NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

NOLAN ESPINDA,
Hawaii Department of Public Safety Director, et al.
Petitioners
and Cross-Respondents

- vs -

ROYCE C. GOUVEIA
Respondent
And Cross-Petitioner

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a jury's execution of a verdict form acquitting the defendant, and announcement that it has reached a verdict, suffice to erect a double jeopardy bar to retrial?

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Respondent Royce C. Gouveia conditionally petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit—to review the Ninth Circuit's judgment and decision that a jury's verdict of acquittal lacked sufficient finality to trigger a double jeopardy bar to a second trial—in the event this Court grants the petitioners a writ of certiorari to review other aspects of the Ninth Circuit's decision.

RELATED PROCEEDINGS

Related proceedings in the lower federal and state courts are set forth in the petitioners' Petition for a Writ of Certiorari, Pet. at 1, and the respondent's Brief in Opposition, BIO at 1.

JURISDICTION

The district court had jurisdiction pursuant to 28 USC §2241 and filed its written order granting the respondent a writ of habeas corpus on August 25, 2017. Petitioners' Appendix (Pet. App.) at 31–74. The Ninth Circuit had jurisdiction to review the district court's judgment and order pursuant to 28 USC §2241 and §2253, published its opinion affirming the district court on June 12, 2019, Pet. App. at 1–30, and denied en banc review on July 23, 2019, Pet. App. 75. This Court has jurisdiction to review the Ninth Circuit's judgment pursuant to 28 USC §1254.

CONSTITUTIONAL PROVISION

"No person shall be … subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V.

CASE STATEMENT

For a fuller statement of the case, see the respondent's Brief in Opposition, BIO at 1–11. The facts pertinent to his conditional cross-petition are briefly reiterated here.

Before a jury, the State of Hawaii tried the respondent on reckless manslaughter. Pet. App. at 32–33. The jury fully executed a verdict form, dated and signed by the jury foreperson, stating: "WE THE JURY in this case find the Defendant, NOT GUILTY." Brief in Opposition Appendix (BIO App.) at 1. Using a preprinted form denoted "Communication No. 3 from the Jury," the jury foreperson announced that the jury had ceased deliberating: "We reached a verdict," the note read. BIO App. at 2. But, believing the verdict "tainted" by some jurors' fears that a pro-prosecution spectator might retaliate against them for acquitting the respondent, the state trial court refused to "take" and "receive" the verdict and, without the respondent's consent, declared a mistrial after questioning each juror about the supposed taint. Pet. App. at 39–41; BIO App. at 4–85, 110, 112, 119.

Among other things, the respondent unsuccessfully argued in the trial court that the jury's verdict should be accepted and should bar a second trial. BIO App. at 86–87; Petitioners' Appendix (Pet. App.) at 37, 40. The trial court and the state appellate courts all treated the verdict as being final, relying on that finality to conclude that the trial court could not further instruct the jury (in a fashion that would assuage fear of retaliation) and have them continue deliberating. BIO App. at 95, 117; see also Pet. App. at 82. In a timely commenced federal habeas proceeding,

the respondent pursued the claim that the jury's verdict sufficed to trigger double jeopardy because the jury unequivocally announced that they had ceased deliberating and had acquitted the respondent. Pet. App. at 31–32. The district court ruled the acquittal was not final enough to trigger a double jeopardy bar because the trial court hadn't "received" it. Pet. App. at 56–62. On the petitioners' appeal (having lost in the district court on the issue of manifest necessity), the Ninth Circuit acknowledged that the state courts "suggested" the verdict was final, but nonetheless agreed with the district court that it wasn't; the Ninth Circuit accordingly rejected the respondent's argument that the verdict barred retrial. Pet. App. at 26–27.

REASON FOR GRANTING THE CONDITIONAL CROSS- PETITION

1. The Fifth Amendment's double jeopardy clause "afford[s] absolute finality to a jury's verdict of acquittal." *Burks v. United States*, 437 U.S. 1, 16 (1978). (emphasis omitted). This Court addressed what counts as an acquittal, when the fact-finder at issue is a jury, in *Blueford v. Arkansas*, 566 U.S. 599 (2012). Blueford contended that he could not be retried for capital and first-degree murder, because the jury foreperson reported—in between the two *Allen* instructions the trial court gave the jury—that the jury had voted unanimously for "not guilty" on capital and first-degree murder, but were deadlocked on manslaughter and had not yet deliberated on negligent homicide. *Blueford*, 566 U.S. at 603–606; see also *Allen v. United States*, 164 U.S. 492 (1896). This Court disagreed, because the jury hadn't ceased deliberating:

> We disagree. The foreperson's report was not a final resolution of anything. When the foreperson told the court how the jury had voted on

> each offense, the jury's deliberations had not yet concluded. The jurors in fact went back to the jury room to deliberate further, even after the foreperson had delivered her report. When they emerged a half hour later, the foreperson stated only that they were unable to reach a verdict. She gave no indication whether it was still the case that all 12 jurors believed Blueford was not guilty of capital or first-degree murder, that 9 of them believed he was guilty of manslaughter, or that a vote had not been taken on negligent homicide. The fact that deliberations continued after the report deprives that report of the finality necessary to constitute an acquittal on the murder offenses.

