No. 24-____

IN THE

Supreme Court of the United States

KAREN READ,

Petitioner,

v.

NORFOLK COUNTY SUPERIOR COURT;
ANDREA J. CAMPBELL, Massachusetts Attorney General,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a final and unanimous, but unannounced, decision by a jury following trial that the prosecution failed to prove a defendant guilty of a charged offense constitutes an acquittal precluding retrial under the Double Jeopardy Clause.

2. Whether a defendant who produces credible evidence of such a final, unanimous, and unannounced acquittal is entitled to a post-trial hearing to substantiate the fact of such acquittal.

RELATED PROCEEDINGS

Read v. Norfolk County Superior Court, No. 25-1257, U.S. Court of Appeals for the First Circuit, Judgment entered March 27, 2025.

Read v. Norfolk County Superior Court, No. 25-CV-10399, U.S. District Court for the District of Massachusetts, Order denying habeas petition entered March 13, 2025.

Read v. Commonwealth, No. SJC-13663, Supreme Judicial Court of Massachusetts, Opinion entered February 11, 2025.

Commonwealth v. Read, No. SJ-2024-0332, Supreme Judicial Court for Suffolk County, Judgment entered March 12, 2025.

Commonwealth v. Read, Criminal Action 22-00117, Norfolk County Superior Court, Order denying motion to dismiss entered August 23, 2024.

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No official citation of the opinion of the First Circuit Court of Appeals is yet available, but the opinion may be found at 2025 WL 926289 (1st Cir. Mar. 27, 2025). Pet. App. 1a-19a. The opinion of the district court is unpublished but is available at 2025 WL 815048 (D. Mass. Mar. 13, 2025). Pet. App. 20a-56a. The opinion of the Massachusetts Supreme Judicial Court is reported at 495 Mass. 312, 250 N.E.3d 551. Pet. App. 57a-87a. The Massachusetts Superior Court's order denying Read's motion to dismiss is not reported. Pet. App. 88a-114a.

STATEMENT OF JURISDICTION

The judgment of the First Circuit was entered on March 27, 2025. This Court has jurisdiction to review the judgment of the First Circuit on a writ of certiorari under 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

INTRODUCTION

This case is an ideal vehicle to resolve an issue of fundamental constitutional importance argued to the Court but not decided in *Blueford v. Arkansas*, 566 U.S. 599 (2012). The petitioner in *Blueford* argued

that, where the jury actually resolved some elements of a charged offense in the defendant's favor, no formal verdict need be returned for that decision to constitute an acquittal prohibiting re-prosecution under the Double Jeopardy Clause. The divided Court did not decide that question because, in *Blueford*, the majority concluded that the foreperson's mid-deliberation report regarding the jury's votes "lacked the finality necessary to amount to an acquittal . . . , quite apart from any requirement that a formal verdict be returned or judgment entered." *Id.* at 608.

The instant case squarely presents the question that *Blueford* did not decide. Here, beginning the day after petitioner's first trial ended in a mistrial, four jurors contacted trial counsel to inform them that the jury had reached a final and unanimous, but unannounced, conclusion that petitioner Karen Read is not guilty of murder in the second-degree and leaving the scene of the collision, two of the three charges pending against her. A statement by a fifth juror, relayed indirectly to counsel via two intermediaries, indicated that the jury had agreed that Read is not guilty of the murder charge. In addition, one of the jurors made a similar representation to the prosecutor. The jury's not guilty verdicts were not announced because the trial court, believing but not confirming that the impasse reported in a series of three juror notes applied to all, rather than only some, counts, never inquired regarding the scope of the deadlock and the jurors failed to volunteer to the trial court that their impasse was limited to one of the three counts rather than all.

The First Circuit held, "even if we assume that the jury unanimously voted in private that the prosecution had failed to prove its case on Counts One and Three, the jury did not 'act[] on [that] view,'" and, accordingly, there was "no act here that could be considered a 'ruling' or characterized as an acquittal." Pet. App. 18a (quoting *McElrath v. Georgia*, 601 U.S. 87, 96 (2024)). That holding runs contrary to this Court's repeated emphasis, over more than a century, that what constitutes an acquittal for purposes of the Double Jeopardy Clause is controlled by substance, not form. The First Circuit's related denial of a post-verdict *voir dire* further prevented Read from proving from all 12 jurors what many of them without any contradiction from the other jurors were representing: that they had reached a final, unanimous, unconditional decision to find her not guilty of murder (Count 1) and leaving the scene (Count 3).

STATEMENT OF THE CASE

A. Read's First Trial Ends in a Mistrial

On June 9, 2022, Read was charged in three separate indictments with second-degree murder in violation of Mass. Gen. Laws c. 265, § 1 (Count 1); manslaughter while operating under the influence of alcohol in violation of Mass. Gen. Laws c. 265, § 13½ (Count 2); and leaving the scene of a collision resulting in death in violation of Mass. Gen. Laws c. 90, § 24(2)(a½)(2) (Count 3). COA Joint App. 186-91. A jury trial began on April 16, 2024 in

Massachusetts Superior Court. The trial court declared a mistrial on July 1, 2024.

On June 25, 2024, the jury began deliberations after receiving instructions from the trial court. The court instructed the jurors, "You should continue deliberating until you have reached a final verdict on each charge." COA Joint App. 237. It also noted that Count 2 contained "lesser included charge[s]" of involuntary manslaughter and motor vehicle homicide, which the jury should consider "even if [the Commonwealth] fail[ed] to prove the greater charge of manslaughter while operating a motor vehicle under the influence of liquor." COA Joint App. 226, 229. Later, in supplemental instructions to the jury, the court again described Count 2 as "encompass[ing] three separate charges." COA Joint App. 270.

On June 28, 2024, the fourth day of deliberations, the jury sent the following note to the court: "I am writing to inform you on behalf of the jury that despite our exhaustive review of the evidence and our diligent consideration of all disputed evidence, we have been unable to reach a unanimous verdict." COA Joint App. 297. The court sent the jury back to continue deliberations. COA Joint App. 301.

On July 1, 2024, the jury presented another note, stating:

> despite our commitment to the duty entrusted to us, we find ourselves deeply divided by fundamental differences in our opinions and state of mind. The divergence in our views are not rooted in a lack of understanding or

> effort but deeply held convictions that each of us carry, ultimately leading to a point where consensus is unattainable. We recognize the weight of this admission and the implications it holds.

COA Joint App. 311. The court gave a so-called *Tuey-Rodriguez* charge,[1] and sent the jury back to continue deliberations. COA Joint App. 311-14.

Later that day, the jury sent yet another note:

> despite our rigorous efforts, we continue to find ourselves at an impasse. Our perspectives on the evidence are starkly divided. Some members of the jury firmly believe that the evidence surpasses the burden of proof, establishing the elements of the charges beyond a reasonable doubt. Conversely, others find the evidence fails to meet this standard and does not sufficiently establish the necessary elements of the charges. The deep division is not due to a lack of effort or diligence but, rather, a sincere adherence to our individual principles and moral convictions. To continue to deliberate would be futile and only serve to force us to compromise these deeply held beliefs.

COA Joint App. 315. After reading the note on the record, the court, without any apparent consideration of alternatives such as asking whether the impasse was to all as opposed to just some

[1] "The *Tuey-Rodriguez* charge is a model instruction given when jurors report deadlock after due and thorough deliberation that is designed to urge the jury to reach a verdict by giving more serious consideration to opposing points of view." *Commonwealth v. Read*, 495 Mass. 312, 315 n.4 (2025) (citation omitted).

counts and without first inviting counsel to be heard, *sua sponte* declared a mistrial and dismissed the jury. COA Joint App. 315.

B. Post-Trial Juror Statements Reveal that Jury Found Read Not Guilty on Counts 1 and 3

The following day, on July 2, 2024, unsolicited by any party, one of the jurors ("Juror A") contacted one of the attorneys for Read, Alan Jackson. Juror A stated that s/he "wish[ed] to inform [Attorney Jackson] of the true *results*" of the jury's deliberations. COA Joint App. 333. According to Juror A, "the jury unanimously agreed that Karen Read is NOT GUILTY of Count 1 (second degree murder). Juror A was emphatic that Count 1 (second degree murder) was 'off the table,' and *that all 12 of the jurors were in agreement that she was NOT GUILTY of such crime*." COA Joint App. 334 (emphasis added). "[T]he jury also unanimously agreed that Karen Read is NOT GUILTY of Count 3 (leaving the scene with injury/death)." COA Joint App. 334.

One day later, on July 3, 2024, another attorney for Read, David Yannetti, was contacted by "two different individuals (hereinafter, 'Informant B' and 'Informant C') who had received information from two distinct jurors (hereinafter 'Juror B' and 'Juror C') both of whom were part of the deliberating jury in this case." COA Joint App. 330.

Informant B sent Attorney Yannetti "a screenshot he/she had received from someone (hereinafter, 'Intermediary B') of text messages that

Intermediary B had received from Juror B. In that screenshot, Juror B texted the following to Intermediary B: 'It was not guilty on second degree. And split in half for the second charge. . . . *I thought the prosecution didn't prove the case. No one thought she hit him on purpose or even thought she hit him on purpose* [sic].'" COA Joint App. 330 (emphasis added). Juror B later placed an unsolicited phone call to Attorney Yannetti, confirming that the foregoing information, which had been publicly filed in an affidavit, was accurate. COA Joint App. 377. "Juror B clarified, however, that he/she meant to write, 'No one thought she hit him on purpose or even knew that she had hit him.'" COA Joint App. 377-78. Juror B further told Attorney Yannetti s/he "believe[d] that every member of the jury, if asked, w[ould] confirm that the jury reached Not-Guilty verdicts on indictments (1) and (3)." COA Joint App. 378.

Informant C had been in contact with another individual ("Intermediary C") who is a co-worker and friend of Juror C and joined a Zoom meeting during which Juror C discussed the trial. Informant C sent Attorney Yannetti the below screenshots of his/her text messages with Intermediary C regarding what Juror C revealed in the Zoom meeting:

> Intermediary C: "no consideration for murder 2. manslaughter started polling at 6/6 then ended deadlock @ 4no8yes."
>
> ….
>
> Informant C: "interesting. if it was no consideration for murder two, shouldn't she

> have been acquitted on that count. and hung on the remaining chargers [sic] goes back to the jury verdict slip that was all confusing"
>
> Intermediary C: "she should've been acquitted I agree. Yes, the remaining charges were what they were hung on. and that instruction paper was very confusing."

COA Joint App. 331-32.

After the filing of Read's initial motion to dismiss, but before the superior court hearing on that motion, Attorney Jackson was contacted by two other deliberating jurors. The first, "Juror D," stated "that the jury reached NOT GUILTY verdicts on Count 1 and Count 3, and that the disagreement was solely as to Count 2 and its lesser offenses." COA Joint App. 340. S/he recounted that, "*after the jury was excused and aboard the bus, many of the jurors appeared uncomfortable with how things ended, wondering, Is anyone going to know that we acquitted [Karen Read] on Count 1 and 3?*" COA Joint App. 340 (emphasis added). Juror D unequivocally told counsel, "*Every one of us will agree and acknowledge that we found [Karen Read] NOT GUILTY of Counts 1 and 3. Because that's what happened*." COA Joint App. 340. "Juror E" similarly stated "that the jury was 'unanimous on 1 and 3' that Karen Read was NOT GUILTY of those charges." COA Joint App. 370.

The Commonwealth filed a post-trial notice of disclosure informing the court that, "[o]n Sunday July 21, 2024, [an] Assistant District Attorney ['ADA'] . . . received an unsolicited voicemail on his

office's phoneline from an individual, who identified their self as a juror by full name and seat number." COA Joint App. 372. The message stated, "it is true what has come out recently about the jury being unanimous on charges 1 and 3." COA Joint App. 372. The ADA received a subsequent message from the same individual stating s/he could "confirm unanimous on charges one and three, as not guilty and as of last vote 9-3 guilty on the manslaughter charges . . . ." COA Joint App. 372. The Commonwealth additionally "received emails from three individuals who identified themselves as jurors" and "indicated they wished to speak anonymously." COA Joint App. 372. The Commonwealth declined to substantively respond to the voice messages or emails, instead claiming in responsive emails that it was ethically prohibited from discussing such matters. COA Joint App. 372.

C. Read Raises Her Constitutional Claim in State Court

Read moved in the state trial court to dismiss Counts 1 and 3 arguing that the jury's final and unanimous decision, reflected in the post-trial affidavits, that she is not guilty of those counts constituted an acquittal precluding re-prosecution. COA Joint App. 323-24. Read additionally argued that she was entitled to a post-verdict judicial inquiry to substantiate the fact of the acquittals. COA Joint App. 327-28. The trial court denied Read's motion. The court "accept[ed]" the juror statements reflected in the affidavits "as true and accurate," as did each other court that reviewed the legal issues, for purposes of ruling on the motion, but

held that, "[b]ecause there was no open and public verdict affirmed in open court rendered in this case, the defendant was not acquitted of any of the charges." Pet. App. 100a. The court also held that Read was not entitled to post-verdict inquiry because her argument did "not implicate racial bias or her right to receive an impartial trial" and because her request "would necessarily require inquiry into the back and forth among the jurors during deliberations." Pet. App. 112a-113a.[2]

Read petitioned the Massachusetts Supreme Judicial Court ("SJC"), pursuant to Mass. Gen. Laws. c. 211, § 3, to review the superior court's ruling. COA Joint App. 52-88. A single justice referred the petition to the full court. COA Joint App. 470. The SJC ultimately affirmed the denial of Read's motion to dismiss concluding, like the trial court had, that, "because the jury did not publicly affirm that the defendant was not guilty of the charges, there was no acquittal barring retrial under the double jeopardy clause." Pet. App. 83a-84a. The SJC additionally held that "the trial judge did not err or abuse her discretion in denying [Read's] request for [post-trial] inquiry where it would not change the outcome of the defendant's first trial. The jury chose to report a deadlock, not a verdict, and no basis exists for further investigation into private discussions or subjective beliefs they declined to announce publicly in open court." Pet. App. 87a.

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[2] Read additionally contended that there was no manifest necessity to support the declaration of mistrial on Counts 1 and 3, but that claim is not raised in this Petition.

D. Decision Below

Read subsequently filed a federal petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2241 in federal district court, again contending, *inter alia*, that the jury's conclusion that she is not guilty constituted an acquittal and that she was entitled to post-verdict inquiry on that issue. COA Joint App. 36-46. The district court denied her petition, and Read appealed to the First Circuit.

