an accomplice." *Id.* at 1408 (footnote omitted). "Once the jury returned its verdict, the failure to instruct on the accomplice liability theory terminated Saylor's jeopardy as effectively as" an acquittal. *Id.* at 1404. Even though the jury had never considered accomplice liability, the court contin-

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[6] The Georgia Supreme Court applied state law in *Boyd* because that case predated this Court holding in *Benton* that the Double Jeopardy Clause applies to the States, *see* 395 U.S. at 795-796.

ued, Saylor had already been "put to the expense and jeopardy of a full trial and … the essential result of the trial was favorable to Saylor on the charge of being an accomplice to murder." *Id.* at 1407; *see also Terry* v. *Potter*, 111 F.3d 454, 458 (6th Cir. 1997) (where a jury convicted the defendant of wanton murder and was silent on intentional murder, the defendant could not be retried for intentional murder after the conviction was reversed). Yet with the decision below, the Sixth Circuit has moved from adhering to this Court's double-jeopardy precedent to rejecting it.

Similarly, in *State* v. *Davis*, 67 P.2d 894 (Wash. 1937), the Washington Supreme Court (citing this Court's decision in *Selvester*) held that "where an indictment … contains two or more counts and the jury either convicts or acquits upon one and is silent as to the other, … the accused cannot again be put upon trial as to those counts," *id.* at 895. But the same court took a contrary approach more recently in *Wright*, "reject[ing] the defendants' contention that jeopardy [for intentional murder] terminated when the jury was discharged without an express verdict on intentional murder." 203 P.3d at 1036. The courts of New York and New Mexico have also reversed course over time. *Compare People* v. *Dowling*, 84 N.Y. 478, 483 (1881) ("[W]here … there is a specific verdict of guilty on one count, and the verdict is silent as to the other counts, … it is a bar to further prosecution on the counts on which the verdict is silent."), *and State* v. *Moreno*, 364 P.2d 594, 595 (N.M. 1961) (jury silence as to one count was legally equivalent to acquittal and "operates as a bar to further prosecution on that count" (citing *Jolly*, 170 U.S. 402)), *with Jackson*, 231 N.E.2d at 730 (defendant could be retried for felony murder after the jury was silent on that charge because the jury "had no reason to

consider the felony murder charge once it found the defendant guilty of premeditated murder"), *and Ben*, 362 P.3d at 183-184 (jeopardy did not terminate where there was no implied acquittal).

The discrepant fates of Saulsberry and his co-defendant, Franklin Howard, provide a particularly egregious example of a court reversing course. As explained, the two co-defendants were each initially found guilty of premeditated murder, with the jury remaining silent on felony murder. *See Howard*, 2004 WL 2715346, at *11. And each co-defendant's premeditated-murder conviction was then reversed on appeal. *See Howard*, 30 S.W.3d at 277-278. Yet in a span of under two years, the same court held both (1) that the jury's silence on felony murder precluded retrying Howard for that crime, and (2) that the *same jury's* silence—on that *same charge*—did not preclude retrying Saulsberry (who, as mentioned, was not present during the killing). *Compare Howard*, 2004 WL 2715346, at *11-12, *with* App. 50a-51a.

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"A free society does not allow its government to try the same individual for the same crime until it's happy with the result." *Gamble* v. *United States*, 139 S. Ct. 1960, 1996 (2019) (Gorsuch, J., dissenting). Yet that is exactly what the Tennessee Court of Criminal Appeals did here, and that is what numerous other courts do on a regular basis. Certiorari is warranted to end lower courts' widespread disregard of this Court's precedent.

III. This Case Is A Good Vehicle To Correct Lower Courts' Flouting Of This Court's Double-Jeopardy Precedent

This case presents a good opportunity for the Court to reaffirm its double-jeopardy precedent and bring lower courts back in line. Saulsberry has preserved his double-jeopardy claim at every stage. The claim was also considered and passed upon by both the state and federal courts in written opinions, providing this Court the benefit of those courts' prior consideration. And the case holds real and important consequences for Saulsberry—namely, the difference between a fifty-year sentence (which could be shortened if Saulsberry is released on parole) and life imprisonment.

Finally, because the Tennessee Court of Criminal Appeals' decision was contrary to this Court's precedent, AEDPA imposes no barrier to relief. The Court need not extend the holdings of *Wade*, *Green*, *Downum*, *Jorn*, or the numerous other cases cited above; it need only remind state and lower federal courts of their obligation to adhere to those cases. Doing so in this case will also make clear that defendants are entitled to vindication of their important double-jeopardy right even on habeas review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOSHUA M. KOPPEL
Counsel of Record
DANIEL S. VOLCHOK
ALLISON SCHULTZ
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
joshua.koppel@wilmerhale.com

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