No. 19-6528

In The
Supreme Court of the United States

NOLAN P. ESPINDA, Warden, Director of the Department of Public Safety for the State of Hawaii; CLARE CONNORS, Attorney General of the State of Hawaii,

Petitioners and *Cross-Respondents*,

v.

ROYCE C. GOUVEIA,

Respondent and *Cross-Petitioner*.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR CROSS-RESPONDENTS IN OPPOSITION

DWIGHT NADAMOTO
Acting Prosecuting Attorney
CITY AND COUNTY OF HONOLULU
DONN FUDO*
Deputy Prosecuting Attorney
**Counsel of Record*
1060 Richards Street
Honolulu, Hawai'i 96813
(808) 768-6535
dfudo@honolulu.gov

Counsel for Petitioners

QUESTION PRESENTED

Does an undisclosed verdict form received by the trial court prior to the conclusion of the jury's deliberations and the substance of which was never announced by the trial court or otherwise made known to the court or the parties possess the finality *Blueford v. Arkansas*, 566 U.S. 599 (2012), requires to constitute a formal verdict resolving anything?

RELATED PROCEEDINGS

a. *Nolan P. Espinda,* Warden, Director of the Department of Public Safety for the State of Hawaii; CLARE CONNORS, Attorney General for the State of Hawaii, *Petitioners*, v. *Royce C. Gouveia*, Respondent. No. 19-516 Petition for Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

b. The Circuit Court of the First Circuit of the State of Hawai'i docketed the proceedings in the state trial court as *State v. Gouveia,* Crim. No. 12-1-1474. The state trial court denied orally Cross-Petitioner, Royce C. Gouveia's (hereinafter "Gouveia") motion in which he argued that double jeopardy barred his retrial (*see*, Gouveia's "Brief in Opposition Appendix" (hereinafter "BIO App.") at 103-106), after which the court filed "FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING STATE'S ORAL MOTION FOR MISTRIAL BASED ON MANIFEST NECESSITY". *See generally*, Case No. 19-516, Petitioners' Appendix (hereinafter "Pet. App.") at 76-83

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RELATED PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASON FOR DENYING THE CROSS-PETITION 4

I. The Question Presented Does Not Warrant Review 4

A. The ruling below is consistent with Supreme Court case law 4

B. The issue presented in the Cross-Petition neither warrants nor requires clarification of Supreme Court case law..... 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Blueford v. Arkansas,
566 U.S. 599 (2012) 4, 5, 6, 7, 9

Mattox v. U.S.,
146 U.S. 140 (1892) 4

State v. Gouveia,
139 Hawai‘i 70, 384 P.3d 846 (2016) 10

Teague v. Lane,
489 U.S. 288 (1989) 11

White v. Woodall,
572 U.S. 415 (2014) 10

RULES

Federal Rules of Criminal Procedure
Rule 31(d) 9
Hawai‘i Rules of Penal Procedure
Rule 31(c) 8, 9

STATEMENT OF THE CASE

In Gouveia's Conditional Cross-Petition for Writ of Certiorari (hereinafter "Cross-Petition") he seeks review of the United States Court of Appeals for the Ninth Circuit's ruling that no final verdict was rendered in his trial that would "trigger a double jeopardy bar to a second trial". *See generally*, Cross-Petition at 1. As noted herein below, the "Case Statement" of the Cross-Petition omits certain events that transpired during the trial in state court that are material to the court's ruling that there was no final verdict.

With regard to the jury's deliberations, Gouveia declares, in relevant part:

> 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. . . . 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.

Cross-Petition at 2 (internal and external citations omitted, punctuation altered).

First, Communication No. 3 was the undisclosed verdict form and on which the jury foreperson never announced that the jury had ceased deliberating. *See generally*, Pet. App. at 77. Second, the jury simultaneously sent Communication No. 3. with Communication 2 in which the jury informed the state trial court as follows: "'Concern. This morning on prosecutor's side of courtroom there was a man, shaved head, glaring and whistling at [Gouveia]. We have concern for our safety as jurors[ ]'". *Id*. at 77-78 (punctuation altered).

Third, the state trial court did not receive the undisclosed verdict form because "the parties asked that the jurors be individually voir dired about Communication No. 2". Pet. App. at 33-34. Fourth, "'[s]pecial precautions were taken to ensure no juror revealed the verdict" during the questioning (Pet. App. at 78), and "[t]he verdict was never taken for this case. At no point during the proceedings did the [state trial] [c]ourt take, read or otherwise get any indication of the jury's verdict." Pet. App. at 79. The Hawai'i Intermediate Court of Appeals "unsealed" the undisclosed verdict form for the first time during Gouveia's direct appeal. Pet. App. at 41.

