No. 23-5090

In the Supreme Court of the United States

TRAVIS J. BROWN,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction to review petitioner's federal constitutional claim, when the lower courts denied that claim based on the longstanding state procedural rule that an issue raised and resolved on direct appeal is not cognizable in state habeas corpus proceedings.

2. Whether petitioner's first degree murder conviction violates the Double Jeopardy Clause.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

In re Travis J. Brown, S278794 (June 21, 2023) (petition for writ of habeas corpus denied) (state collateral review) (this case below).

People v. Brown, S268924 (July 14, 2021) (petition for review denied) (direct appeal).

California Court of Appeal, Fourth District:

In re Travis J. Brown, G061859 (Jan. 5, 2023) (petition for writ of habeas corpus denied) (state collateral review) (this case below).

People v. Brown, G058533 (Apr. 22, 2021) (judgment affirmed) (direct appeal).

People v. Brown, G049867 (May 4, 2016) (affirming in part and reversing in part) (direct appeal).

California Superior Court, Orange County:

In re Travis Jordan Brown, M-19887, M-19991 (13NF1076) (Sept. 16, 2022) (petition for writ of habeas corpus denied) (state collateral review) (this case below).

People v. Brown, 13NF1076 (Nov. 1, 2019) (judgment imposed).

United States District Court for the Central District of California:

Travis J. Brown v. Cisneros, No. 8:23-cv-01386-JWH-AJR (C.D. Cal.) (petition for writ of habeas corpus pending).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

STATEMENT

1. During a gang confrontation in July 2008, petitioner Travis Brown stepped up to a rival gang member and shot him in the head from close range, killing him. Pet. App. A 6, 11. In 2014, a jury convicted Brown of first degree murder and active participation in a criminal street gang with true findings on related firearm and gang sentence enhancements. *Id.* at 2, 4; Pet. App. B 1. The court of appeal affirmed the gang participation conviction but reversed the murder conviction and its attendant enhancements and remanded the matter for further proceedings on the murder charge. Pet. App. A 31; Pet. App. B 1. Brown was retried for first degree murder, convicted a second time, and sentenced to life imprisonment without the possibility of parole plus 35 years to life in prison. Pet. App. D 2, 10.

2. The petition asserts claims arising from the trial court's mishandling of certain verdict form irregularities at Brown's first trial, which are described as follows.

During deliberations, the jury notified the trial court that it was unable to reach a verdict. Pet. App. A 3. The jury did not sign or date the form indicating a deadlock. *Id.* When that form was returned to the jury, the jury informed the bailiff that it was withdrawing its notification of a deadlock. *Id.* Later that afternoon, the jury informed the bailiff that it had reached a verdict but preferred to wait until the next day to return it. *Id.* at 3, 21. The bailiff retrieved the verdict forms for the court to review. *Id.* The verdict forms included one signed and dated January 2, 2014, reflecting that the jury found

Brown "GUILTY" of first degree murder, as well as true findings on several sentence enhancements and special circumstance allegations. *Id*. at 24; 2 CT 316-317. [1] Those true findings included the jury's finding that Brown "committed first degree murder while an active participant in a criminal street gang and for a criminal street gang purpose." Pet. App. A 24; 2 CT 316-317. But the forms also included an unsigned form reflecting a "NOT GUILTY" verdict on the same charge. Pet. App. A 3, 21, 24; 2 CT 314. That form had a crossed-out date, and the words "withdrawl" (sic) and "void" appeared diagonally across the page in large letters. Pet. App. A 3, 21, 24; 2 CT 314. The jury failed to return a verdict on Count 2 on the charge of actively participating in a criminal street gang. *See* 4 RT 944; 2 CT 313.

The next day, and without informing counsel, the trial court sent the jury a note stating that "[t]he 'Not Guilty' form for Murder in the First Degree had 'withdrawal void' handwritten across the form. The Court has taken out that form and replaced it with a clean copy." Pet. App. A 3, 21; 2 CT 313. The court also asked the jury with respect to Count 2 to date and sign the "appropriate form for the verdict you have reached" or to indicate that it was unable to reach a verdict. 2 CT 313. Approximately ten minutes later, the jury notified the court that its verdicts were ready. Pet. App. A 3, 22. The jury returned the "GUILTY" verdict form on the first degree murder count that it had signed and

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[1] "CT" and "RT" refer to the Clerk's Transcript and the Reporter's Transcript filed in the court of appeal in case number G049867.

dated the previous day. *Id*. at 25-26; 2 CT 316-317. But it also submitted another "NOT GUILTY" verdict form for the same count, signed and dated January 2, 2014 (the prior day). Pet. App. A 25-26; 2 CT 315. In addition, the jury returned a verdict form dated January 3, 2014, reflecting a "GUILTY" verdict on Count 2. 2 CT 318.