A panel of the First Circuit affirmed. The First Circuit began from the premise, long-established in this Court's caselaw, that, "[i]n deciding whether a defendant was acquitted," the court must "'focus on substance over labels,' and 'look to whether the ruling's substance relates to the ultimate question of guilt or innocence.'" Pet. App. 16a (quoting *McElrath v. Georgia*, 601 U.S. 87, 94, 96 (2024)). Despite the fact that the *Blueford* Court expressly declined to find that lack of a formal verdict was dispositive regarding the Double Jeopardy implications of a jury finding, the First Circuit found *Blueford* to be "dispositive." Pet. App. 17a. The First Circuit stated the post-trial juror statements here were "far weaker" than the foreperson's mid-deliberation statement in *Blueford* because the statements here "do not describe when any votes were taken or whether such votes were preliminary or formal. Like *Blueford*, there is no sign that a final vote was taken, meaning that if any deliberations continued after a vote, jurors could have changed their minds. Nor did the jury announce its verdict in open Court." Pet. App. 18a (citations omitted). Ultimately, the First Circuit concluded, "even if we

assume that the jury unanimously voted in private that the prosecution had failed to prove its case on Counts One and Three, the jury did not 'act[] on [that] view,'" and "[t]here was simply no act here that could be considered a 'ruling' or characterized as an acquittal." Pet. App. 18a (quoting *McElrath*, 601 U.S. at 96). The First Circuit also concluded that the post-trial hearing requested by Read "would not be appropriate" because "the content of jury deliberations is [typically] kept secret to enable jurors to discuss their views freely and frankly and to protect them from harassment." Pet. App. 19a.

Read is facing re-prosecution starting with jury selection on April 1, 2025 by the same prosecutor for the very same offenses – murder and leaving the scene – despite powerful evidence that the jury in her prior trial found her not guilty. An Application for Stay of State Court Proceedings Pending Disposition of this Petition for Certiorari has been filed contemporaneously herewith.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The First Circuit's Ruling Conflicts with This Court's Double Jeopardy Caselaw, Including its Consistent Emphasis on Substance Over Form in Determining What Constitutes an Acquittal

As this Court recently reaffirmed, the ancient right to a jury trial is no mere "procedural formalit[y] but [rather a] fundamental reservation[] of power to the American people." *Erlinger v. United States*, 602 U.S. 821, 832 (2024) (citation omitted).

"By requiring the Executive Branch to prove its charges to a unanimous jury beyond a reasonable doubt, the Fifth and Sixth Amendments seek to mitigate the risk of prosecutorial overreach and misconduct . . . ." *Id.* "Prominent among the reasons colonists cited in the Declaration of Independence for their break with Great Britain was the fact Parliament and the Crown had 'depriv[ed] [them] in many cases, of the benefits of Trial by Jury.'" *Id.* at 829 (quoting ¶ 20). "After securing their independence, the founding generation sought to ensure what happened before would not happen again. As John Adams put it, the founders saw representative government and trial by jury as 'the heart and lungs' of liberty." *Id.* (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977)). It follows that a jury acquittal is entitled to the utmost respect in our criminal justice system. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) ("Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." (citation omitted)). The jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *Id.* at 572; *see also Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017) ("[T]he jury is a necessary check on governmental power" and "a tangible implementation of the principle that the law comes from the people.").

One of the central benefits of a right to a trial before an impartial jury is that if the jury acquits, the sovereign cannot re-prosecute. "The Double Jeopardy Clause provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" *Blueford v. Arkansas*, 566 U.S. 599, 605 (2012) (quoting U.S. Const., Amdt. 5).

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting h[er] to embarrassment, expense and ordeal and compelling h[er] to live in a continuing state of anxiety and insecurity, *as well as enhancing the possibility that even though innocent [s]he may be found guilty*.

Green v. United States, 355 U.S. 185, 187-88 (1957) (emphasis added); *see also Martin Linen*, 430 U.S. at 569 ("At the heart of this policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression."); *Blueford*, 566 U.S. at 605 (quoting *Martin Linen*).

"[W]hat constitutes an 'acquittal' is not to be controlled by the form" of the action in question. *Martinez v. Illinois*, 572 U.S. 833, 841-42 (2014) (quoting *Martin Linen*, 430 U.S. at 571). "Rather, [the Court] must determine whether" the action "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571.

"[L]abels—including those provided by state law—do not control [the] analysis . . . ." *McElrath v. Georgia*, 601 U.S. 87, 96 (2024) (citation omitted).

Here, the affidavits by Attorneys Jackson and Yannetti reflect post-trial statements by four deliberating jurors that the jury had reached a final, unanimous conclusion that Read is not guilty of Counts 1 and 3 (and an indirect statement by a fifth juror that they had agreed with respect to Count 1). A call by one juror to the prosecutor himself corroborated the trustworthiness of these representations. Both the trial court and the SJC, for purposes of ruling on the Double Jeopardy issue, "proceed[ed] from the assumption that the affidavits [we]re accurate." Pet. App. 79a n.14. Neither the Commonwealth nor Respondents ever challenged the authenticity or accuracy of the juror statements despite many opportunities to do so. There was nothing tentative about the jurors' statements. To the contrary, they were definitive in describing the result of the jury's deliberations. COA Joint App. 334 ("Juror A was emphatic that Count 1 (second degree murder) was 'off the table,' and that all 12 of the jurors were in agreement that she was NOT GUILTY of such crime."), 330 (reflecting text message from Juror B, "It was not guilty on second degree. . . . No one thought she hit him on purpose or even [knew that she had hit him]"), 340 ("Juror D, without hesitation, said in substance, *Every one of us will agree and acknowledge that we found [Karen Read] NOT GUILTY of Counts 1 and 3. Because that's what happened*."), 370 ("Juror E explained that the jury was 'unanimous on 1 and 3' that Karen Read was NOT GUILTY of those charges."). Despite

significant publicity that accompanied the filing of the defense motion relying on jury declarations, none of the remaining jurors ever communicated to the court, the court's staff, the District Attorney's office, defense counsel, or the media that they disputed the accuracy of the five jurors' representations – something likely to occur if the conclusions of a jury were being misrepresented in the declarations of the five jurors who were being quoted in the litigation.

The First Circuit's rejection of Read's claim of acquittal is rooted in a formalism that has been consistently rejected by this Court in a string of precedents spanning more than one hundred years. *See supra* pages 14-15 (citing cases); *Ball v. United States*, 163 U.S. 662, 671 (1896) ("However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."); *Hudson v. Louisiana*, 450 U.S. 40, 41 & n.1 (1981) (holding that judicial grant of new trial prohibited retrial on Double Jeopardy grounds, notwithstanding that the state "Code of Criminal Procedure d[id] not authorize trial judges to enter judgments of acquittal in jury trials"). This emphasis of substance over form applies in the context of both jury acquittals and judicial acquittals. This Court has, for example, "consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or *implied by a conviction on a lesser included offense* . . . ." *Price v. Georgia*, 398 U.S. 323, 329 (1970) (emphasis added)*; see also Green*, 355 U.S. at 191 ("[W]e believe this case," where defendant was charged with first and second-

degree murder and the jury returned a verdict finding him guilty of the lesser offense, "can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: 'We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.'").

The acquittal here was the jury's unanimous and final decision, reflected in the post-trial affidavits, that Read is not guilty. This Court has instructed that "*an acquittal has occurred if the factfinder acted on its view that the prosecution had failed to prove its case*." *McElrath*, 601 U.S. at 96 (citation omitted) (emphasis added). "[I]t is not dispositive whether a factfinder incanted the word acquit." *Id.* (citation omitted). Justice Sotomayor, joined by Justices Ginsburg and Kagan in dissent in *Blueford*, reaffirmed that, "[i]n ascertaining whether an acquittal has occurred, form is not to be exalted over substance. Rather, [the Court] ask[s] whether the factfinder has made a substantive determination that the prosecution has failed to carry its burden. . . . Jeopardy terminates upon a determination, however characterized, that the evidence is insufficient to prove a defendant's factual guilt." 566 U.S. at 611-12 (citations omitted). *Justice Sotomayor defined "a verdict in substance" as "a final collective decision . . . reached after full deliberation, consideration, and compromise among the individual jurors*." *Id.* at 616 (citation omitted) (emphasis added).

Consistent with these principles, it is not unprecedented for a jury's unanimous and final

decision to supersede even verdict slips that fail to accurately reflect such collective juror decisions. Read cited two cases in which a jury's unrecorded vote for acquittal was given effect, notwithstanding the jury's failure to formally announce such verdict. *See United States v. Dotson*, 817 F.2d 1127, 1129 (5th Cir. 1987) (affirming correction of verdict on one count after "receiv[ing] a telephone call from two of the jurors . . . stat[ing] that, contrary to the verdict read in court, the jury had unanimously voted to acquit"), *vacated in part on other grounds*; *United States v. Stauffer*, 922 F.2d 508, 511 (9th Cir. 1990) (affirming changing verdict on count where "[p]ost-verdict interviews of several jurors . . . determined that the jury had . . . intended to acquit").

The *Blueford* majority opinion is not to the contrary. There, the foreperson had reported during deliberations that the jury "was unanimous against" the charges of capital murder and first-degree murder but split on a lesser included charge of manslaughter. 566 U.S. at 603-04. The court sent the jury back to continue deliberations and, when the jury remained unable to reach a verdict, declared a mistrial. *See id.* at 604. The Court rejected the defendant's argument that the Double Jeopardy Clause prohibited re-prosecution for capital and first-degree murder. In doing so, the Court relied heavily upon the lack of finality of the juror's report. "[T]he jury's deliberations had not yet concluded," and it "went back to the jury room to deliberate further." *Id.* at 606. "The foreperson's report was not a final resolution of anything," and there was no indication at the conclusion of deliberations that "it was still the case that all 12 jurors believed [the

defendant] was not guilty of capital or first-degree murder." *Id.* Accordingly, the foreperson's mid-deliberation report "lacked the finality necessary to amount to an acquittal . . . , quite apart from any requirement that a formal verdict be returned or judgment entered." *Id.* at 608.[3] Additionally, in *Blueford*, the jury was deliberating on lesser-included offenses within a single charge, such that, "under Arkansas law, the jury's options . . . were limited to two: either convict on one of the offenses, or acquit on all." *Id.* at 610. Massachusetts law, by contrast, expressly permits partial verdicts on separate indictments. *See, e.g.*, Mass. R. Crim. P. 27(b); *A Juvenile v. Commonwealth*, 392 Mass. 52, 55 n.1 (1984).

The First Circuit erred in finding *Blueford* "dispositive" here. Pet. App. 17a. Unlike the foreperson's statement in *Blueford*, the affidavits reflecting juror statements in this case were all executed post-trial. The fact that, in this context, the affidavits do not so much as hint that the decision to acquit was non-final or revisited at any time is a powerful indicator of finality. The jurors' references to the "result" of deliberations and to not guilty "verdicts" reinforce that conclusion. COA Joint App. 334, 340, 370, 378. Unlike in *Blueford*, the jury's decision was communicated after the conclusion of deliberations, such that there was no possibility that it was reconsidered. In these circumstances, the First Circuit's conclusion that, "even if" Read's jury "unanimously voted in private

[3] This Court made clear more than 100 years ago that the formal entry of judgment is not required for a jury decision to acquit to preclude retrial. *See Ball*, 163 U.S. at 671.

that the prosecution had failed to prove its case on Counts One and Three," there would still be no acquittal for Double Jeopardy purposes, Pet. App. 18a, exalts form over substance in a manner contrary to this Court's precedents and, Read contends, violates the core principle of Double Jeopardy, the prohibition on successive trials. *See Green*, 355 U.S. at 187-88.

II. The First Circuit's Ruling that Read Was Not Entitled to Post-Trial Inquiry to Substantiate the Fact of the Acquittals Is Inconsistent with This Court's Caselaw

The First Circuit also relatedly affirmed the district court's conclusion that "[e]ven assuming that a post-trial *voir dire* elicited evidence strongly favorable to petitioner—such as an attestation from each juror that the jury voted unanimously to acquit petitioner on Counts One and Three before being discharged—her claim would still fail." Pet. App. 55a. Under this reasoning, sworn and credible statements by all 12 jurors attesting to a final, unanimous decision to acquit would not be sufficient to mount a successful Double Jeopardy challenge. This result is not required by logic or precedent, and it is inconsistent with this Court's precedents arising from other contexts. Additionally, the First Circuit cited "concerns" about maintaining the secrecy of jury deliberations in denying the request for post-trial *voir dire*. Pet. App. 18a-19a.

In the analogous context of juror bias, the law is clear that the defendant's Sixth Amendment right to an impartial jury also guarantees "the opportunity to

prove" a claim of bias. *Dennis v. United States*, 339 U.S. 162, 171-72 (1950); *see also Smith v. Phillips*, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.").

Post-verdict inquiry is similarly required to investigate claims of external influence. In *Remmer v. United States*, 347 U.S. 227, 228 (1954), "[a]fter the jury had returned its verdict, the petitioner learned for the first time that during the trial a person unnamed had communicated with a certain juror, who afterwards became the jury foreman, and remarked to him that he could profit by bringing in a verdict favorable to the petitioner." The trial court, without the defense's knowledge, then enlisted the FBI to investigate. This Court held that the defendant was entitled to post-verdict inquiry regarding the FBI's unauthorized contact with jurors.

Read submits that there is no legal or constitutional basis to afford less rights to a defendant seeking the ultimate benefit of her right to a jury trial – an acquittal as found by a unanimous jury of her peers – than those regularly granted to defendants raising process-related challenges, *i.e.*, contending that their jury was not impartial. A good faith Fifth Amendment Double Jeopardy claim, where Read has met her burden of production, should be entitled to no less procedural protections as a good faith claim of juror bias. Read acknowledges that there is little precedent involving situations factually similar to that at issue here.

This case is unique. It is not often that after trial one juror, much less four jurors, directly contact defense counsel stating in no uncertain terms that the jury had acquitted the defendant.[4] But the unique strength of the evidence underlying Read's motion to dismiss clearly demonstrates that she has met her burden of production and fully supports rather than undermines her claim for relief.

Ordering a post-trial *voir dire* would answer the First Circuit's concern that the not guilty determinations were not final, Pet. App. 18a, and "[t]he simple outline of § 2241[5] makes clear . . . that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts . . . ." *Hamdi v. Rumsfeld*, 542 U.S. 507, 526 (2004). In fact, this Court has held that "a federal [habeas] court *must* grant an evidentiary hearing" where, as here, "the merits of the factual dispute were not resolved in the state hearing." *Townsend v. Sain*, 372 U.S. 293, 313 (1963) (emphasis added). This is a necessary corollary of the straightforward proposition that:

> where specific allegations before the [habeas] court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that [s]he is [in custody] illegally and is therefore entitled to

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[4] But the situation is not entirely unprecedented. *See Dotson*, 817 F.2d at 1129; *Stauffer*, 922 F.2d at 511.

[5] Because, as the First Circuit acknowledged and the parties did not dispute, Pet. App. 7a, Read's petition was properly brought under 28 U.S.C. § 2241, the restrictions on fact-finding under 28 U.S.C. § 2254 did not apply. *See generally Williams v. Taylor*, 529 U.S. 420 (2000).

> relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

Harris v. Nelson, 394 U.S. 286, 300 (1969); *see also Townsend*, 372 U.S. at 312 ("It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. Thus a narrow view of the hearing power would totally subvert Congress's specific aim . . . of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the Constitution."); 28 U.S.C. § 2246 ("On application for a writ of habeas corpus, evidence may be taken orally or by deposition . . . .").

The First Circuit was also wrong to deny the request for post-trial hearing to maintain confidentiality of "the content of jury deliberations." Pet. App. 19a. The results of a jury's deliberations are not secret. They are, in fact, routinely announced in open court.

The inquiry requested by Read could be accomplished by a single, or at most a small number of, "yes" or "no" questions posed to jurors: *did you unanimously acquit Karen Read of the charges in Counts 1 and 3?*, *was your decision (or did you believe your decision to be) final as to each count?*, or similar questions that do not intrude into the heart of jury deliberations. If all 12 jurors answer those questions affirmatively, no speculation regarding the basis for that unanimous conclusion could alter its constitutional significance. *See McElrath*, 601 U.S. at 97 ("We simply cannot know why the jury in [this]

case acted as it did, and the Double Jeopardy Clause forbids us to guess.").

Prior to the enactment of Federal Rule of Evidence 606(b), which the parties agreed was facially inapplicable here,[6] this Court held "that the rule against jurors' impeaching their verdicts applie[d] only in a proceeding actually impeaching that verdict," which indisputably does not describe this case in which Read is attempting to prove that the jury reached a verdict. *Warger v. Shauers*, 574 U.S. 40, 47 (2014) (citing *Clark v. United States*, 289 U.S. 1 (1933)). And this Court has held that, at least in some circumstances, inquiry is required even when (unlike in the present case) it violates Rule 606(b). *See Pena-Rodriguez*, 580 U.S. at 225.

In sum, the defense learned post-trial that the jury reached a verdict that was not announced. It was at least entitled to the opportunity to substantiate that fact in order to ensure Read is not unconstitutionally forced to stand trial for criminal offenses, including murder, of which she has already been acquitted. Such inquiry in no way intrudes on the deliberative process of the jury. Such an inquiry instead honors the jury service which the trial court described as "extraordinary" rather than rendering irrelevant the efforts of at least four jurors to disclose that there was not an impasse on all three counts, as contrasted to only one count. Read contends that the Double Jeopardy Clause's guarantee against successive prosecutions is no less fundamental than, *e.g.*, the Sixth Amendment right

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[6] The rule applies only to juror testimony "[d]uring an inquiry into the validity of a verdict or indictment."

to an impartial jury and no less deserving of protection, including, whereas here a defendant makes a persuasive and credible showing of an unannounced acquittal, by post-trial hearing to substantiate such acquittal.

CONCLUSION

For all the foregoing reasons, this Court should grant Read's petition for a writ of certiorari.

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APPENDIX

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APPENDIX A

2025 WL 926289

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

No. 25-1257

KAREN READ,

Petitioner, Appellant,

v.

NORFOLK COUNTY SUPERIOR COURT;
Andrea J. Campbell, Massachusetts Attorney General,

Respondents, Appellees.

March 27, 2025

Appeal from the United States District Court
for the District of Massachusetts
[Hon. F. Dennis Saylor, IV, U.S. District Judge]

Attorneys and Law Firms

Martin G. Weinberg and Michael Pabian on brief for appellant.

Caleb J. Schillinger, Special Assistant Attorney General, Assistant Norfolk District Attorney, and Andrea Joy Campbell, Attorney General of Massachusetts, on brief for appellees.

Before Gelpí, Montecalvo, and Aframe, Circuit Judges.

OPINION

MONTECALVO, Circuit Judge.

On April 16, 2024, Karen Read's trial began in Norfolk County Superior Court in Massachusetts on charges of murder in the second degree, Mass. Gen. Laws ch. 265, § 1 (Count One); manslaughter while operating under the influence of alcohol, Mass. Gen. Laws ch. 265, § 13 1/2 (Count Two); and leaving the scene of personal injury resulting in death, Mass. Gen. Laws ch. 90, § 24(2)(a 1/2)(2) (Count Three). After thirty-seven days of trial, the charges were submitted to the jury for deliberation. During approximately twenty-eight hours of deliberations, the jury sent three notes to the trial judge, informing the court that the jury was increasingly deadlocked. On July 1, 2024, after receiving the third note, the trial judge declared a mistrial. A retrial is scheduled to start on April 1, 2025.

After the mistrial, Read moved to dismiss Counts One and Three on the basis that the Double Jeopardy Clause barred retrial. The trial judge denied that motion, and the Massachusetts Supreme Judicial Court (SJC) affirmed.[1] Read then filed a habeas petition in federal court under 28 U.S.C. § 2241 to prevent the state court from retrying her on those counts, arguing that a retrial would violate her constitutional double

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[1] Read filed her petition to the SJC under chapter 211, section 3 of the Massachusetts General Laws, which confers upon the SJC a "general superintendence" power that permits, among other things, review of "interlocutory matters in criminal cases only when substantial claims of irremediable error are presented ... and only in exceptional circumstances, ... where it becomes necessary to protect substantive rights." *Garcia v. Commonwealth*, 486 Mass. 341, 158 N.E.3d 452, 458 (2020) (alterations in original) (citations omitted).

jeopardy rights. The United States District Court for the District of Massachusetts denied her habeas petition, and Read now appeals that decision. For the reasons that follow, we affirm.

I. Background

We focus here only on those facts relevant to the issues before us.

Following the close of evidence, the trial court instructed the jury to consider each of the three charges against Read listed above as well as two lesser offenses that were included in Count Two: involuntary manslaughter and motor vehicle homicide.

The jury began its deliberations on Tuesday, June 25, 2024, the thirty-seventh day of trial. Three days later, on Friday, June 28, the jury sent a note to the trial judge stating that they were "unable to reach a unanimous verdict."[2] The court discussed with the parties how to respond. Read's counsel argued that the court should give what is called a *Tuey-Rodriquez* instruction under Massachusetts law – a standard instruction encouraging the jury to reach agreement by seriously considering other jurors' points of view. *Commonwealth v. Rodriquez*, 364 Mass. 87, 300 N.E.2d 192, 202-03 (1973). The Commonwealth disagreed, arguing that it was too soon to give such an instruction. The court agreed with the Commonwealth, finding that there had not yet been sufficient time for "due and thorough deliberations." The court directed the jury to continue deliberating.

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[2] The first note reads: "I am writing to inform you, on behalf of the jury, that despite our exhaustive review of the evidence and our diligent consideration of all disputed evidence, we have been unable to reach a unanimous verdict."

In the late morning of Monday, July 1, the jury sent a second note to the judge, explaining that they were "commit[ted] to the duty entrusted to [them]" but were "deeply divided by fundamental differences" and had reached "a point where consensus [was] unattainable."[3] The court again discussed the jury note and potential responses with the parties. As they had previously, Read's counsel argued that the court should give the *Tuey-Rodriquez* instruction, and the Commonwealth argued that it was still too soon. This time, however, the court agreed with Read's counsel and gave the instruction before directing the jury to continue deliberating.[4]

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[3] The second note reads:

> Despite our commitment to the duty entrusted to us, we find ourselves deeply divided by fundamental differences in our opinions and state of mind.
>
> The divergence in our views are [sic] not rooted in a lack of understanding or effort, but deeply held convictions that each of us carry ultimately leading to a point where consensus is unattainable. We recognize the weight of this admission and the implications it holds.

[4] In the *Tuey-Rodriquez* instruction, the court reminded jurors of their "duty to decide this case if [they] can do so conscientiously" and stated, in part:

> Where there is disagreement, those jurors who would find the defendant not guilty should consider whether the doubt in their own minds is a reasonable one if it makes no impression upon the minds of the other jurors ....
>
> At the same time, those jurors who would find the defendant guilty ought seriously to ask themselves whether they may not reasonably doubt the correctness of their judgment if it is not shared by other members of the jury.

Later that day, the jury sent a third note, stating that they "continue[d] to find [them]selves at an impasse" despite "rigorous efforts" and that "continu[ing] to deliberate would be futile."[5] Upon receiving the note, the court told the parties that "the jury is at an impasse," and then called the jury back into the courtroom. The judge read the note out loud and immediately declared a mistrial, dismissing the jury. Unlike with the prior two jury notes, the judge did not first read the note to counsel or ask them for input.

Read's counsel report that shortly after trial concluded, they were contacted by several people. First, a juror told one of Read's attorneys that the jury had unanimously agreed that Read was not guilty of Counts One and Three. A second juror called another of Read's attorneys and relayed the same information. Then a third party reported to Read's counsel that a third juror had told a mutual friend that there was "no consideration for [second-degree]

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[5] The third note reads:

> Despite our rigorous efforts, we continue to find ourselves at an impasse.
>
> Our perspectives on the evidence are starkly divided. Some members of the jury firmly believe that the evidence surpasses the burden of proof[,] establishing the elements of the charges beyond a reasonable doubt. Convers[e]ly, others find the evidence fails to meet this standard[ ] and does not sufficiently establish the necessary elements of the charges.
>
> The deep division is not due to a lack of effort or diligence, but rather a sincere adherence to our individual principles and moral convictions.
>
> To continue to deliberate would be futile and only serve to force us to compromise these deeply held beliefs.

murder" – Count One – and that the jury was deadlocked on the manslaughter charge – Count Two.

After Read filed a motion to dismiss based on these reports, a fourth juror contacted her counsel to express their view "that it was very troubling that the entire case ended without the jury being asked about each count, especially Count [One] and Count [Three]." That juror added that "the jury actually discussed telling the judge that they had agreed unanimously on NOT GUILTY verdicts for Counts [One] and [Three], but they were not sure if they were allowed to say so." Finally, a fifth juror contacted Read's counsel and informed them that the jury was "unanimous" that Read was not guilty on Counts One and Three and was "deadlocked" only "in relation to the 'lower charges' on Count [Two]."

The Commonwealth likewise received communications from individuals identifying themselves as jurors after Read filed her motion to dismiss. One left a voicemail stating, "it is true what has come out recently about the jury being unanimous on [Counts One and Three]." Three individuals sent emails to the Commonwealth, expressing that they wished to speak anonymously. They later declined to communicate further once the Commonwealth informed them that it could not promise confidentiality.

The trial court denied Read's motion to dismiss, holding that double jeopardy did not bar Read's retrial on Counts One and Three and that conducting a post-trial inquiry with the jurors would impermissibly delve into the substance of jury deliberations. Read appealed but the SJC affirmed, holding that the trial court had acted within its discretion in declaring a mistrial and that no acquittal had occurred because the jury had not publicly affirmed that Read was not

guilty of the charges. *Read v. Commonwealth*, 495 Mass. 312, 250 N.E.3d 551, 559, 565-66 (2025). Read then petitioned for habeas relief before the district court, which also rejected her arguments that double jeopardy should preclude her retrial and declined to order or conduct a post-trial hearing. *Read v. Norfolk Cnty. Super. Ct.*, No. 25-cv-10399, 2025 WL 815048, at *1, 15 (D. Mass. Mar. 13, 2025). We now consider her arguments to this court.

II. Standard of Review and Legal Issues

A federal court may grant a writ of habeas corpus to a person who is "in custody" in violation of the Constitution or federal laws. 28 U.S.C. § 2241(a), (c)(3); *see also Justs. of Bos. Mun. Ct. v. Lydon*, 466 U.S. 294, 300-01, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984) (holding that a person on pretrial release is considered to be "in custody" for the purposes of habeas relief). "[W]e, as a federal habeas court reviewing a petition under section 2241, must defer to the SJC's findings of fact but must undertake plenary review of that court's resolution of issues of law." *Marshall v. Bristol Super. Ct.*, 753 F.3d 10, 16 (1st Cir. 2014) (alteration in original) (quoting *Gonzalez v. Justs. of Mun. Ct. of Bos.*, 382 F.3d 1, 7 (1st Cir. 2004), *judgment vacated on other grounds*, 544 U.S. 918, 125 S.Ct. 1640, 161 L.Ed.2d 474 (2005), and reinstated, 420 F.3d 5 (1st Cir. 2005)). "We review a district court's disposition of a section 2241 petition de novo." *Id.*

The issues before us all stem from Read's claim that the Constitution's Double Jeopardy Clause bars her retrial for Counts One and Three. The Double Jeopardy Clause provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V;

see also Benton v. Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) (applying the Double Jeopardy Clause to the States through the Fourteenth Amendment). To succeed on a double jeopardy challenge, the defendant must show that (1) jeopardy attached in the original state court proceeding and (2) "the state court terminated jeopardy in a way that prevents reprosecution." *Gonzalez*, 382 F.3d at 8.

In this case, there is no dispute that jeopardy attached when the jury was empaneled and sworn. *See Martinez v. Illinois*, 572 U.S. 833, 839, 134 S.Ct. 2070, 188 L.Ed.2d 1112 (2014) (per curiam). Rather, the question is whether the court terminated jeopardy (i.e., whether the trial ended) in a way that prevents a second trial. Read offers two alternative arguments: first, that the court erred because there was no "manifest necessity" to declare a mistrial on two counts and, second, that the jury effectively acquitted her on those two counts.

III. Discussion

A. Manifest Necessity

We begin by summarizing the legal principles relevant to Read's "manifest necessity" claim. Under our constitutional framework, a defendant generally may not be retried for a charge if, after trial begins, the court discharges the jury without the defendant's consent. *United States v. Ramirez*, 884 F.2d 1524, 1528 (1st Cir. 1989). This stems from a defendant's "valued right to have [her] trial completed by a particular tribunal." *Id.* (quoting *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949)). But this right "is not absolute; it is subject to the rule of 'manifest necessity.'" *Id.* (quoting *United States v.*

Perez, 22 U.S. 579, 580, 9 Wheat. 579, 6 L.Ed. 165 (1824)).

Under the doctrine of manifest necessity, trial judges may not foreclose the defendant's right to have that particular jury reach a verdict "until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *Id.* (quoting *United States v. Jorn*, 400 U.S. 470, 485, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971)). The Supreme Court has defined "manifest necessity" as meaning a "high degree" of necessity. *Renico v. Lett*, 559 U.S. 766, 774, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010) (quoting *Arizona v. Washington*, 434 U.S. 497, 506, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). A deadlocked jury is the "classic example" of a situation where declaring a mistrial is manifestly necessary. *Id.* (quoting *Downum v. United States*, 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963)). The government may then retry the defendant for the charge, or charges, on which the jury deadlocked. *Id.*

Relatedly, while a trial court's decision to declare a mistrial based on "manifest necessity" is "accorded great deference," that deference does not "end the inquiry" and can be overcome. *Washington*, 434 U.S. at 510, 514, 98 S.Ct. 824. Because the decision affects a defendant's constitutionally protected interest "to conclude [her] confrontation with society through the verdict of a tribunal [she] might believe to be favorably disposed to [her] fate," *id.* at 514, 98 S.Ct. 824 (quoting *Jorn*, 400 U.S. at 486, 91 S.Ct. 547), "reviewing courts have an obligation to satisfy themselves that ... the trial judge exercised 'sound discretion' in declaring a mistrial," *id.* For example, a trial court has not exercised "sound discretion" if it

"acts irrationally or irresponsibly," *id.*, or "for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling," *id.* at 510 n.28, 98 S.Ct. 824.