With regard to the nature of the undisclosed verdict form, Gouveia asserts, in relevant part:

> 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.

Cross-Petition at 2 (external citations in original). The citations Gouveia provides do not support his assertion.

"BIO App. at 95" is an excerpt of the exchange between the state trial court and Gouveia's counsel that occurred after the questioning of the jurors that included the following:

> THE COURT: Well, if I declare a mistrial based on the reasons that [the deputy prosecutor] has given me, it's a no-brainer it's manifest necessity, right? There's no -- put it this way.
>
> There's no other remedy short of a mistrial that's going to cure this or allow us to take the verdict, correct? It's not like we can continue the trial --

[GOUVEIA'S COUNSEL]: I understand.

THE COURT: -- or I can give them a further instruction.

[GOUVEIA'S COUNSEL]: Correct, correct.

THE COURT: You know, they reached a verdict already and then they tell me that there was this other thing. So, you know, if I think it rises to the level of a mistrial, I'm pretty much going to find that there's manifest necessity 'cause there's nothing short of a mistrial that I can do. It's a tainted verdict, if that's going to be my ruling. I mean, you agree with that, right?

[GOUVEIA'S COUNSEL]: I would agree with that, your honor. [BIO App. at 95]

"BIO App. at 117" is an excerpt of the decision of the Hawai'i Supreme Court in which the court noted, in relevant part, "Under these circumstances, the circuit court determined that the verdict was already tainted and that neither a continuance nor additional jury instructions to ignore the outside influence would have been effective. This determination was reasonable." BIO App. at 117.

"Pet. App. at 82" is an excerpt of the state trial court's "FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING STATE'S ORAL MOTION FOR MISTRIAL BASED ON MANIFEST NECESSITY" (Pet. App. at 76), that included the following conclusion:

8. Under the totality of the circumstances in light of the plain language of Communication No. 2 and the voir dire of the individual jurors, the Court finds that the jury was not impartial in their deliberation and decision-making process. Based on the foregoing, there is no other remedy short of a mistrial to cure the issue at hand as neither a continuance nor a further jury instruction would appropriately address the issue of an impartial jury and its subsequent tainted verdict.

Pet. App. at 82.

REASON FOR DENYING THE CROSS-PETITION

I. The Question Presented Does Not Warrant Review

The Cross-Petition does not present the factors warranting this Court's review. The Ninth Circuit's ruling that the undisclosed verdict form that the trial court never received and the substance of which was never revealed did not constitute a final verdict for purposes of the Double Jeopardy Clause is consistent with the holding in *Blueford v. Arkansas*, 566 U.S. 599 (2012). Furthermore, Gouveia does not claim the ruling creates a circuit split. Nor do Gouveia's proffered reasons justify a departure from the considerations that govern the granting of certiorari.

A. The ruling below is consistent with Supreme Court case law

a. "[E]xternal causes tending to disturb the [jury's] exercise of deliberate and unbiased judgment" are "absolutely" forbidden and depending on the circumstances could require a trial court to declare a mistrial. *Mattox v. U.S.*, 146 U.S. 140, 149–50 (1892). The state trial court received the undisclosed verdict form together with jury Communication No. 2 that informed the state trial court of the following: "'Concern. This morning on prosecutor's side of courtroom there was a man, shaved head, glaring and whistling at [Gouveia]. We have concern for our safety as jurors[ ]'". Pet. App at 77 (punctuation altered). "Communication No. 2 raised the concern of the [c]ourt and both counsel that the incident may have substantially prejudiced [Gouveia's] right to a fair trial." Pet. App. 81.

"Based on Communication No. 2, both parties requested the court to individually voir dire the jurors regarding the communication[,]" (Pet. App. at 78), after which:

> . . . All twelve jurors were individually questioned on September 6, 2013, and September 9, 2013, by both the [c]ourt and parties specifically about Communication No. 2. Special precautions were taken to ensure no juror revealed the verdict during the individual voir dire.
>
> . . . The [c]ourt questioned the jurors individually and both counsel for the State and for [Gouveia] were given adequate opportunity to question each juror regarding Communication No. 2. [*Ibid*]

Ibid. Clearly, the jury had not completed its duties and pending the outcome of the questioning the possibility remained that the trial court would direct the jury to retire for further deliberations. Therefore, consistent with the holding in *Blueford*, the undisclosed verdict form "was not a final resolution of anything". *Id*. at 606.

b. Gouveia asserts, "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". Cross-Petition at 4. In particular, Gouveia declares, "What matters under *Blueford* is whether the jury concluded its deliberations; the record here demonstrates, unequivocally, that they had." *Ibid.* Gouveia's reliance on *Blueford* is misplaced.