The trial court received the verdict forms and privately deemed the "NOT GUILTY" verdict form on the murder charge "another mistake." Pet. App. A 25-26; 4 RT 945. With Brown and counsel present, the trial court had the clerk read in open court the guilty verdict forms for the two crimes charged—murder and active participation in a criminal street gang—as well as the jury's true findings on the sentence enhancement and special circumstance allegations attached to the murder conviction. Pet. App. A 4; 4 RT 938-939. At Brown's request, the clerk polled the jury "collectively as to all counts, enhancements and/or findings." 4 RT 940. Each juror individually stated in open court that the verdicts and findings as read by the court clerk were true and correct. *Id*. at 941; Pet. App. A 4, 29.

After the jury was excused, the court informed counsel for the first time of the verdict form irregularities. Pet. App. A 4, 25-26, 29; 4 RT 936, 944. The court explained that the jury had "scribbled out" the date on the first "NOT GUILTY" form, written "withdrawl" and "void" across that form, and "failed to indicate any verdict whatsoever" on Count 2. 4 RT 944-945. The court also told counsel that the jury "made another mistake" by "sign[ing] the not guilty

murder in the first degree, which is the one they had originally written 'withdrawn' and 'void.'" *Id.* at 945. The court noted that it would "memorialize" the verdict form irregularities by including them as part of the "court file, in case anybody has an issue with that." *Id.* The court later sentenced Brown. Pet. App. A 4.

3. The court of appeal reversed Brown's murder conviction and attendant enhancements for two reasons. Pet. App. A 17-29. First, in a decision issued in a separate case after Brown's trial, the California Supreme Court held that it was error to instruct a jury on a "natural and probable consequences" theory of aider and abettor liability for a first degree murder conviction. *Id.* at 17-20; see *People v. Chiu*, 59 Cal. 4th 155, 158-159 (2014). After "closely examin[ing] the record" of Brown's trial, the court of appeal concluded that the error in providing such an instruction in Brown's case was not harmless beyond a reasonable doubt. Pet. App. A 18. Second, the court of appeal held that the trial court's "decision to record the guilty verdict for first degree murder and to ignore the not guilty verdict rendered at the same time, rather than inform counsel of the problem," "implicated [Brown's] right to the assistance of counsel at a critical stage in the proceedings." *Id.* at 5, 24, 29. The court of appeal reversed the murder conviction and enhancements and remanded for further proceedings. *Id.* at 31.[2]

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[2] The court of appeal affirmed the judgment on Count 2 for active participation in a criminal street gang. Pet. App. A 31. That conviction is not challenged here.

In remanding for a possible retrial on the murder charge, the court of appeal rejected Brown's argument that retrial was barred because of the Double Jeopardy Clause and related state law requirements. Pet. App. A 21-25, 29-30. [3] As the court of appeal explained, those state statutory requirements set out "in prescriptive detail" the procedures a California state court must follow in receiving a jury verdict. *Id.* at 26 (citing *People v. Carbajal*, 56 Cal. 4th 521, 530 (2013)). Those procedures, set forth at California Penal Code section 1147, et seq., are designed to safeguard the criminal defendant's "right to an unanimous verdict," *People v. Anzalone*, 56 Cal. 4th 545, 555 (2013), to minimize the risk of the trial court "unduly . . . influencing the jury to reach a particular outcome," *Carbajal*, 56 Cal. 4th at 531, and to "eliminate any further risk of inconsistent verdicts" by "provid[ing] courts with specific mechanisms for prompting a jury's reconsideration of an erroneous or inconsistent verdict," *id.* at 536-537.