Read argues that the trial judge made a "precipitous decision" in declaring a mistrial, emphasizing that only two minutes passed between the trial court announcing that it had received a third jury note – by stating, "the jury is at an impasse" – and discharging the jury. Read also argues that the record suggests that the court did not consider alternatives to declaring a mistrial or even discuss the possibility of a mistrial with the parties.

In response, the Commonwealth counsels that we take a broader view of the relevant timeline. It argues that the trial court took careful steps throughout deliberations in responding to the jury's notes and only declared a mistrial when it was clear, after the third such note, that the jury was truly deadlocked. The Commonwealth further argues that federal courts have never required a trial court to take any particular steps when confronted with a deadlocked jury and that the judge exercised sound discretion under these circumstances. In addition, the Commonwealth argues that, contrary to Read's suggestion, the trial judge was not required to ask the jury about a partial verdict or poll individual jurors, as doing so may have improperly risked coercing a verdict.

In determining whether the declaration of a mistrial reflected a trial judge's sound discretion and was "reasonably necessary under all the circumstances," we consider "whether the district court explored other options, gave counsel the opportunity to object, and acted 'after sufficient reflection.'"

United States v. Candelario-Santana, 977 F.3d 146, 158 (1st Cir. 2020) (quoting *United States v. Toribio-Lugo*, 376 F.3d 33, 39 (1st Cir. 2004)); *see also Brady v. Samaha*, 667 F.2d 224, 229 (1st Cir. 1981) (stating that whether the "record indicates [the judge] has considered alternatives to a mistrial is significant," as is "affording counsel an opportunity to be heard on the subject"). Among other factors, the amount of time that the judge takes with the mistrial decision is relevant: "A precipitate decision, reflected by a rapid sequence of events culminating in a declaration of mistrial, would tend to indicate insufficient concern for the defendant's constitutional protection." *Brady*, 667 F.2d at 229. But there is no "mechanical rule" or set of "specific steps" that a trial court must follow before declaring a mistrial due to deadlock. *Candelario-Santana*, 977 F.3d at 158. Rather, the court must only take "some step" to ensure the jury is actually deadlocked. *Id.*

We agree with the Commonwealth and the district court that we must consider the trial court's actions throughout jury deliberations and not limit our review solely to the court's response to the third jury note. *See Read*, 2025 WL 815048, at *8. Thus, we return to the judge's actions during that period.

Recall that the trial judge received the first jury note about its difficulty in reaching a unanimous verdict after the jury had been deliberating for around nineteen hours. *See id.* at *1. Upon receiving the note, the trial judge shared it with counsel and heard their arguments on how to respond. As discussed, Read's counsel urged the judge to give a *Tuey-Rodriquez* instruction, arguing that the jurors had "exhausted all manner of compromise" and were "at an impasse." In other words, Read's counsel

encouraged the court to find that the jury had failed to reach a unanimous verdict following "due and thorough" deliberations. *See Commonwealth v. Jenkins*, 416 Mass. 736, 625 N.E.2d 1344, 1345 (1994) (holding that "the giving of a [Tuey-Rodriquez] charge" generally reflects a conclusion by the court that "the jury's deliberations were 'due and thorough'" within the meaning of then-applicable Mass. Gen. Laws ch. 234, § 34). This is particularly relevant because, under Massachusetts law, once a "jury, after due and thorough deliberation, returns to court without having agreed on a verdict" and is sent back out for further deliberation, but then returns to once again report a deadlock, the court cannot require them to continue deliberating unless the jury consents. Mass. Gen. Laws ch. 234A, § 68C. However, after the first note, the court declined to give the instruction and sent the jury back to keep deliberating because it concluded that there had not yet been sufficient time for the jury to have engaged in "due and thorough deliberations."

After the second jury note, Read's counsel pressed a second time for the *Tuey-Rodriquez* instruction, arguing that the jury was "hopelessly deadlocked." The Commonwealth again argued it was premature, but the judge found that enough time had elapsed to conclude that the jury's deliberations were "due and thorough," and thus proceeded to give the instruction. It was only after the jury's third report of deadlock, when the court was statutorily precluded from ordering the jury to continue deliberations without their consent, that the trial court declared a mistrial. Mass. Gen. Laws ch. 234A, § 68C; *Read*, 250 N.E.3d at 560.

Considering the court's actions throughout jury deliberations, we find that the record, read as a whole, reflects only that the court acted diligently to avoid a mistrial. After the first note, and after consulting with the parties, it declined to give the *Tuey-Rodriquez* instruction and sent the jury back to deliberate. After the second note, the judge again consulted with counsel before concluding that the jury had engaged in "due and thorough deliberations" such that it was appropriate to give the instruction. The court then received a note in which the jury made clear not only that unanimity remained unobtainable, but also implied that the jury would not consent to further deliberations because such deliberations "would be futile" and "only serve to force [the jurors] to compromise [their] deeply held beliefs." Without that consent, the court would have been bound by statute – the constitutionality of which Read does not challenge – from compelling the jury to continue deliberating. Mass. Gen. Laws ch. 234A, § 68C. While we agree there is force to the SJC's view that "the more prudent course" may have been to read the third note to counsel and allow them to weigh in, as the judge had done upon receiving the prior two notes, the court's decision not to do so with the third note was within its discretion, particularly when faced with the circumstances described above. Read, 250 N.E.3d at 563.

Read further argues, with the benefit of hindsight and the post-trial statements from some jurors, that the trial court should have considered, as an alternative to declaring a mistrial, asking the jury to specify on which charges it faced deadlock or if its final note related to some or all of the charges. But our point of reference is the court's knowledge at the time it declared the mistrial. *See Washington*, 434

U.S. at 506, 98 S.Ct. 824 (A reviewing court must consider "the particular problem confronting the trial judge."); *see also United States v. Elliot*, 463 F.3d 858, 864 (9th Cir. 2006) ("A reviewing court must determine whether such a manifest necessity existed at the time a mistrial was declared by the district court."); *United States v. Cameron*, 953 F.2d 240, 244 (6th Cir. 1992) (same). We cannot say that a "clear alternative," *Toribio-Lugo*, 376 F.3d at 39, was available to the court at the time of its decision, for the following reasons.

At that time, the only juror statements that the court had were the jury notes in front of it. The notes stated that the jury was "unable to reach a unanimous verdict" (first note); that the jury was "deeply divided by fundamental differences in [their] opinions and state of mind" and that "consensus [was] unattainable" (second note); and that the jurors' perspectives were "starkly divided," with some believing the evidence "establish[ed] the elements of the charges beyond a reasonable doubt" and others finding the evidence "[did] not sufficiently establish the necessary elements of the charges" (third note). (Emphases added). The emphasized portions were the only time that the charges were mentioned, and the jury notes contained no indication that the jury might have reached unanimous agreement on any individual count.

Read now argues that the court should have considered that "charges" might refer only to the lesser-included offenses embedded within Count Two, and, accordingly, the court should have inquired into the possibility of a partial verdict pursuant to Massachusetts Rule of Criminal Procedure 27(b). Mass. R. Crim. P. 27(b) (providing that the court

"may first require the jury to return verdicts on ... charges upon which the jury can agree" before "declar[ing] a mistrial as to any charges upon which the jury cannot agree"). But the interpretation of the notes that Read now advances only seems plausible in light of the post-trial statements that did not exist and were therefore unavailable to the court when it had to make its decision. On their face, the notes appear to make a series of definite assertions that the jury could not reach any unanimous verdict. Thus, while it would have been within the court's discretion under Massachusetts Rule of Criminal Procedure 27(b) to inquire into the existence of a partial verdict, there was no apparent need to do so here. Nor was this alternative proposed by Read's counsel during the two opportunities counsel was given to consult with the court regarding the jury's reported deadlock or upon learning that the jury had returned to report an impasse for the third time.[6] It follows that at the time of the court's decision, considering the information the court had before it, there was no readily apparent alternative to declaring a mistrial. For these reasons, we are satisfied that the trial court exercised "sound discretion" in declaring a mistrial.[7] *See Washington*, 434 U.S. at 514, 98 S.Ct. 824.

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[6] We note that there is nothing in the third note that changes the calculus. Indeed, the third note – which says that the jury remained divided on the "charges" – is the note that is most facially inconsistent with the possibility of there being a partial verdict.

[7] Given our conclusion that the trial court exercised sound discretion in granting a mistrial, we need not address the Commonwealth's alternative argument that Read's counsel impliedly consented to a mistrial.

B. Post-Trial Statements

Next, Read argues that several jurors' post-trial statements establish that the jury actually acquitted her on two counts, such that she may not be re-prosecuted on those counts. As an alternative remedy, she requests a hearing to ask the original jurors whether they acquitted her on Counts One and Three.

1. Whether an Acquittal Occurred

"[A] verdict of acquittal is final, ending a defendant's jeopardy, and ... bar[ring] a subsequent prosecution for the same offence." *McElrath v. Georgia*, 601 U.S. 87, 94, 144 S.Ct. 651, 217 L.Ed.2d 419 (2024) (quoting *Green v. United States*, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)). "[W]hether an acquittal has occurred for purposes of the Double Jeopardy Clause is a question of federal, not state, law." *Id.* at 96, 144 S.Ct. 651.

Under the Double Jeopardy Clause, an "acquittal ... encompass[es] any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Id.* at 94, 144 S.Ct. 651 (quoting *Evans v. Michigan*, 568 U.S. 313, 318, 133 S.Ct. 1069, 185 L.Ed.2d 124 (2013)). "[A]n acquittal has occurred if the factfinder 'acted on its view that the prosecution had failed to prove its case.'" *Id.* at 96, 144 S.Ct. 651 (quoting *Evans*, 568 U.S. at 325, 133 S.Ct. 1069). In deciding whether a defendant was acquitted, we "focus on substance over labels," and "look to whether the ruling's substance relates to the ultimate question of guilt or innocence." *Id.* at 94, 96, 144 S.Ct. 651 (cleaned up) (quoting *United States v. Scott*, 437 U.S. 82, 98 n.11, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978)). In addition to a jury's formal verdict, a ruling that

precludes retrial can include, for example, a judge's order granting a motion of acquittal, even if that order is mistaken or based on legal error. *See, e.g., Smith v. Massachusetts*, 543 U.S. 462, 467-69, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571-72, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977).

Read argues that there was an acquittal because "[t]he 'ruling' here was the jury's unanimous and final decision, reflected in the post-trial affidavits, that Read is not guilty." She offers no case law that directly supports her argument. Instead, she points to cases where the jury returned a verdict, and the verdict form was later amended to fix an error. *See United States v. Dotson*, 817 F.2d 1127, 1129 (5th Cir.), *vacated in part on other grounds*, 821 F.2d 1034 (5th Cir. 1987); *United States v. Stauffer*, 922 F.2d 508, 511 (9th Cir. 1990).

The Commonwealth counters that there was no valid jury verdict here under Massachusetts law. In particular, the Commonwealth emphasizes that under state law, "a criminal verdict is effective only when affirmed by jurors in open court." (Quoting *Read*, 250 N.E.3d at 565). The Commonwealth also notes that federal law accords with this principle. *See, e.g., Blueford v. Arkansas*, 566 U.S. 599, 601, 132 S.Ct. 2044, 182 L.Ed.2d 937 (2012).

Here, binding precedent is dispositive. In *Blueford v. Arkansas*, the Supreme Court considered whether an acquittal had occurred where, before a mistrial was declared, the jury foreperson reported in open court that the jury had voted unanimously against guilt on two of four charges but then returned to deliberating. 566 U.S. at 601, 610, 132 S.Ct. 2044. The Court held that the defendant was not acquitted

of those two charges based on the possibility that jurors could have changed their minds during the time they continued deliberating but before a mistrial was declared. *Id.* at 606-08, 132 S.Ct. 2044. In other words, even where the jury foreperson had reported in court a unanimous vote to acquit on two charges, that was insufficient because deliberations were ongoing and the verdict was not final. *See id.*

Read's evidence is far weaker than the facts in *Blueford*. The statements here do not describe when any votes were taken or whether such votes were preliminary or formal. Like *Blueford*, there is no sign that a final vote was taken, meaning that if any deliberations continued after a vote, jurors could have changed their minds. *See id.* at 606, 608, 132 S.Ct. 2044. Nor did the jury announce its verdict in open court. *Cf. id.* at 603-04, 132 S.Ct. 2044. Instead, the only communications the jury made were about its inability to reach a consensus. Therefore, even if we assume that the jury unanimously voted in private that the prosecution had failed to prove its case on Counts One and Three, the jury did not "act[ ] on [that] view." *McElrath*, 601 U.S. at 96, 144 S.Ct. 651 (quoting *Evans*, 568 U.S. at 325, 133 S.Ct. 1069). There was simply no act here that could be considered a "ruling" or characterized as an acquittal.

2. Post-Trial Hearing

Read requests a post-trial hearing to question the original jurors as to whether they acquitted her on Counts One and Three during their deliberations. But on the facts here, we agree with the district court that there was no final "ruling" of acquittal that would trigger double jeopardy concerns such that post-trial inquiry of the jurors would be appropriate. *See Read*, 2025 WL 815048, at *11. We also share the

district court's concerns about conducting such a hearing. Typically, the content of jury deliberations is kept secret to enable jurors to discuss their views freely and frankly and to protect them from harassment. *See Tanner v. United States*, 483 U.S. 107, 120, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987). The district court found that these concerns – the "freedom of juror deliberations and the protection of jurors against harassment" – were "unquestionably implicated" in this case. Read, 2025 WL 815048, at *15. We agree with the district court that such a hearing would not be appropriate here.

IV. Conclusion

The district court's decision is affirmed. Read's motion to stay the state court proceedings pending appeal is denied as moot.

APPENDIX B

2025 WL 815048

UNITED STATES DISTRICT COURT,
D. MASSACHUSETTS

Civil Action No. 25-cv-10399-FDS

KAREN READ,

Petitioner,

v.

NORFOLK COUNTY SUPERIOR COURT and
Massachusetts Attorney General,

Respondents.

Signed March 13, 2025

Attorneys and Law Firms

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Thomas E. Bocian, Office of the Attorney General, Boston, MA, for Respondent Massachusetts Attorney General.

MEMORANDUM AND ORDER ON
PETITION FOR WRIT OF HABEAS CORPUS

SAYLOR, Chief Judge

This is a petition for writ of habeas corpus under 28 U.S.C. § 2241. Petitioner Karen Read is under indictment in the Massachusetts Superior Court for second-degree murder and two other charges. She was tried on those charges beginning on April 16, 2024. On July 1, 2024, after the jury reported that it was deadlocked, the trial judge declared a mistrial.