In *Blueford,* the defendant stood trial for capital murder and the trial court instructed the jury "that the charge of capital murder included three lesser offenses: first-degree murder, manslaughter, and negligent homicide". *Id.*, 566 U.S. at 602.

After deliberating a few hours, the jury indicated to the trial court that it was deadlocked. *Blueford*, 566 U.S. at 603. The court issued an *Allen* instruction and the jury then continued deliberating, but shortly thereafter, the jury informed the court it was still deadlocked. *Ibid*. In response to the trial court's inquiry regarding the vote count on each specific charge, the foreperson stated that the jury was unanimous against guilt on both capital and first-degree murder but deadlocked on manslaughter. *Id*. at 603–04. The court issued another *Allen* instruction, and the jury continued deliberating. *Id*. at 604. A half hour later, the jury returned to the courtroom and indicated that they were still deadlocked. *Ibid*. The court then declared a mistrial and denied Blueford's motion to dismiss the capital and first-degree murder charges on double jeopardy grounds based on the foreperson's report. *Ibid*. The Supreme Court of Arkansas affirmed on interlocutory appeal holding, *inter alia*, "the foreperson 'was not making a formal announcement of acquittal'". *Id*. at 604–05 (punctuation altered).

Blueford sought review in the Supreme Court contending, *inter alia*, that "despite the absence of a formal verdict", the foreperson's announcement of the jury's unanimous votes constituted an acquittal. *Blueford*, 566 U.S. at 606. The Court rejected Blueford's contention, holding, in relevant part, "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." *Ibid*.

The Court explained,

> It was therefore possible for Blueford's jury to revisit the offenses of capital and first-degree murder, notwithstanding its earlier votes. And because of that possibility, the foreperson's report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses, quite apart from any requirement that a formal verdict be returned or judgment entered.

Blueford, 566 U.S. at 608.

The Ninth Circuit's ruling that the undisclosed verdict form was not a final verdict is consistent with the holding in *Blueford*. Depending on the outcome of the questioning of all the jurors, the trial court had the authority to refuse to accept the undisclosed verdict form and direct the jurors to retire for further deliberations. There was no revelation of the contents of the undisclosed verdict form because "the parties asked that the jurors be individually voir dired about Communication No. 2". Pet. App. at 33-34. Relatedly, "'[s]pecial precautions were taken to ensure no juror revealed the verdict" during the questioning. Pet. App. at 78. Furthermore, "[t]he verdict was never taken . . . At no point during the proceedings did the [state trial] [c]ourt take, read or otherwise get any indication of the jury's verdict[ ]" (Pet. App. at 79), therefore the undisclosed verdict form "was not a final resolution of anything". *Blueford*, 566 U.S. at 606.

Consistent with *Blueford*, the Ninth Circuit also recognized that the undisclosed verdict form did not satisfy the requirements of a formal verdict mentioned in *Blueford* (*Id*. 566 U.S. at 608), ruling that any such verdict "'must be rendered by the jury in open court and accepted by the court in order to become final'". Pet. App. at 27 (external citation and footnote omitted, punctuation altered).

Acknowledging the importance of the requirements that must be satisfied to validate, formalize, and finalize a verdict, the court explained,

> Had this case been in federal court, the verdict clearly would not have been final for double jeopardy purposes before its contents were known to the trial judge and parties. The Ninth Circuit has held:
>
> > 'Rule 31(d) [of the Federal Rules of Criminal Procedure] grants the judge or any party the absolute right to have the jury polled after it has returned its verdicts. Although their jury room votes form the basis of the announced verdict, the jurors remain free to dissent from the announced verdict when polled. In short, a jury has not reached a valid verdict until deliberations are over, the result is announced in open court, and no dissent by a juror is registered.'
>
> * * * *
>
> In federal court proceedings, when a poll 'reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.' Fed. R. Crim. P. 31(d).
>
> Even if a jury is not polled, a juror could presumably announce in open court his or her disagreement with other jurors, thereby preventing a verdict from being final. The jury could then be sent back to continue deliberations.

Pet. App. at 59-60 (brackets in original, external citations in original omitted, punctuation altered).

Significantly, Rule 31(c) of the Hawai'i Rules of Penal Procedure is similar to Rule 31(d) of the Federal Rules of Criminal Procedure and provides:

> **Poll of Jury.** When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, or there is not concurrence by the number of jurors stipulated to as being necessary for returning a verdict, the jury may be directed to retire for further deliberations or may be discharged.