To implement these principles, California law provides that once a jury agrees upon a verdict, the jury must be brought into open court, and upon the foreperson's oral confirmation that a verdict has been reached, each juror must declare the same. Cal. Pen. Code §§ 1147, 1149. Either party may request juror polling, in which "each juror must orally affirm the verdict." *Anzalone*, 56 Cal. 4th at 551 (citing Cal. Pen. Code §§ 1163, 1164). Should "any one

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[3] *See also* Appellant's Opening Br. at 63-81, No. G049867 (trial court's handling of verdict forms "violat[ed] . . . appellant's constitutional rights of jury unanimity and double jeopardy underlying" certain statutory requirements)

answer in the negative, the jury must be sent out for further deliberation." Cal. Pen. Code § 1163. Similarly, the court may order jury reconsideration where it appears the jury misunderstood the law in rendering a verdict of guilty. Cal. Pen. Code § 1161. The court may not order reconsideration where the jury returns a verdict of acquittal. *Id*.

If "no disagreement is expressed" upon polling the jury, the verdict is complete, and the jury becomes subject to discharge. Cal. Pen. Code § 1164(a). It is this oral declaration by the jurors that constitutes the "true return of the verdict." *People v. Valenzuela*, 23 Cal. App. 5th 82, 85 (2018); *see People v. Traugott*, 184 Cal. App. 4th 492, 500 (2010) ("[I]t is 'the oral declaration of the jurors, not the submission of the written verdict forms [that] constitutes the *return* of the verdict'"); *People v. Green*, 31 Cal. App. 4th 1001, 1009 (1995) ("[T]here is no verdict absent unanimity in the oral declaration").

Citing those provisions, Brown argued on appeal that the jury's initial voided and "withdraw[n]" "not guilty" verdict form manifested an intent to acquit and therefore required dismissal of that charge. Pet. App. A 21-25. The court of appeal disagreed, reasoning that the jury's submission of a verdict form "with the words 'withdrawl' and 'void' scrawled across the form in large letters"—at the same time that it submitted "a signed and dated guilty verdict *on the same count*"—"does not demonstrate an intent to acquit on that count." *Id.* at 24. "The jury's act of crossing out the date and signature and writing 'withdrawl' and 'void' . . . negates the possibility of any such inference." *Id.*; *see*

also id. at 25 (verdict forms did not "'manifest [the jury's] intention to acquit' such that retrial would be prohibited under double jeopardy").

Brown also argued that the trial court's handling of the inconsistent verdict forms, "one for guilty and one for not guilty," barred retrial. Pet. App. A 25. He reasoned that the "court refused to accept the not guilty verdict and, as the jury returned a not guilty verdict on count one, he cannot be retried for that offense." *Id.* at 30. The court of appeal agreed that the trial court's handling of the verdict forms resulted in prejudicial error. *Id.* at 25. But it rejected Brown's argument that he could not be retried. *Id.* The court reasoned that the jury's submission of guilty and not guilty verdict forms on the same count was not "the equivalent of a verdict of acquittal." *Id.* at 29-30. Rather, the jury's intent was "unintelligible." *Id.*; *see id.* at 28 ("there is no recordable verdict when the jury purports to find the defendant guilty and not guilty on the same count"); *id.* at 29 (verdict on murder count "is simply unintelligible"). "Because the jury did not unequivocally indicate an intent to acquit," the prosecution was not precluded from retrying Brown on the murder charge. *Id.* Brown did not seek review of the court of appeal's decision in the California Supreme Court or this Court.

4. Before his retrial, Brown moved to unseal juror contact information from his first trial to ascertain whether the jury had intended to acquit. Pet. App. D 11, 14. He explained that, if the jury had intended to acquit, he would seek to dismiss the murder charge. *Id.* at 14; see Cal. Pen. Code, § 1385(a)

(superior courts may dismiss action in furtherance of justice). The trial court denied the request. Pet. App. D 11. Upon retrial, a jury found Brown guilty of first degree murder with related firearm and gang sentence enhancements, as well as a gang-murder special circumstance. *Id.* at 2, 10. The trial court imposed a total term of life imprisonment without the possibility of parole plus 35 years to life in prison. *Id.* at 10.