Petitioner moved in the Superior Court to dismiss two of the three charges on the ground that the Double Jeopardy Clause barred a retrial of those charges. The Superior Court denied that motion, and petitioner appealed that ruling to the Massachusetts Supreme Judicial Court. The SJC affirmed the Superior Court by a unanimous vote. Petitioner then filed this habeas petition. The retrial is scheduled to commence in the Superior Court on April 1, 2025.

The issues presented by the petition are limited to those arising under the federal Constitution—specifically, whether a retrial would constitute double jeopardy in violation of petitioner's rights under the Fifth and Fourteenth Amendments. For the reasons set forth below, the petition will be denied.

I. Background

A. 2024 Trial

On June 9, 2022, the Commonwealth of Massachusetts charged petitioner Karen Read with second-degree murder, in violation of Mass. Gen. Laws ch. 265, § 1 (Count One); manslaughter while operating under the influence of alcohol, in violation of Mass. Gen. Laws ch. 265, § 131/2 (Count Two); and

leaving the scene of a collision resulting in death, in violation of Mass. Gen. Laws ch. 90, § 24(2)(a1/2)(2) (Count Three). *See Read v. Commonwealth*, 495 Mass. 312, 314 (2025).

A jury trial began in Norfolk County Superior Court on April 16, 2024, and lasted more than two months. *See id.* At the close of evidence, the jury received instructions concerning the three charged offenses, as well as two lesser-included offenses in Count Two: involuntary manslaughter and motor vehicle homicide. *See id.*

As part of its instructions, the trial judge indicated that the jury would receive separate verdict slips for each of the three charges. *See id.* The foreperson was directed to check the appropriate boxes as to each charge and to notify the court once the jury had reached a unanimous verdict. *See id.* The trial judge further instructed the jurors to "continue deliberating until [they] ha[d] reached a final verdict on each charge" and not to disclose their progress or standing as to any charge until they had reached a unanimous verdict. *See id.*

On the jury's third day of deliberations, the foreperson delivered a note to the court. *See id.* At that point, the jury had been deliberating for approximately 19 hours. In its entirety, the note said:

> I am writing to inform you, on behalf of the jury, that despite our exhaustive review of the evidence and our diligent consideration of all disputed evidence, we have been unable to reach a unanimous verdict.

See id.

The court read the note into the record, and then invited argument from the parties as to whether it should issue a *TueyRodriguez* charge (which is the Massachusetts equivalent of the federal *Allen* charge). *See id.* at 315; *see also Commonwealth v. Rodriguez*, 364 Mass. 87, 101-02 (1973); *Commonwealth v. Tuey*, 8 Cush. 1, 2-3 (1851); *Allen v. United States*, 164 U.S. 492 (1896). Such an instruction is designed to "urge the jury to reach a verdict by giving more serious consideration to opposing points of view" when the jury is deadlocked after "due and thorough deliberations." *Commonwealth v. Carnes*, 457 Mass. 812, 827 (2010); Mass. Gen. Laws ch. 234A, § 68C.

The Commonwealth opposed issuing the instruction. Counsel for petitioner, however, asserted that the jury's use of the terms "impasse" and "exhaustive" indicated that the jury's deliberations had been sufficiently "due and thorough," and thus warranted the instruction. *See Read*, 495 Mass. at 315. Given the length of the trial, the volume of evidence presented, and the complexity of the issues, the trial judge determined that "due and thorough" deliberations had not yet been completed, and thus the instruction was not appropriate at that time. *See id.*

At around 10:45 a.m. on the following Monday, July 1, 2024, the foreperson submitted a second note to the court. *See id.* By that point, the jury had deliberated for approximately 25 hours. The second note stated:

> Despite our commitment to the duty entrusted to us, we find ourselves deeply divided by fundamental differences in our opinions and state of mind.

> The divergence in our views are not rooted in a lack of understanding or effort, but deeply held convictions that each of us carry ultimately leading to a point where consensus is unattainable.
>
> We recognize the weight of this admission and the implications it holds.

See id. After soliciting further argument from the parties, the trial judge determined that a *Tuey-Rodriguez* instruction was appropriate at that point. The court noted that it had "never seen a note like this [from a jury] reporting to be at an impasse." *Id.* at 316. The instruction was given to the jurors, who then returned to the jury room for further deliberations. *See id.*

Later that day, at around 2:30 p.m., the foreperson delivered a third note to the court. *See id.* By that point, the jury had deliberated for nearly 30 hours in total. The third note stated:

Despite our rigorous efforts, we continue to find ourselves at an impasse.

> Our perspectives on the evidence are starkly divided. Some members of the jury firmly believe that the evidence surpasses the burden of proof establishing the elements of the charges beyond a reasonable doubt. Conversely, others find the evidence fails to meet this standard, and does not sufficiently establish the necessary elements of the charges.
>
> The deep division is not due to a lack of effort or diligence, but rather a sincere

> adherence to our individual principles and moral convictions.
>
> To continue to deliberate would be futile and only serve to force us to compromise these deeply held beliefs.

See id.

The court read the note into the record before the parties, directed that the jury be brought back into the courtroom, and declared a mistrial. *See id.* The court then discharged the jury and discussed setting a future status conference with the parties. *See id.* Petitioner's counsel did not object to the court's declaration of a mistrial at any time during that discussion or ask to be heard on that topic. *See id.*

B. Post-Trial Events

On July 2, 2024, one day after the trial concluded, "Juror A" contacted one of petitioner's counsel to inform him that the jury had agreed the defendant was not guilty of either Count One or Three. *See id.* The following day, July 3, a person who was not a member of the jury sent petitioner's counsel screenshots of text messages from "Juror B" saying, among other things, "It was not guilty on second degree. And split in half for the second charge." *Id.* at 317.[1] Another person, not a member of the jury, sent

[1] According to the affidavit of petitioner's counsel, the text read, "It was not guilty on second degree. And split in half for the second charge. When the judge sent us back with that Hernandez thing to look at the other side it turned into a bully match. I thought the prosecution didn't prove the case. No one thought she hit him on purpose or even thought she hit him on purpose [sic]." (Pet. Ex. A at 283). Juror B later affirmed the content of these messages directly to petitioner's counsel. (*Id.* at 330).

petitioner's counsel screenshots of text messages summarizing a conversation "Juror C" had with friends about deliberations. *See id.* According to this intermediary, "manslaughter started polling at 6/6 then ended deadlock @4no8yes." *Id.*[2] Several days later, "Juror D" contacted petitioner's counsel to explain that the jury's deadlock related only to Count Two and its lesser included offenses. *See id.* "Juror E," similarly, contacted petitioner's counsel to explain that the jury had been deadlocked only on the "lower charges on count 2." *Id.*

Based on a subset of those statements, petitioner filed a motion to dismiss Counts One and Three on July 8, 2024, one week after the declaration of a mistrial. *See id.* In substance, petitioner argued that the jurors' post-trial statements demonstrated that the jury had effectively acquitted her as to those counts, rendering a potential retrial unconstitutional. *See id.* She further contended that the declaration of a mistrial was improper as to those two counts and that the court, at a minimum, should conduct a post-verdict inquiry to verify the subsequent accounts of the deliberations. *See id.*

After petitioner's counsel attested to the juror communications as a part of petitioner's motion to dismiss, the Commonwealth also received communications from several jurors. *See id.* at 318. One juror left the prosecutor two voicemails stating that the jury had voted not guilty on Counts One and Three and had voted "9-3 guilty on the lower

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[2] According to the affidavit of petitioner's counsel, the summary also stated, "no consideration for murder 2." Upon questioning, the intermediary further stated, "the remaining charges were what they were hung on." (Pet. Ex. A at 285).

manslaughter charges." *Id.* [3] Three other jurors e-mailed the prosecutor asking to speak about deliberations anonymously, but declined to do so after they were informed that the Commonwealth might have to disclose what they said to petitioner's counsel or the court. *See id.*

After hearing argument, the trial court denied the motion to dismiss Counts One and Three. The court stated that there had been "no open and public verdict affirmed in the open court" acquitting petitioner of any of the charges. *Id.* The court also rejected petitioner's contention that declaration of a mistrial was inappropriate, noting that petitioner had herself twice requested a *Tuey-Rodriguez* instruction—which is typically the last step before a mistrial—and at no point objected to or sought to opine on the court's mistrial declaration. *See id.* In light of the jury's multiple notes indicating a deadlock, the court concluded that a mistrial was necessary and appropriate. *See id.*

C. SJC Appeal

On September 11, 2024, petitioner filed a petition to the Supreme Judicial Court of Massachusetts ("SJC"). On February 11, 2025, the SJC affirmed the trial court's denial of the motion to dismiss. *See id.* at 314.

The SJC first held that the trial court properly acted within its discretion to determine that the jury was at an impasse and that a mistrial was "manifestly necessary." *Id.* at 320. It based that conclusion primarily on the jury's "increasingly

[3] According to the Commonwealth, those messages came on August 1, one month after the jury was discharged. (Pet. Ex. A at 325).

emphatic notes," some of which "echo[ed] language from other cases where [the SJC] ha[s] characterized a jury's report of deadlock as 'unambiguous.'" *Id.* It went on to reject petitioner's contention that no "manifest necessity" had been established because the trial judge failed to adequately consider alternatives to mistrial. *See id.* at 321. According to the SJC, the judge "did consider and pursue such alternatives" by taking a measured and iterated approach to breaking the deadlock. *Id.*

The SJC specifically rejected petitioner's other proposed alternatives, including inquiring about a partial verdict or polling the jury. *See id.* at 321-25. It found that while Mass. R. Crim. P. 27(d) allows a trial judge to inquire about a partial verdict, "a judge is not required to accept a partial verdict before declaring a mistrial, ... and is prohibited from doing so on a single indictment that contains lesser included offenses," such as Count Two here. *Id.* at 321. The court gave great weight to the fact that "the record before the trial judge suggested complete deadlock" where "[t]he first and second notes provided no indication of a partial consensus, and the third note plainly implied the opposite." *Id.* at 322. It also emphasized that "these notes indicated that additional inquiry into the jury's deliberations risked producing a coerced verdict." *Id.* at 322-25.

The SJC also rejected petitioner's claim that the trial judge abused her discretion by declaring a mistrial without notifying defense counsel of the third note's contents and without allowing them to express their views. *See id.* at 325-26. It found that "there [was] no indication that inviting defense counsel to participate in a third round of consultation

would have produced any fruitful alternatives" to mistrial. *Id.* at 325.

The SJC then held that "because the jury did not publicly affirm that [petitioner] was not guilty of [Counts 1 and 3], there was no acquittal barring retrial under the double jeopardy clause." *Id.* at 329-30. It relied on the fact that, under Mass. R. Crim. P. 27(a), the jury had not returned a valid verdict; only "the actual return, receipt, and recording of a verdict ... constitutes a final verdict[.]" *Id.* at 327-28. The court reasoned that absent these conditions, it "cannot conclude that the jury acted on their view that the prosecution had failed to prove its case," as required to establish acquittal under *McElrath v. Georgia*, 601 U.S. 87 (2024). *Id.* at 328. It rejected petitioner's contention that the formalities of valid verdicts should not prevent the acquittal votes from taking effect. *See id.* at 329-30. According to the court, "requiring a jury to publicly affirm their verdict in open court ... serves a vital purpose—it ensures that the verdict agreed upon in private truly reflects the unanimous and deliberate judgment of each juror." *Id.* at 329.

The SJC then went on to hold that the trial judge did not abuse her discretion in denying the petitioner's request for post-trial inquiry. *See id.* at 332. It found that because no verdict was announced as required, a post-trial *voir dire* "would not change the outcome of defendant's first trial." *Id.* The court reasoned that petitioner was not entitled to this inquiry because the jurors' affidavits "do not indicate exposure to extraneous matters or juror bias," and because "there [was] no suggestion that jury's failure to return a verdict was the result of a clerical error." *Id.* at 330-31. The inquiry would therefore in-

appropriately require "probing the content of juror deliberations" and would do so "well after they became susceptible to outside influences." *Id.* at 331-32.

In the meantime, the trial judge set the matter for a retrial beginning on April 1, 2025. *See id.* at 332.

D. Procedural History

On February 18, 2025, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 in this Court. That same day, the Court issued an expedited briefing and hearing schedule in light of the imminent retrial date. Defendants submitted an opposition brief on February 26, 2025, and the Court heard oral arguments on March 5, 2025.

For the following reasons, the petition will be denied.

II. Analysis

There are two threshold questions that the Court must address before turning to the merits of the claim: whether it has jurisdiction to consider the habeas petition and, if so, whether it must abstain from doing so.

A. Jurisdiction and Ripeness

A United States District Court may issue a writ of habeas corpus for a person "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(a), (c)(3). A person on pre-trial release is considered to be "in custody" and may petition for habeas relief if that custody violates federal law. *See Justs. of Bos. Mun. Ct. v. Lydon*, 466 U.S. 294, 300 (1984). Ordinarily, a person "in custody" is "in custody pursuant to the judgment of a State court" or "in custody under sentence of a court

established by Act of Congress." 28 U.S.C. §§ 2254(a), 2255(a). Because a person on pretrial release falls in neither category, any habeas petition filed by such a person must be brought under 28 U.S.C. § 2241. The petition here is therefore filed under the correct statute.

A state defendant who is released pending trial "must still contend with the requirements of the exhaustion doctrine if [she] seeks habeas corpus relief in the federal courts." *Lydon*, 466 U.S. at 301. Nonetheless, a petitioner claiming a violation of the Double Jeopardy Clause need not stand trial a second time to exhaust her state remedies. *See id.* at 302. Instead, she must "take[ ] h[er] claim that [s]he should not be tried again as far as [s]he can in the state courts." *Id.*

Here, petitioner moved to dismiss Counts One and Three of the indictment based on her double-jeopardy claim, and appealed the denial of that motion to the Massachusetts Supreme Judicial Court, which denied her claim. Thus, she has exhausted her state-court remedies for the alleged constitutional violation, and the matter is ripe for review.

Accordingly, the Court may properly exercise jurisdiction over the habeas petition. *See Lydon*, 466 U.S. at 302.

B. Abstention

The primary relief petitioner seeks is release from state custody and a declaration that a retrial on Counts One and Three would violate the Double Jeopardy Clause. (Pet. at 7). In effect, she seeks a permanent stay of her state prosecution. That request for relief potentially conflicts with the policy that, "except under extraordinary circumstances,

where the danger of irreparable loss is both great and immediate," federal courts should abstain from enjoining state criminal prosecutions or issuing declaratory or other relief to similar practical effect. *Younger v. Harris*, 401 U.S. 37, 45 (1971); *see Samuels v. Mackell*, 401 U.S. 66, 73 (1971).

By statute, a court considering a habeas petition may, "before final judgment or after final judgment of discharge ... stay any proceeding against the person detained ... by or under the authority of any State for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251.[4] Nevertheless, the power to enjoin state prosecutions must be exercised sparingly, even when it is permitted. *See Younger*, 401 U.S. at 54 (requiring abstention based on "the absence of the factors necessary under equitable principles to justify federal intervention," assuming such intervention was permitted).