Blueford, 566 U.S. at 606.

In the present matter, the record demonstrates that the jury had concluded their deliberations and, accordingly, that their verdict has the finality necessary to constitute an acquittal under the double jeopardy clause. The jury foreperson fully executed a verdict form that stated: "We the jury in this case find the Defendant Not Guilty." BIO App. at 1 (some capitalization omitted). The jury foreperson also executed a note to the trial court that said the jury had "reached a verdict." BIO App. at 2. Subsequently questioned, each juror affirmed that their vote as not tainted and none registered the slightest misgivings about the jury's unanimous verdict. BIO App. at 4–85. The trial court, moreover, treated the verdict as final and relied on that finality to rule that it could not ask the jury to revisit it. Pet. App. at 82; BIO App. at 95. The Hawaii Supreme Court agreed. BIO App. at 117. And the Ninth Circuit acknowledged that the state courts appeared to believe the verdict was final and could not be revisited. Pet. App. at 25–26. What matters under *Blueford* is whether the jury concluded its deliberations; the record here demonstrates, unequivocally, that they had.

The district court and the Ninth Circuit reasoned that the verdict was not final because the trial court didn't read it aloud in open court. Pet. App. at 27, 56–62. That rationale does not comport with *Blueford*, or any of this Court's other double jeopardy cases. Finality in *Blueford* turned on what the *jury* did nor did not do (specifically, that the jury continued deliberating), not what the trial judge did or did not do. *Blueford*, 566 U.S. at 606. That focus comports with how a trial judge's ruling is assessed for whether it is an acquittal or not. In the context of a judge's ruling, an acquittal encompasses "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense," which includes "a ruling by the court that the evidence is insufficient to convict, a factual finding that necessarily establishes the criminal defendant's lack of criminal culpability, and any other ruling which relates to the ultimate question of guilt or innocence." *Evans v. Michigan*, 568 U.S. 313, 318–319 (2013) (citations, quotation marks, and brackets omitted). What matters there is whether the ruling is "merits-related," rather than procedural; when merits-related, the "ruling concludes proceedings absolutely." *Evans*, 566 U.S. at 319. The focus is on what the trial judge did in the ruling (whether she addressed the merits of the State's case for guilt), not what the judge did *with* the ruling afterwards.

In the context of a judge's ruling, moreover, this Court has "emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). And, to the point here, this Court has affirmed that "it has long been settled under the Fifth

Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when not followed by any judgment, is a bar to a subsequent prosecution for the same offence." *Green v. United States*, 355 U.S. 184, 188 (1957) (citation and quotation marks omitted). The sufficiency of finality as to a jury's passing on culpability should not turn on the form of what a trial judge does with it, when such trappings of formality do not control whether a trial judge's merits-related ruling is sufficiently final to constitute an acquittal.

Be it a jury's or a judge's determination that is under review, the standard should be the same. And when, as here, the record demonstrates that a jury ceased its deliberations by unanimously finding the defendant "not guilty," there should be no doubt that the jury has acquitted the defendant, no matter what the trial judge may thereafter do or not do, and thereby triggered a double jeopardy bar to retrial for the same offense.

CONCLUSION

This Court should deny the petition for a writ of certiorari, but if it does not, this Court should grant this conditional cross-petition for a writ of certiorari, because the issue raised in it provides an alternative, meritorious ground on which to affirm the Ninth Circuit.

The issue presented in this conditional cross-petition also provides this Court the opportunity to clarify two things. The first would clarify that the same standard, focusing on substance rather than form, applies to assess whether a defendant has been acquitted for purposes of the Fifth Amendment's double jeopardy clause, be the

fact-finder a judge or a jury. The second would clarify that what matters, when the jury is the fact-finder at issue, are not formal trappings (such as whether a trial court took or received the verdict, or thereafter conducted a discretionary poll of the jury, in open court), but whether the jury had concluded their deliberations.

DATED: Honolulu, Hawaii, November 5, 2019.

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