The court of appeal affirmed the conviction. Pet. App. D 2, 19. It held that the trial court had not abused its discretion in denying Brown's request for juror contact information. *Id.* at 14-15. The court of appeal also rejected Brown's claim that the evidence was insufficient to corroborate his accomplice's testimony that he was the shooter. *Id.* at 16-18. Brown presented those two issues in a petition for review to the California Supreme Court. *Brown v. California*, S268924. The California Supreme Court denied the petition in July 2021. *Id.* Brown again did not seek review in this Court.

5. Brown then filed two state habeas corpus petitions in the trial court in which he raised a total of six claims. Pet. App. B 10-11. Relevant here, Brown argued that his retrial on the murder charge violated double jeopardy. *Id.* at 10. The trial court denied the petitions in September 2022, rejecting the double jeopardy claim on the procedural ground that the claim had been considered and denied on direct appeal. *Id.* at 13. Brown filed habeas corpus petitions raising the same claims in the court of appeal and in the California Supreme

Court; each was summarily denied. Pet. App. C; *In re Travis J. Brown*, Nos. G061859, S278794.[4]

ARGUMENT

Brown seeks this Court's review of his claim that the Double Jeopardy Clause barred retrial on the murder charge. But this Court lacks jurisdiction to consider that claim: the trial court below denied the claim based exclusively on an adequate and independent state ground. And even if that were not so, there is no persuasive basis for this Court to grant review. To be sure, the trial court's handling of the verdict forms in Brown's initial trial was improper—as the court of appeal recognized in ordering a new trial. But the lower courts correctly rejected Brown's double jeopardy argument on the merits (in prior proceedings in which Brown did not seek review in this court), and those decisions do not conflict with this Court's precedents or the other federal and state authorities cited in the petition.

1. Brown appears to seek review of the court of appeal's May 2016 decision rejecting the claim that retrial was barred under double jeopardy principles. Pet. 1. But Brown did not seek review of that decision in the California Supreme Court or file a petition for a writ of certiorari seeking review in this Court. *See* 28 U.S.C. § 1257 ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may

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[4] Petitioner recently filed a federal petition for a writ of habeas corpus, raising a double jeopardy claim. *Travis J. Brown v. Cisneros*, No. 8:23-cv-01386-JWH-AJR (C.D. Cal.). That petition remains pending.

be reviewed by the Supreme Court by writ of certiorari[.]"). Nor did he raise a double jeopardy challenge to his conviction following his retrial, or seek this Court's review of the decision affirming that conviction and sentence. *Id.* And the deadline for seeking review in this Court of those decisions has long passed. *See* 28 U.S.C. § 2101(d); Sup. Ct. R. 13.1, 13.2.

Brown suggests that he seeks review of the trial court's September 2022 denial of his state habeas petitions, in which he asserted his double jeopardy claim. Pet. 2; Pet App. B 10 (claim one alleged that "retrial on the murder charge following reversal on appeal for judicial misconduct during petitioner's first trial violated petitioner's constitutional right not to be placed twice in jeopardy"). But the trial court did not reach the merits of that claim; it instead denied the claim exclusively on the state procedural ground that the claim had been considered and rejected on direct appeal. *Id*. at 10, 13 (citing *In re Harris*, 5 Cal. 4th 813, 829 (1993) (issues raised and rejected on direct appeal cannot be considered anew in habeas corpus proceedings), *disapproved on another point in Shalabi v. City of Fontana*, 11 Cal. 5th 842, 855 (2021). That denial was the "last reasoned opinion on the claim," because the court of appeal and the California Supreme Court summarily denied petitioner's subsequent state habeas petitions. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).[5] And where the "last reasoned opinion on the claim explicitly imposes a procedural" bar to

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[5] *In re Travis Brown*, No. G061859 (Jan. 5, 2023 order of the court of appeal summarily denying habeas relief); Pet. App. C (June 21, 2023 order of the California Supreme Court summarily denying habeas relief).

considering a claim, this Court "presume[s] that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Id.*; *see also Kernan v. Hinojosa*, 578 U.S. 412, 414-415 (2016) (per curiam) (similar).

Under the adequate and independent state ground doctrine, the trial court's denial of petitioner's claim on state procedural grounds bars this Court's review. "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies whether the state law ground is substantive or procedural. *Id.* "Ordinarily, a violation of a state procedural rule that is 'firmly established and regularly followed' will be adequate to foreclose review of a federal claim." *Cruz v. Arizona*, 598 U.S. 17, 25-26 (2023). "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman*, 501 U.S. at 729.