As the district court aptly noted,

> The purpose of Hawaii's Rule 31(c) is to assure the court and the parties that a unanimous verdict has been reached and to give each juror the opportunity to indicate assent to the verdict in open court. *See Hawaii v. Uyesugi*, 100 Haw. 442, 457, 60 P.3d 843, 858 (2002); *see also Hawaii v. Yamada*, 99 Haw. 542, 562, 57 P.3d 467, 487 (2002) ('Criminal defendants are entitled to a unanimous verdict under the Hawai'i Constitution and pursuant to court rule.'). As illustrated by *Hawaii v. Keaulana*, 71 Haw. 81, 83, 784 P.2d 328, 329 (1989), jurors in Hawaii courts have actually indicated during polling that verdicts reached were not unanimous, resulting in continued deliberations. This demonstrates that even though the jury in the present case had unanimously agreed to acquit Gouveia and had informed the court that it had reached a verdict, that decision was not yet a final acquittal for double jeopardy purposes under Hawaii law, as jurors could still have changed their minds.

Pet. App. at 61 (citations in original, punctuation altered).

The requirements of Rule 31(d) of the Federal Rules of Criminal Procedure and Rule 31(c) of the Hawai'i Rules of Penal Procedure are not merely "trappings of formality" as Gouveia declares (Cross-Petition at 7), and instead, further "'[t]he very object of the jury system'" – "'to secure unanimity by a comparison of views, and by arguments among the jurors themselves.'" *Blueford,* 566 U.S. at 608 (external citation omitted). The rules also grant trial courts the authority to refuse to accept a purported verdict and direct the jury to retire for further deliberations. Accordingly, the Ninth Circuit correctly found that "the undisclosed verdict form did *not* constitute a final verdict for purposes of the Double Jeopardy Clause" (Pet. App. at 26 (emphasis in original)), noting it "'lack[ed] the [necessary] finality'" because it was "'possible for [the] jury to revisit . . . its earlier votes.' *Blueford*, 566 U.S. at 608". Pet. App. at 27 (external citation in original, punctuation altered).

B. The issue presented in the Cross-Petition neither warrants nor requires clarification of Supreme Court case law

In Gouveia's unsuccessful direct appeal to the Hawai'i Intermediate Court of Appeals he alleged the following "two points of error . . . 1) the circuit court abused its discretion in declaring a mistrial because manifest necessity was not present; and 2) the circuit court erroneously denied his motion to dismiss for violation of double jeopardy". *State v. Gouveia*, 139 Hawai'i 70, 75, 384 P.3d 846, 851 (2016). Following the Intermediate Court of Appeals' rejection of his points of error, the Hawai'i Supreme Court granted Gouveia's petition for certiorari review in which he presented the following three questions:

> 1. Did a divided [ICA] erroneously affirm the trial court's declaration of a mistrial, at the request of [the State], over [Gouveia's] objection, before receiving a jury's not guilty verdict, based on "manifest necessity" when each juror indicated that his or her verdict was not influenced by an extra-judicial incident?
>
> 2. Did a divided [ICA] erroneously affirm the trial court's denial of a Motion to Dismiss for Violation of Double Jeopardy based on the trial court's prior declaration of the mistrial?
>
> 3. Did a divided [ICA] erroneously rely on testimony which should not have been permitted pursuant to Rule 606(b) of the [HRE]?

Id. at 76, 384 P.3d at 852 (brackets in original).

Because Gouveia did not afford the state courts the opportunity to consider whether the undisclosed verdict form "suffice[d] to erect a double jeopardy bar to retrial", the appropriate time to consider the issue would be on direct, not habeas, review. *See*, *White v. Woodall*, 572 U.S. 415, 427 (2014) (the "appropriate time to consider [a] question as a matter of first impression would be on direct review, not

in a habeas case"); *see also*, *Teague v. Lane*, 489 U.S. 288, 310 (1989) ("[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands" (brackets in original, external citation omitted, punctuation altered)). Furthermore, the circumstances unique to this case do not reveal that the Ninth Circuit erred or that its ruling was based on Supreme Court case law that requires clarification.

CONCLUSION

For the reasons set forth above, the Cross-Petition for a writ of certiorari should be denied.

Respectfully submitted,

DWIGHT NADAMOTO
Acting Prosecuting Attorney
CITY AND COUNTY OF HONOLULU
DONN FUDO*
Deputy Prosecuting Attorney
**Counsel of Record*

December 4, 2019