A federal court generally must abstain from acting if "the requested relief would interfere ... with (1) an ongoing state judicial proceeding; (2) that implicates an important state interest; and (3) that provides an adequate opportunity for the federal plaintiff to advance his federal constitutional challenge," such as a state criminal prosecution. *Verizon New England, Inc. v. Rhode Island Dep't of Lab. & Training*, 723 F.3d 113, 116 (1st Cir. 2013). But if there is a showing of "bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate," a federal court may enjoin (or

[4] The Anti-Injunction Act, 28 U.S.C. § 2283, accordingly does not bar petitioner's requested relief. *See id.* ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress.").

effectively enjoin) an ongoing state proceeding. *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982).

A party can establish that extraordinary circumstances justify such an injunction by showing that she will suffer "great and immediate irreparable injury" if the state proceeding goes forward. *Doe v. Donovan*, 747 F.2d 42, 44 (1st Cir. 1984). In a typical case, a colorable double-jeopardy claim satisfies the irreparable-injury standard, because "a requirement that a defendant run the entire gamut of state procedures, including retrial, prior to consideration of his claim in federal court, would require him to sacrifice one of the protections of the Double Jeopardy Clause." *Lydon*, 466 U.S. at 303.[5]

Here, petitioner makes a colorable double-jeopardy claim. Even if she is ultimately acquitted of Counts One and Three, or if a conviction on those counts is ultimately overturned on double jeopardy grounds,

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[5] It is true that in one instance the First Circuit applied the abstention doctrine in a habeas petition alleging a double-jeopardy violation. *See Donovan*, 747 F.2d at 44. There, the alleged violation did not establish irreparable injury arising from a retrial because of "the unique jurisdictional posture" of that case. *Id.* At 45. The petitioner there was a minor less than a year shy of her eighteenth birthday, who was to stand trial for manslaughter even if the murder charge against her were dropped on double-jeopardy grounds, and who could not remain in state custody after she turned 18. *Id.* at 44-45. The Court of Appeals concluded that she "will suffer no significantly greater harm from a retrial on the murder count even if manslaughter is subsequently found to be the only permissible charge." *Id.* at 45. However, the court also affirmed the principle that, in ordinary circumstances, "the mere possibility of retrial prior to a determination of the federal constitutional claim would constitute irreparable harm justifying federal court intervention." *Id.* at 44.

she will have suffered irreparable injury from standing trial again for those charges. The Court therefore will not abstain, and will consider the merits of petitioner's claim.

C. Double Jeopardy

Under the Fifth and Fourteenth Amendments, no person "shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *see* U.S. Const. amend. XIV, *Benton v. Maryland*, 395 U.S. 784, 794 (1969). The right "protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." *See Lydon*, 466 U.S. at 306–07.

Here, petitioner contends that the Double Jeopardy Clause prevents her retrial on Counts One and Three for two reasons: because the trial judge improperly declared a mistrial and because she was actually acquitted as to both counts. Alternatively, she seeks an order providing for *voir dire* of the jurors in order to ascertain whether they did, in fact, vote to acquit her on both counts prior to the declaration of a mistrial.

1. Whether the Trial Judge Improperly Declared a Mistrial

A trial judge may declare a mistrial in a criminal case without implicating the protections of the Double Jeopardy Clause whenever, "taking all the circumstances into consideration," there is a "manifest necessity" for doing so. *United States v. Perez*, 9 Wheat. 579, 580 (1824); *Renico v. Lett*, 559 U.S. 766,

773 (2010). [6] A "mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial." *Arizona v. Washington*, 434 U.S. 497, 509 (1978); *accord Renico*, 559 U.S. at 774; *Blueford v. Arkansas*, 566 U.S. 599, 609 (2012); *see also Downum v. United States*, 372 U.S. 734, 736 (1963) (a deadlocked jury is the "classic example" of when a state may try the same defendant twice).

The decision whether to grant a mistrial is reserved to the "broad discretion" of the trial judge. *Illinois v. Somerville*, 410 U.S. 458, 462 (1973); *see also Perez*, 9 Wheat. at 580 (stating that the decision to declare a mistrial is left to the "sound discretion" of the judge, but "the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes"). "The reasons for 'allowing the trial judge to exercise broad discretion' are 'especially compelling' in cases involving a potentially deadlocked jury." *Renico*, 559 U.S. at 775 (quoting *Washington*, 434 U.S. at 509).

Furthermore, "[t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is ... accorded great deference by a reviewing court." *Washington*, 434 U.S. at 510. The justification for deference is that "the trial court is in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate." *Renico*, 559 U.S. at 775. In the absence of such deference,

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[6] Subsequent to *Perez*, the Supreme Court clarified that the "manifest necessity" standard "cannot be interpreted literally," and that a mistrial is appropriate when there is a " 'high degree' " of necessity. *Washington*, 434 U.S. at 506.

trial judges might otherwise "employ coercive means to break the apparent deadlock," thereby creating a "significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Id.* at 509-10.

The Supreme Court has "expressly declined to require the 'mechanical application' of any 'rigid formula' when trial judges decide whether jury deadlock warrants a mistrial." *Renico*, 559 U.S. at 775 (quoting *Wade v. Hunter*, 336 U.S. 684, 691, 690 (1949)).

> We have also explicitly held that a trial judge declaring a mistrial is not required to make explicit findings of "'manifest necessity' " nor to "articulate on the record all the factors which informed the deliberate exercise of his discretion." And we have never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse.

Id. (quoting *Washington*, 434 U.S. at 517); *see Blueford*, 566 U.S. at 609 (stating that "[w]e have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict").

Similarly, the First Circuit has held that trial judges are not required "to take specific steps or

make specific findings before concluding that a jury is deadlocked and unlikely to reach a verdict." *United States v. Candelario-Santana*, 977 F.3d 146, 158 (1st Cir. 2020). Rather, a judge exercises sound discretion to declare a mistrial based on deadlock as long as she "take[s] *some* step to ensure that the jury truly is unable to reach a verdict before discharging it." *Id.*[7]

Here, there was a "manifest necessity" for the declaration of a mistrial based on jury deadlock, and the trial court did not abuse its broad discretion in reaching that conclusion.

In her memorandum of decision, the trial judge stated that she "had no doubt based on the jury's notes to the Court that [the jury] was unable to reach a unanimous verdict." (Pet. Ex. A at 402-403). Nothing in the jury's three notes, she found, "indicated agreement on any of the charges," or even an "inkling of an indication of agreement," notwithstanding the "care that went into writing the notes and how articulately they expressed the jurors' disagreement." (Pet. Ex. A at 403). Once the jury

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[7] In an opinion issued before *Renico*, the First Circuit held that although there is "no mechanical rule" that determines whether there is manifest necessity for a mistrial, three factors "inform[ ]" the inquiry: "(i) whether alternatives to a mistrial were explored and exhausted; (ii) whether counsel had an opportunity to be heard; and (iii) whether the judge's decision was made after sufficient reflection." *United States v. Toribio-Lugo*, 376 F.3d 33, 39 (1st Cir. 2004). To the extent, if any, that decision can be read to hold that a failure to consider any of those three factors is somehow dispositive, it has been superseded by subsequent Supreme Court decisions. *See Renico*, 559 U.S. at 779. In any event, the *Toribio-Lugo* court held that the inquiry "inevitably reduces to whether the district judge's declaration of a mistrial was reasonably necessary under all the circumstances." *Toribio-Lugo*, 376 F.3d at 39.

reported a deadlock for the third time, Massachusetts law prohibited the judge from ordering the jury to continue deliberations without their consent. *See* Mass. Gen. Laws ch. 234A, § 68C; *Read*, 495 Mass. at 321, 323. She concluded that it was "clear" that the jurors "would not consent to continuing their deliberations" after it sent the third note. (Pet. Ex. A at 400).

The SJC similarly concluded that "[t]he jury clearly stated during deliberations that they had not reached a unanimous verdict on any of the charges and could not do so." *Read*, 495 Mass. at 313. "The first and second notes provided no indication of a partial consensus, and the third note plainly implied the opposite." *Id.* at 322. "In short, the record before the trial judge suggested complete deadlock." *Id.*

This Court sees no basis to conclude that the trial judge's decision to declare a mistrial was incorrect or improper. To begin, the relevant inquiry is not confined to the brief interval of time between the receipt of the third note and the trial judge's declaration of a mistrial. By that point, the jury had deliberated for nearly 30 hours, and had sent three notes to the court indicating that they were deadlocked the latter two making that point with considerable emphasis. The trial judge had held two conferences with counsel to discuss how to respond to the reported deadlock (during both of which counsel for defendant had argued that the jury was at an impasse). After the second conference, the judge gave the *Tuey-Rodriguez* instruction. In short, the decision to declare a mistrial was the product of a multi-day discussion between counsel and the court. Under the circumstances, the judge cannot be said to have acted

precipitately and without adequate time for reflection.

Nor did the trial judge fail to provide defense counsel an opportunity to be heard. *See Read*, 495 Mass. at 325-26. The judge solicited counsel's views after the first and second notes; by the time of the second note, if not earlier, it should have been obvious to all parties that a mistrial was highly likely. As for counsel's opportunity to respond to the third note, it is true that the span of time was relatively brief between the point that the trial judge advised counsel that the jury was at an impasse and the point she declared a mistrial. But it was not so brief that counsel could not have objected or asked to be heard. Furthermore, after the trial judge declared a mistrial, there is no obvious reason why counsel could not have immediately asked to be heard at sidebar in order to seek reconsideration of her decision before the jury was formally discharged.[8]

Petitioner also contends that the trial judge improperly failed to consider alternatives before declaring a mistrial. The trial judge did, in fact, consider such alternatives in response to the first and second note, and concluded after the second note to

[8] In *Toribio-Lugo*, 376 F.3d at 40-42, the trial judge ruled that defense counsel had consented to the declaration of a mistrial because she failed to make an objection. The First Circuit reversed, noting that counsel had made "either two or three attempts to be heard during the district court's sua sponte consideration of whether or not to declare a mistrial," but that the judge "stopped counsel in her tracks, cutting her off" on each occasion, and it was "only after these three attempts to state her position had been firmly rebuffed that [she] lapsed into silence." *Id.* at 41. That is very far from the situation here, where defense counsel made no attempt to make an objection or ask to be heard.

give a *Tuey-Rodriguez* instruction. After the third note which, again, emphatically indicated that the jury was at a deadlock—Massachusetts law required her to discharge the jury unless it consented to continue deliberations. *See* Mass. Gen. Laws ch. 234A § 68C. The judge reasonably determined under the circumstances that the jury would not consent to do so. (Pet. Ex. A at 402-403).

Nothing more was required, as a matter of federal constitutional law, before the trial judge could fairly conclude that the jury was genuinely deadlocked and should be discharged. In particular, the trial judge was not required to inquire about a possible partial verdict or poll the jury before discharging it. As the SJC noted, to make further inquiry would create a substantial possibility of coercing a verdict. *See Read*, 495 Mass. at 321-24, 26.

In summary, the trial judge took appropriate steps before determining that the jury was "*genuinely* deadlocked." *Candelario-Santana*, 977 F.3d at 158 (emphasis in original). The evidence that the jury was at an unresolvable impasse was substantial, and the trial judge, in the exercise of her "broad discretion," made a well-grounded decision to declare a mistrial—a decision that is entitled to "great deference" by this Court. *Somerville*, 410 U.S. at 462; *see Washington*, 434 U.S. at 510. Accordingly, because there was "manifest necessity" for the mistrial, petitioner may be tried again on the same charges without violating her rights under the Double Jeopardy Clause. *See Washington*, 434 U.S. at 509.[9]

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[9] The trial judge concluded that counsel's lack of objection to the declaration of a mistrial constituted implied consent.

2. Whether the Jury Acquitted Petitioner

Petitioner further contends that she was actually acquitted by the jury as to Counts One and Three, and therefore cannot be tried again on those counts.

"[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and ... is a bar to a subsequent prosecution for the same offence." *McElrath*, 601 U.S. at 94 (quoting *Green v. United States*, 355 U.S. 184, 188 (1957)) (internal quotation marks omitted). "The Double Jeopardy Clause recognizes an event as an acquittal" when "there has been any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Id.* at 96.

It is also well-established that "whether an acquittal has occurred for purposes of the Double Jeopardy Clause is a question of federal, not state, law." *Id.* The analysis does not depend on state-law "labels," and a state's "characterization, as a matter of double jeopardy law, of [a ruling] is not binding." *Id.* (quoting *Smalis v. Pennsylvania*, 476 U.S. 140, 144, n.5 (1986)). Nonetheless, state law remains relevant.

> [T]he ultimate question is whether the Double Jeopardy Clause recognizes an event as an acquittal. In making that determination, we ask whether—given the operation of state law—there has been "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense."

(Pet. Ex. A at 399-402). The SJC concluded that it did not need to reach the issue. *Read*, 495 Mass. at 326 n.13. This Court likewise concludes it need not do so.

Id. (quoting *Evans v. Michigan*, 568 U.S. 313, 318 (2013)); *see also Smith v. Massachusetts*, 543 U.S. 462, 474 (2005) (suggesting that a double-jeopardy ruling might be different if the state had adopted different procedural rules).

A "ruling" of insufficient proof does not require a jury verdict; a judge may direct a verdict of acquittal or overturn a conviction based on insufficient evidence. *See*, *e.g.*, *Burks v. United States*, 437 U.S. 1, 17–18 (1978). The critical question is whether there was such a "ruling." *McElrath*, 601 U.S. at 96.

Here, the SJC summarized what constitutes a valid jury verdict under "the operation of" Massachusetts law:

> [T]he fundamental requirements for a jury's issuance of a verdict in a criminal case are set forth in Mass. R. Crim. P. 27(a). Pursuant to that rule, a valid jury verdict must be unanimous and returned by the jury to the judge in open court. Our case law confirms that a criminal verdict is effective only when affirmed by jurors in open court. In other words, the distinction between informal agreement on a verdict and the actual return, receipt, and recording of a verdict in open court is central—only the latter constitutes a final verdict of the jury on a criminal charge. We have consistently reaffirmed this longstanding distinction throughout our jurisprudence.

Read, 495 Mass. at 327-328 (quotations and citations omitted); *see also A Juvenile v. Commonwealth*, 392 Mass. 52, 56-57 (1984) (quoting *Lawrence v. Stearns*, 11 Pick. 501, 502 (1831)) ("The only verdict which can

be received and regarded, as a complete and valid verdict of a jury, upon which a judgment can be rendered, is an open and public verdict, given in and assented to, in open court, as the unanimous act of the jury, and affirmed and entered of record, in the presence and under the sanction of the court.").