The rule in California barring a habeas petitioner from relitigating a claim already considered and rejected on direct appeal—known as the *Waltreus* rule—is firmly established. *See In re Waltreus*, 62 Cal. 2d 218, 225 (1965). The rule exists to ensure that habeas corpus proceedings do not "serve as a second appeal," *id.*, but instead as an "extraordinary remedy applicable when the usual channels for vindicating rights—trial and appeal—have failed." *In re Reno*, 55 Cal. 4th 428, 476-477 (2012), *superseded by statute on other grounds*

as stated in In re Friend, 11 Cal. 5th 720, 725-741, 745 (2021). Indeed, "[t]here may be no more venerable a procedural rule with respect to habeas corpus" in California: its origins date to 1945 and the rule has "retain[ed] continued, if not enhanced, power." *Reno*, 55 Cal. 4th at 476-477; *see also Harris*, 5 Cal. 4th at 825-829.

The trial court here expressly denied Brown's double jeopardy claim on the basis that it had been "considered and denied on appeal," and "[i]ssues raised and rejected on appeal cannot be renewed in a petition for writ of habeas corpus." Pet. App. D 13 (citing *Harris*, 5 Cal. 4th at 829). The trial court's resolution of the claim on state law grounds is "sufficient to support the judgment," *Coleman*, 501 U.S. at 729, and this Court lacks jurisdiction to reach the merits of Brown's double jeopardy claim. *Cf. Walker v. Martin*, 562 U.S. 307, 316-317 (2011).

2. Even if this Court had jurisdiction, Brown's double jeopardy arguments would not warrant this Court's review. The court of appeal's 2016 resolution of Brown's double jeopardy claim does not conflict with this Court's precedents or any of the other decisions cited in the petition. And Brown identifies no other persuasive reason for review.

a. Brown contends that review is warranted because the court of appeal "erroneous[ly] reli[ed]" on this Court's decision governing inconsistent verdicts on separate counts in *United States v. Powell*, 469 U.S. 57 (1984), when addressing Brown's double jeopardy claim. Pet. 12-15. Brown is incorrect.

In *Powell*, the Court affirmed the principle that "[c]onsistency in the verdict is not necessary." 469 U.S. at 62 (quoting *Dunn v. United States*, 284 U.S. 390, 393 (1932)). "[W]here truly inconsistent verdicts have been reached" on different counts of an indictment, "the most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show they were not convinced of the defendant's guilt." *Id.* at 64-65 (quoting *Dunn*, 284 U.S. at 393). As a result, neither the prosecution nor defendant "may . . . upset" inconsistent verdicts, and both verdicts in general must be given effect. *Id.* at 65.

The court of appeal recognized that *Powell* did not "govern a situation where there exists a guilty and not guilty verdict on the same count and against the same defendant." Pet. 13; *see also* Pet. App. A 28. Indeed, the court expressly distinguished *Powell*, reasoning that *Powell* "does not apply when the inconsistent verdict consists of a guilty and a not guilty verdict in the same count. Effect cannot be given to both." Pet. App. A 28. The court of appeal explained that "[w]hen a jury states it has a verdict and submits signed and dated guilty and not guilty verdicts on the same count, the flaw is not merely one of inconsistency in the verdicts; the jury's verdict is simply unintelligible." *Id.* at 29.[6]

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[6] *See also* Pet. App. A 28 ("there is no recordable verdict when the jury purports to find the defendant guilty and not guilty on the same count"); *id.* at 30 ("the

Instead of relying on *Powell*, the court of appeal rested on well-established double jeopardy principles to hold that retrial was not barred under the specific circumstances presented in this case. The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense. *Oregon v. Kennedy*, 456 U.S. 667 (1982). And it "attaches particular significance to an acquittal," *United States v. Scott*, 437 U.S. 82, 91 (1978), which operates as an absolute bar to re-prosecution. *Fong Foo v. United States*, 369 U.S. 141, 143 (1962).

As the court of appeal explained, the jury in Brown's first trial did not return "the equivalent of a verdict of acquittal." Pet. App. A 30. The jury's intent was "unintelligible," and it did not "unequivocally indicate an intent to acquit." *Id.* While the jury had returned one "NOT GUILTY" verdict form, it also returned a "GUILTY" verdict form on the same count, and every juror agreed when polled that the guilty verdicts read in open court were true and correct. *Id.* at 29-30; *supra* p. 3.