The SJC concluded that the jury here did not render a valid verdict under Massachusetts law. *See Read*, 495 Mass. at 328 ("Far from an affirmation in open court of unanimous agreement on counts one and three, these notes clearly reflected a lack of consensus on 'the charges.' Even if the jury's deadlock pertained specifically to count two, their notes made no such distinction, nor did they indicate any verdict would be returned to the judge in open court, as required by Mass. R. Crim. P. 27(a)."). Petitioner appears to concede as much. (Pet. Reply at 13-16). Thus, in the absence of a valid verdict under state law, she must point to some other "*ruling* that the prosecution's proof is insufficient to establish criminal liability" to show that the jury acquitted her as a matter of federal constitutional law. *McElrath*, 601 U.S. at 96 (emphasis added).

Petitioner has not done so. Counsel have pointed to no case, from any jurisdiction, in which a private, unreported, and unrecorded vote of a jury was deemed to be a "ruling" capable of terminating jeopardy. In fact, the Supreme Court has held that it is not sufficient for the foreperson of a jury to report —in open court, in the presence of the other jurors— that the jury had voted to acquit as to certain counts. *See Blueford*, 566 U.S. at 608.

In *Blueford*, the defendant was tried in Arkansas state court for capital murder, which included the lesser included offenses of first-degree murder,

manslaughter, and negligent homicide. *Id.* at 602. After a period of deliberation, the foreperson reported that the jury was "hopelessly deadlocked." *Id.* at 603. The court then "asked the foreperson to disclose the jury's votes on each offense." *Id.* The foreperson reported that the jury had voted unanimously against capital murder, had voted unanimously against first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide. *Id.* at 603-604. The court gave the jury an *Allen* charge (its second) and instructed the jury to resume deliberations. *Id.* at 604. When the jury returned a half an hour later and reported that they were still deadlocked, the court declared a mistrial. *Id.*

The state then sought to retry the defendant on all charges. *Id.* He moved to dismiss the capital murder and first-degree murder charges on double-jeopardy grounds. *Id.* The trial court denied the motion, and the Arkansas Supreme Court affirmed. *Id.*

The Supreme Court concluded that the defendant had not been acquitted, and that therefore double jeopardy did not bar a new trial as to all charges.

Blueford's primary submission is that he cannot be retried for capital and first-degree murder because the jury actually acquitted him of those offenses. The Arkansas Supreme Court noted—and Blueford acknowledges—that no formal judgment of acquittal was entered in his case. But none was necessary, Blueford maintains, because an acquittal is a matter of substance, not form. Blueford contends that despite the absence of a formal verdict, a jury's announcement constitutes an acquittal if it "'actually represents a resolution ... of some or all of the factual elements of the offense charged.'" Here, according to Blueford, the foreperson's announcement of the jury's

unanimous votes on capital and first-degree murder represented just that: a resolution of some or all of the elements of those offenses in Blueford's favor. *Id.* at 605-06 (citations omitted). The court rejected that contention, concluding that "[t]he foreperson's report was not a final resolution of anything." *Id.* at 606.

> 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.

Id. The court concluded that it "was therefore possible for Blueford's jury to revisit the offenses of capital and first-degree murder, notwithstanding its earlier votes." *Id.* at 608. "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." *Id.* [10]

Here, even assuming that the jury did take a vote to acquit petitioner on Counts One and Three, there is no basis to conclude that any such agreement was "final[ ]." *Id.* And unlike *Blueford*, any such agreement was not reported in open court in the presence of the other jurors, casting further doubt on the finality of any vote.

Petitioner seeks to distinguish *Blueford* on the ground that the post-trial juror statements here reflect the jury's position at "the end of deliberations," and that therefore there was no real possibility that a juror might change his or her mind. (Pet. Mem. at 27-28). But those post-trial statements do not actually indicate when the relevant votes were taken, or whether they actually reflect a final, conclusive verdict of acquittal by all twelve jurors. (Pet. Ex. A at 283-88, 292-94, 323-26, 330-31). And they certainly do not foreclose the possibility that the relevant votes were based on a preliminary discussion or a straw poll. *See Blueford*, 566 U.S. at 608 ("A single juror's change of mind is all it takes to require the jury to reconsider"); *see also Commonwealth v. Roth*, 437 Mass. 777, 793 (2002) (stating that even the "most recent 'vote' immediately prior to reporting deadlock may well be tentative, a failed experiment in compromise, and not a true expression of each juror's assessment of the case").

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[10] In a later portion of the opinion, where the Supreme Court concluded that the trial judge did not improperly declare a mistrial, it "reject[ed] the suggestion" that "the court ... should have taken some action ... to give effect to [the jury's] votes." *Id.* at 609.

In short, any jury vote here was not final, as required by *Blueford*. It was not an "actual return, receipt, and recording of a verdict in open court," as required under Massachusetts law. *Read*, 495 Mass. at 327. And there is no other basis, in fact or law, to conclude that it is a "ruling" capable of terminating jeopardy. Accordingly, and as a matter of federal constitutional law, petitioner was not actually acquitted of any of the relevant offenses. *See McElrath*, 601 U.S. at 96.

D. Whether a Post-Trial Voir Dire of Jurors Is Appropriate

Finally, and alternatively, petitioner requests post-trial *voir dire* of the individual jurors in order to ascertain whether they voted to acquit her on any of the charges before the trial judge declared a mistrial. The SJC rejected that request, concluding that an inquiry would contravene the Massachusetts "prohibition on probing the content of juror deliberations." *Read*, 495 Mass. at 330.

There is a threshold question as to whether this Court has the legal authority to conduct such a *voir dire*. As a general matter, the statutory framework for habeas proceedings contemplates the taking of evidence. Specifically, Section 2243 provides that a court "shall summarily hear and determine the facts" underlying a petition for habeas corpus. 28 U.S.C. § 2243. Section 2246 further provides that "[o]n application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit." 28 U.S.C. § 2246. And when a federal prisoner files a habeas petition under Section 2255 challenging his or her federal confinement, the statute explicitly authorizes the court

to "make findings of fact" to determine whether the claim has merit. 28 U.S.C. § 2255(b).

However, in a petition filed by a state prisoner under Section 2254 challenging his or her state confinement, a federal court has more limited authority. *See* 28 U.S.C. § 2254(e). In such a proceeding, "a determination of a factual issue made by a State court shall be presumed to be correct," subject to rebuttal. 28 U.S.C. § 2254(e)(1). If there have been no state-court factual findings supporting the claim, the petitioner is entitled to an evidentiary hearing only if the claim relies on a retroactive rule of constitutional law or a factual predicate not discoverable through due diligence, and if the facts petitioner seeks to adduce would show that "no reasonable factfinder would have found the applicant guilty." 28 U.S.C. § 2254(e)(2).

Petitioner here is not challenging a federal sentence, nor a state court judgment, so her petition is not brought under either Section 2255 or Section 2254. Instead, she is challenging her state custody under Section 2241. In one respect, the ability of a federal court to conduct a factfinding inquiry in connection with a petition under Section 2241 is clearly limited; the federal court must give deference to any findings of fact made by the state courts. *See Marshall v. Bristol Superior Ct.*, 753 F.3d 10, 16 (1st Cir. 2014). But the extent of the authority of a federal court to take *additional* evidence concerning the underlying state-court proceeding is not clear.

The general grant of factfinding authority under Sections 2243 and 2246 would seem to permit the federal court to conduct an evidentiary hearing concerning a state-court proceeding under at least some circumstances. Indeed, at least two federal

courts appear to have held evidentiary hearings in matters involving state-prisoner petitions under Section 2241, although neither opinion cited any authority for doing so nor provided any relevant legal analysis. *See Johnson v. Patton*, 580 F. App'x 646, 649 (10th Cir. 2014) (unpublished) (noting in passing that the federal court conducted an evidentiary hearing concerning "jail-time and street-time credits" for which a state prisoner would be eligible); *Hiratsuka v. Houser*, 2022 WL 348460, at *1 (D. Alaska Jan. 5, 2022) (noting in passing that the federal court held an evidentiary hearing concerning delays in pre-trial proceedings), report and recommendation adopted, 2022 WL 343772 (D. Alaska Feb. 4, 2022), aff'd, 2023 WL 5695995 (9th Cir. Sept. 5, 2023).

Counsel for petitioner has not, however, pointed to any case, from any court, where a federal court considering a Section 2241 petition has either undertaken its own *voir dire* of a state-court jury or ordered a state court to do the same. Either approach is fraught with potential problems.

To begin, an injunction directing the state trial court to conduct a *voir dire* of the former jurors would implicate substantial concerns of federalism and comity. *Cf. Younger*, 401 U.S. at 43-44. While those concerns may be somewhat mitigated if this Court itself conducts the *voir dire*, such a process would nonetheless represent a substantial intrusion by a federal court into the functions and role of the state judiciary. For example, and at a minimum, this Court would have to issue an order directing the state court to produce the impounded juror list. Such a *voir dire* should be undertaken, if at all, only in extraordinary

circumstances and even then with great circumspection and care.

Furthermore, the *voir dire* petitioner proposes would inevitably require a detailed inquiry into the jury's deliberations. Petitioner contends that the inquiry could be limited to a simple yes-or-no question as to any votes the jury may have taken before the declaration of the mistrial. But surely more than that would be required. A *voir dire* would serve little or no purpose unless it established that the jury took a unanimous and conclusive vote of acquittal on one or more counts. To make such a finding, it would be necessary to ascertain when any votes were taken, and what each juror said and thought at the time of the vote. How many votes were taken? Were they straw votes, or otherwise preliminary or tentative? What was the timing of those votes in connection with the various notes to the trial judge? What, if anything, did jurors say to each other about the votes? Did the votes reflect any compromises? Was the possibility of compromise discussed? What were the mental processes of each juror? Did any jurors have private reservations about the vote they cast? How can any such votes be reconciled with the jury's public statements that they were deadlocked on the

"charges"? [11] Why are the juror affidavits inconsistent? [12]

Nor would the inquiries be limited to the deliberations and votes inside the jury room. Because the events in question happened more than eight months ago, it would also be necessary to inquire into matters such as the potential pressures on jurors since the conclusion of the trial and the effect, if any, of such pressures on their testimony. *See Read*, 495 Mass. at 332 (noting that any inquiry of the jurors would necessarily "occur well after they became susceptible to outside influences"). Those are hardly hypothetical concerns, given the intense public focus on the jurors and their expressly voiced concerns for their privacy and even physical safety. (Pet. Ex. A at, 293, 324, 325-26).

Any *voir dire* of that nature would, at a minimum, involve considerable complexities and lead to extended delays. But even assuming that the many practical issues with a *voir dire* could be resolved—and even putting the federalism and comity issues to one side—there is a more substantial problem with petitioner's proposal: it runs directly contrary to long-

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[11] The trial judge found that the post-trial statements by jurors "directly contradict[ed]" the jury's notes, particularly the third note, which stated they were "starkly divided" as to whether the elements of "the charges" had been proved. (Pet. Ex. A at 396 n.4). The SJC likewise concluded that the statements were "inconsistent with" and "contradict[ed] their prior notes." *Read*, 495 Mass. at 313-14.

[12] The post-trial juror statements are inconsistent as to what charge (or charges) resulted in a unanimous verdict; what the vote count was as to the deadlocked charge; and whether the deliberations were respectful or had become a "bully match." (Pet. Ex. A at 283-85, 325-31).

established principles that generally prohibit any examination of the content of juror deliberations. *See Tanner v. United States*, 483 U.S. 107, 127 (1987).

The starting point for the analysis is Rule 606(b)(1) of the Federal Rules of Evidence. That rule provides as follows:

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

Fed. R. Evid. 606(b)(1).[13] That rule codified long-standing common-law principles designed to protect the freedom of juror deliberations, the protection of jurors against harassment, and the finality of verdicts. *See Tanner*, 483 U.S. at 119-21 (noting that "full and frank discussion in the jury room, juror's willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post-verdict scrutiny of juror conduct"); *Warger v. Shauers*, 574 U.S. 40, 47–48 (2014). The Supreme Court in *Tanner* observed that the prohibitions set out in Rule 606(b)(1) derived from a

[13] Rule 606(b)(2) provides three narrow exceptions to the rule, none of which are applicable here: inquiry is allowed only into extraneous prejudicial information, outside influence, or clerical errors made when entering the verdict on the verdict form. *See* Fed. R. Evid. 606(b)(2).

long-standing common-law rule supported by "[s]ubstantial policy considerations":

> Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

Id., 483 U.S. at 120 (quoting *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915)); *see also Commonwealth v. Fidler*, 377 Mass. 192, 196 (1979) ("[I]t is essential to the freedom and independence of [jury] deliberations that their discussions in the jury room should be kept secret and inviolable; and to admit the testimony of jurors to what took place there would create distrust, embarrassment and uncertainty[.]") (quoting *Woodward v. Leavitt*, 107 Mass. 453, 460 (1871)).[14]

It is true that Rule 606 does not literally apply here, because the jury did not actually render a

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[14] As noted, the SJC concluded that the *voir dire* requested by petitioner would contravene Massachusetts law and its "prohibition on probing the content of juror deliberations." *Read*, 495 Mass. at 330. It stated that "[m]aintaining the secrecy of those deliberations is a bedrock of our judicial system," which "not only prevents jury tampering but also upholds the finality of jury verdicts and fosters confidence in the judicial process." *Id.* at 330-31 (quotation omitted). "Probing secret deliberations to determine whether the jurors may have privately agreed on a verdict they never returned would undermine these fundamental principles." *Id.* at 331.

"verdict." Fed. R. Evid. 606(b)(1). Nonetheless, the same policy considerations concerning the freedom of juror deliberations and the protection of jurors against harassment are unquestionably implicated in the circumstances of this case. In fact, they apply with unusual force. This is a highly sensationalized prosecution that has been the subject of exceptional public scrutiny, not only locally but nationally. For a number of reasons, it has also proved to be unusually divisive. There is a strong likelihood that jurors would be subject to harassment, public pressure, and social coercion were the Court to order a post-trial *voir dire* that explores their viewpoints and votes at some length. [15] More than eight months after the conclusion of the trial, the jurors' willingness to speak honestly about their deliberations would surely be compromised. [16]

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[15] While the Court could of course order that the juror names be kept confidential, it is at least somewhat doubtful that their anonymity could be entirely and permanently protected. More importantly, the jurors themselves would likely doubt the efficacy of any such order, and their willingness to speak freely concerning their deliberations would likely be inhibited.

[16] According to petitioner, "in the context of this highly publicized case, it strains credulity to suggest" that if the post-trial juror statements did not "represent the unanimous view of all 12, the remaining jurors would allow the inaccuracy to go uncorrected." (Pet. Mem. at 27). It is at least as likely that the remaining seven jurors are inhibited from coming forward in order to avoid continued media and social pressure, whether they agree with the post-trial statements or not. (Pet. Ex. A at 331) (Juror B stating that he believes "other jurors have been reluctant to come forward because there is so much public and media attention focused on this case"). In any event, the actual views of those jurors could only be ascertained by a detailed *voir dire*.