The relevant circumstances surrounding the jury's return of the verdict forms support the court of appeal's conclusion that the jury did not manifest an intent to acquit. Among other things, the jury expressly found true the sentencing enhancements that had been alleged in connection with the murder. 2 CT 316-317. The jury was also instructed that if it acquitted Brown

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jury's intent is unintelligible"); *id.* ("it cannot be said that [the verdict form irregularities] is the equivalent of a verdict of acquittal"); *id.* ("the jury did not unequivocally indicate an intent to acquit").

of first degree murder, it was to consider whether Brown committed the lesser offense of second degree murder, and sign and return the appropriate verdict form on that charge. 1 CT 287-288; 4 RT 907-909. It was also instructed that if it deadlocked on the first degree murder charge (or as to second degree murder), it was to inform the court of the deadlock. 1 CT 287-288; 4 RT 907-909. The jury did neither. The jury thus did not "manifest" an "intention to acquit such that retrial would be prohibited under double jeopardy." *Id.* at 25; *see also Carbajal*, 56 Cal. 4th at 532 (distinguishing between inconsistent verdicts and "ambiguous" verdicts where "it was not possible to understand whether the jury had actually convicted or acquitted the defendant of the specified counts").

b. The court of appeal's reasoning shows why its decision is not "incompatible" (Pet. 14) with decisions from the federal courts of appeal addressing "internally inconsistent" verdicts. *See id.* at 12-15. In Brown's view, "several federal circuit courts of appeals have made clear that *Powell* does not control the analysis" when "inconsistent verdicts" are returned on the same count. *Id.* at 13 (citing *United States v. Shippley*, 690 F.3d 1192 (10th Cir. 2012), *cert. denied*, 568 U.S. 1110 (2013); *United States v. Randolph*, 794 F.3d 602 (6th Cir. 2015); *United States v. Pierce*, 940 F.3d 817 (2d Cir. 2019)). But there is no conflict with the court of appeal's decision on that issue. The court of appeal below expressly reached the same conclusion and distinguished *Powell* in addressing whether retrial was barred. *Supra* pp. 13-14.

Brown also briefly suggests that the same federal appellate decisions conflict with the decision below on "principles of double jeopardy." Pet. 14. That is incorrect. As Brown acknowledges, the Tenth Circuit's decision in *Shippley* "did not consider questions emanating from the double jeopardy clause." Pet. 14. The Tenth Circuit instead considered whether the district court erred by ordering a jury to deliberate further after it returned a general verdict finding the defendant guilty of a conspiracy charge, but also returned a finding on a special interrogatory that the defendant had not conspired to distribute any of the particular drugs listed in the indictment. 690 F.3d at 1193. The court observed that "[s]omething had to give": "To enter an acquittal, the district court would have needed to disregard the fact that the jury expressly found Mr. Shippley guilty. To enter a guilty verdict, the court would have needed to overlook the special verdict findings that Mr. Shippley did not conspire to distribute any of the drugs at issue in the case." *Id.* at 1195. The court concluded that "nothing in *Powell* . . . speaks either explicitly or implicitly about what a court's do to in these circumstances, let alone suggests the district court committed an error of constitutional magnitude" by asking the jury to deliberate further. *Id.* In rejecting the defendant's arguments, the court explained that it "did not purport to address other arguments, possibly emanating from the Double Jeopardy Clause or otherwise." *Id.*

The two other federal appellate decisions cited in the petition are also distinguishable. In each case, the courts confronted verdicts where the jury's

special findings negated an essential element of the offense of conviction. In *Randolph,* the Sixth Circuit reversed a judgment of conviction after a jury returned a guilty verdict on a drug trafficking conspiracy charge at the same time it returned the special finding that the government had proven that the amount of cocaine, crack cocaine, and marijuana involved in the conspiracy was "none." *Randolph*, 794 F.3d at 607. The jury's unanimous special verdict finding "negat[ed] an essential element of the charged drug conspiracy," reflecting that the government had failed to prove the defendant guilty of the charged conspiracy beyond a reasonable doubt. *Id*. at 612-613. The court further explained that "[w]here a jury's special verdict finding negates an essential element of the offense, the defendant must be acquitted and cannot be retried on that offense." *Id.* at 612. Under those circumstances, "[t]o allow a retrial when the government fails to prove an essential element of the charge beyond a reasonable doubt violates the Double Jeopardy Clause of the Fifth Amendment." *Id.*

In *Pierce*, the Second Circuit addressed verdict forms "similar" to the forms addressed in *Randolph.* 940 F.3d at 824. The district court in *Pierce* had received a general guilty verdict on a conspiracy charge and special findings that the government had "Not Proven" that the conspiracy involved any of the four types of narcotics charged in an indictment. 940 F.3d at 819. The Second Circuit "agree[d] with the Sixth Circuit in *Randolph* that the

appropriate remedy for the inconsistency (where the jury was not given the opportunity to reconsider) was to set aside the guilty verdict." *Id.*

The circumstances encountered in *Randolph* and *Pierce* are not similar to the circumstances that arose during Brown's first trial. In each of those cases, the jury rendered by way of a special interrogatory a particularized and unanimous finding that directly negated an essential element of the charged offense. In contrast, there was no specific, unanimous finding here reflecting that the prosecutor failed to prove at trial a particular element of the offense of murder. The jury instead submitted two general verdict forms on the same offense, with neither form reflecting a unanimous finding that "negate[d]" an essential element of an offense barring retrial. As the court of appeal concluded in 2016, the verdict forms here were "unintelligible"; at a minimum, they did not reflect an intention to acquit. Pet. App. A 30; *supra* pp. 6-7.

c. Brown also contends (Pet. 17-21) that review is warranted because the court of appeal's decision conflicts with this Court's decision in *Kennedy*, 456 U.S. 667. In *Kennedy*, this Court held that a defendant who successfully obtains a mistrial may prevent retrial on double jeopardy grounds only when the mistrial was instigated by prosecutorial conduct "intended to 'goad' the defendant into moving for a mistrial." 456 U.S. at 676. Although a defendant's request for a mistrial in ordinary circumstances "constitutes a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact," "a narrow exception to the rule" bars

retrial when the government intentionally goads a defendant into moving for a mistrial. *Id.* at 674, 676.

Kennedy does not apply here. The prosecution did not goad Brown into moving for a mistrial; Brown never moved for a mistrial; and there was no mistrial declared in Brown's case. And as Brown acknowledges, this Court has not "expanded the 'narrow exception'" recognized in *Kennedy* in any decision that would conflict with the court of appeal's decision from 2016. Pet. 21.

For the same reason, the lower court decisions cited in the petition that address *Kennedy* do not "conflict[]" with the decision below. Pet. 21. The federal cases that Brown cites involved straightforward applications of this Court's decision in *Kennedy*.[7] The same is true of *Butler v. State*, 95 A.3d 21 (Del. S. Ct. 2014), which held that a mistrial granted upon the defendant's request barred retrial since that request had been precipitated by the judge's actions showing that she did not want to handle a trial that week. *Butler*, 95 A.3d at 37. Brown also cites *Commonwealth v. Britt*, 465 Mass. 87 (2013), but

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[7] *See United States v. Mondragon*, 741 F.3d 1010 (9th Cir. 2013) (district court's participation in a mid-trial settlement conference held at defendant's request, after which jury was dismissed pursuant to mistrial to which defendant consented, did not bar retrial because such participation did not constitute judicial "goading" of the sort contemplated in *Kennedy*); *Earnest v. Dorsey*, 87 F.3d 1123, 1130 (10th Cir. 1996) (applying *Kennedy* in rejecting defendant's claim that trial court's grant of mistrial upon his request barred a retrial; trial court's actions in trying to force immunized prosecution witness into testifying were not intended to provoke mistrial); *United States v. Borromeo*, 954 F.2d 245, 247-248 (4th Cir. 1992) (affirming trial court's finding that prosecutor did not "intentionally provoke[] the defense into moving for mistrial).

Britt did not involve any issue pertaining to the Double Jeopardy Clause. And in *People v. Batts*, 30 Cal. 4th 660, 685-696 (2003), the California Supreme Court interpreted state constitutional double jeopardy protections, set forth in article 1, section 15 of the California Constitution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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