Even the policy underlying Rule 606(b)(1) that favors finality is implicated, if only by analogy. The jury notes reporting a deadlock—culminating in the note stating that the jury was "starkly divided" as to whether the Commonwealth had proved "the necessary elements of the charges"—led ineluctably to a substantial, if not final, legal consequence: the declaration of a mistrial and the termination of the first trial. (Pet. Ex. A at 268).

For all of those reasons, the Court concludes that a federal-court *voir dire* of the state-court jurors—a *voir dire* that would necessarily subject their private deliberations to intense public scrutiny—is probably unlawful and certainly ill-advised. But in any event, under the circumstances presented here, the Court concludes that it is not necessary to reach the issue. Even assuming that a post-trial *voir dire* elicited evidence strongly favorable to petitioner—such as an attestation from each juror that the jury voted unanimously to acquit petitioner on Counts One and Three before being discharged—her claim would still fail.

As noted, an acquittal requires a "*ruling* that the prosecution's proof is insufficient to establish criminal liability for an offense." *McElrath*, 601 U.S. at 96 (emphasis added). A private, unreported, unrecorded jury vote is not a "ruling," and therefore not an acquittal. *Id.* At the very least, such a "ruling" requires finality, and the public affirmation of a verdict is part of what makes it final, rather than provisional. The opportunity for "a single juror's change of mind" is enough to undermine its finality. *Blueford*, 566 U.S. at 608. And such a vote, in any event, does not constitute an acquittal under Massachusetts law. *Read*, 495 Mass. at 326-30.

Therefore, there was no "ruling" that acquitted petitioner as to Counts One and Three. *McElrath*, 601 U.S. at 96.

Accordingly, the Court declines to order post-trial *voir dire* of the individual jurors in the initial trial of this matter.

III. Conclusion

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.

APPENDIX C

495 Mass. 312

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SUFFOLK

SJC-13663

KAREN READ

v.

COMMONWEALTH.

Argued November 6, 2024.

Decided February 11, 2025.

Attorneys and Law Firms

Martin G. Weinberg (Alan J. Jackson, of California, Michael Pabian & David R. Yannetti also present) for the petitioner.

Caleb J. Schillinger, Assistant District Attorney (Laura A. McLaughlin, Assistant District Attorney, also present) for the Commonwealth.

Jessie Rossman, Daniel McFadden, & Michael T. Packard, for American Civil Liberties Union of Massachusetts, Inc., amicus curiae, submitted a brief.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges, Dewar, & Wolohojian, JJ.

OPINION

GEORGES, J.

The defendant challenges the denial of her motion to dismiss after her first trial ended in a mistrial.[1] That trial was lengthy, spanning eight weeks of evidence, involving seventy-four witnesses and 657 exhibits. The defendant does not contend that this evidence was legally insufficient to support a conviction on any of the charges, which would preclude retrial.[2] Instead, her argument focuses on whether the trial judge properly declared a mistrial and the relevance, if any, of posttrial accounts of jury deliberations.

The jury deliberated for five days, sending progressively insistent notes to the judge about their inability to reach a unanimous verdict. In their third and final note, the jury stated that "[s]ome members ... firmly believe[d] that the evidence surpasses the burden of proof establishing the elements of the charges," while others did not. They described their views as rooted in "sincere adherence to [their] individual principles and moral convictions," and stated that further deliberation would be "futile" and would "force [them] to compromise these deeply held beliefs." Based on this final note, the judge declared a mistrial.

The defendant's motion to dismiss and this petition rely on posttrial accounts from several jurors. These

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[1] Although Karen Read commenced this action by filing a petition in the county court, for convenience, we refer to her as the defendant.

[2] The record submitted to the single justice, and now before this court, does not contain transcripts of the testimony or the exhibits from the defendant's first trial.

accounts suggest that, during deliberations, the jury unanimously agreed the defendant was not guilty on two of the three charges and were deadlocked only on the remaining charge. The defendant argues that a mistrial was thus not manifestly necessary because the judge could have requested a partial verdict from the jury before discharging them. The defendant further asserts that these posttrial accounts show she was, in effect, acquitted of two charges, and that double jeopardy bars retrial on those counts.

This petition thus raises the question: Can post-trial accounts of jurors' private deliberations that are inconsistent with their public communications in court render the declaration of a mistrial improper, or constitute an acquittal, where the jury did not announce or record a verdict in open court? We conclude that they cannot. The jury clearly stated during deliberations that they had not reached a unanimous verdict on any of the charges and could not do so. Only after being discharged did some individual jurors communicate a different supposed outcome, contradicting their prior notes. Such post-trial disclosures cannot retroactively alter the trial's outcome – either to acquit or to convict. Accordingly, we affirm the trial judge's denial of the motion to dismiss and the defendant's request for a posttrial juror inquiry.[3]

Background. 1. Trial and deliberations. In 2022, a grand jury returned three indictments against the defendant: murder in the second degree, G. L. c. 265, § 1 (count one); manslaughter while operating a

[3] The motion filed by the American Civil Liberties Union of Massachusetts, Inc., seeking leave to file an amicus curiae brief, is hereby allowed.

motor vehicle under the influence of alcohol, G. L. c. 265, § 13 1/2 (count two); and leaving the scene of personal injury resulting in death, G. L. c. 90, § 24 (2) (a 1/2) (2) (count three). Trial began in April 2024 and lasted over two months. On the thirty-seventh day, the jury received instructions regarding the three indictments, and two lesser included offenses for count two: involuntary manslaughter and motor vehicle homicide.

Before deliberations began, the judge indicated that the foreperson of the jury would be given separate verdict slips for each of the three indictments. The judge then explained the procedure for delivering the verdicts:

> "After the final vote of the jury, the foreperson should check the appropriate boxes as to each charge, then sign and date the verdict slips and notify the court officer that you have reached a unanimous verdict. You will then be brought back into the courtroom, where the foreperson will deliver the verdicts to the Court."

The judge also instructed the jury to "continue deliberating until you have reached a final verdict on each charge," and to not disclose their numerical standing or progress to anyone, including the judge, "before such time as you have reached a unanimous verdict." The jury then began deliberations.

Three days later, after approximately nineteen hours of deliberations, the foreperson submitted a note to the judge (first note) that stated:

> "I am writing to inform you, on behalf of the jury, that despite our exhaustive review of the evidence and our diligent consideration

> of all disputed evidence, we have been unable to reach a unanimous verdict."

After reading the note into the record, the judge requested argument from the parties on whether the jury had conducted "due and thorough" deliberations, warranting a so-called *Tuey-Rodriquez* charge. [4] The Commonwealth argued that the jury had not deliberated long enough, while the defense disagreed, requesting the instruction and asserting that the foreperson's use of the word "exhaustive" suggested "an impasse." The judge determined that further deliberation was appropriate and instructed the jury to continue.

Deliberations extended through the afternoon and resumed the following Monday morning. At 10:45 A.M., the jury foreperson submitted another note to the judge (second note), which stated:

> "Despite our commitment to the duty entrusted to us, we find ourselves deeply divided by fundamental differences in our opinions and state of mind.
>
> "The divergence in our views are *[sic]* not rooted in a lack of understanding or effort, but deeply held convictions that each of us

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[4] See *Commonwealth* v. *Rodriquez,* 364 Mass. 87, 101-102, 300 N.E.2d 192 (1973) (Appendix A); *Commonwealth* v. *Tuey,* 8 Cush. 1, 2-3 (1851). The *Tuey–Rodriquez* charge is a model instruction "given when jurors report deadlock after 'due and thorough deliberation'" that is "designed to urge the jury to reach a verdict by giving more serious consideration to opposing points of view." *Commonwealth* v. *Carnes,* 457 Mass. 812, 827, 933 N.E.2d 598 (2010). Once a deadlocked jury receives the *Tuey–Rodriquez* charge and resumes their deliberations, "they shall not be sent out again without their own consent." G. L. c. 234A, § 68C.

carry ultimately leading to a point where consensus is unattainable.

> "We recognize the weight of this admission and the implications it holds."

Upon receiving this note, the judge again invited argument from both parties. The Commonwealth acknowledged that the jury had already deliberated "in the vicinity of 22 or 23 hours,"[5] but nonetheless argued it was premature to conclude their deliberations had been due and thorough. Defense counsel, however, maintained that the jury were "hopelessly deadlocked," and again requested the *Tuey-Rodriquez* instruction. The judge agreed with defense counsel, noting that the jury had been "extraordinary" and that she had "never seen a note like this reporting to be at an impasse." The judge then delivered the *Tuey-Rodriquez* instruction to the jury and sent them back to deliberate further.

At approximately 2:30 P.M., the foreperson submitted yet another note to the judge (third note), which stated:

> "Despite our rigorous efforts, we continue to find ourselves at an impasse.
>
> "Our perspectives on the evidence are starkly divided. Some members of the jury firmly believe that the evidence surpasses the burden of proof establishing the elements of the charges beyound *[sic]* a reasonable doubt. Convers[e]ly, others find

[5] Although the transcript does not state the precise time that deliberations resumed on Monday morning, based on prior proceedings it appears the jury had deliberated closer to twenty-four or twenty-five hours by this point.

> the evidence fails to meet this standard, and does not sufficiently establish the necessary elements of the charges[.]
>
> "The deep division is not due to a lack of effort or diligence, but rather a sincere adherence to our individual principles and moral convictions.
>
> > "To continue to deliberate would be futile and only serve to force us to compromise these deeply held beliefs."

After receiving the third note, the judge informed counsel that "[t]he jury is at an impasse." The jury were called back into the court room, and the third note was read aloud into the record. Upon reaching the final line – stating that further deliberation would "force [the jury] to compromise these deeply held beliefs" – the judge addressed the jury, saying, "I am not going to do that to you ... folks," and declared a mistrial.

The judge then discharged the jury back to the deliberation room, explaining that she would meet them there privately to thank them for their service. The judge and the parties remained in the court room to discuss their availability for scheduling a status conference on the matter. At no point during this discussion did defense counsel object to the judge's declaration of a mistrial or express disagreement with that outcome.

2. *Posttrial events.* According to affidavits submitted by defense counsel, a member of the deliberating jury (juror A) contacted defense counsel on July 2, 2024, after noticing "inaccurate reports" about the jury's alleged "split" that caused the mistrial the day before. Juror A stated that the jury had unanimously

agreed that the defendant was not guilty of count one (murder in the second degree) and count three (leaving the scene of personal injury resulting in death).

Two days after the mistrial, defense counsel also received screenshots[6] of text message exchanges with jurors or their acquaintances describing the deliberations. In one exchange, another member of the jury (juror B) wrote, "It was not guilty on second degree. And split in half for the second charge."[7] In another exchange, an individual (referred to as an "[i]nformant" by defense counsel) was advised that another juror (juror C) had told friends there was "no consideration" of murder in the second degree and that the jury deadlocked on "the remaining charges." The exchange contained no mention of count three, but it stated that "manslaughter started polling at 6/6 then ended deadlock *[sic]* @ 4no8yes." Juror C had also reportedly stated that the jurors had "a group text going." Upon receiving this information, the informant commented, "[I]f they all agreed on no for murder two[,] they should make that clear to the DA[ ] and the court. [I]t's basically a case of double jeopardy if she is retried on that charge."

On July 8, 2024, one week after the mistrial, the defendant filed a motion to dismiss based on these posttrial accounts. The defendant argued that the accounts showed the jury had effectively acquitted

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[6] "A screenshot is a copy of the image displayed by a computer screen" (quotation and citation omitted). *Commonwealth* v. *Cronin,* 495 Mass. 170, 171 n.2, 248 N.E.3d 142 (2025).

[7] One month later, juror B contacted defense counsel to confirm the content of this exchange, and further asserted that the jury had unanimously agreed the defendant was not guilty of count three as well.

her of counts one (murder in the second degree) and three (leaving the scene of personal injury resulting in death). She further contended that the judge's mistrial declaration was improper for these two counts and requested, at minimum, a postverdict inquiry to confirm whether the jury had agreed she was not guilty of those charges.

Defense counsel later supplemented the motion with accounts from two additional jurors. One juror (juror E) stated that the jury had been deadlocked only on the "lower charges on count 2." The other juror (juror D) stated that the jury's disagreement solely concerned "Count 2 and its lesser offenses." Juror D indicated that the jury had debated whether to inform the judge of their decision on counts one and three, but they were uncertain "if they were allowed" to do so. Juror D claimed that, after discussing the matter, the jury ultimately "decided to inform the court that they were deadlocked, and they expected they would get further instruction about the remaining (decided) counts thereafter."

The Commonwealth also submitted a posttrial filing notifying the court that, after the submission of defense counsel's affidavits, it had received two voicemail messages from a member of the jury. The juror specified that the jury had voted not guilty on counts one and three, "and as of last vote[,] 9-3 guilty ... on the lower-level manslaughter charges." The Commonwealth also received e-mail messages from three individuals who identified themselves as jurors and asked to speak anonymously. Once the Commonwealth informed them that it may be required to disclose the substance of their communications to defense counsel or the court, however, the jurors declined to communicate further.

The trial judge denied the defendant's motion to dismiss after a nonevidentiary hearing. The judge reasoned that, "[b]ecause there was no open and public verdict affirmed in the open court rendered in this case, the defendant was not acquitted of any of the charges," and that any posttrial voir dire of jurors would involve an impermissible inquiry into the substance of the jury's deliberations.

Additionally, the judge rejected the defendant's argument that declaring a mistrial was improper. She noted that defense counsel had twice requested the *Tuey-Rodriquez* instruction – "the final step" preceding a mistrial – and raised no objections nor made any request to be heard when the mistrial was declared. The judge remarked that "defense counsel were no shrinking violets" during the trial, making it unlikely that, "when counsel heard that the jury was at an impasse for a third time and a mistrial was inevitable, at perhaps the most crucial point in the trial, counsel would sit silently if they did not consent to a mistrial." She also concluded that, in any event, the mistrial was manifestly necessary given the jury's repeated statements of deadlock.

On September 11, 2024, the defendant filed a petition for relief under G. L. c. 211, § 3, in the county court.[8] A single justice of this court reserved and

[8] Although a defendant ordinarily is not entitled to interlocutory review of the denial of a motion to dismiss, we have recognized a narrow exception to this general rule in the context of double jeopardy claims. See *Neverson* v. *Commonwealth,* 406 Mass. 174, 175, 546 N.E.2d 876 (1989). The Commonwealth does not contest that interlocutory review is appropriate in the circumstances of the instant case.

reported the matter, without decision, to the full court.[9]

Discussion. 1. *Propriety of declaring a mistrial.* The double jeopardy clause of the Fifth Amendment to the United States Constitution "generally preclude[s] the Commonwealth from trying a defendant more than once for the same offense." *Commonwealth* v. *Phim,* 462 Mass. 470, 473, 969 N.E.2d 663 (2012). See *Benton* v. *Maryland,* 395 U.S. 784, 787, 795-796, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) (Federal double jeopardy clause applicable to States by Fourteenth Amendment). However, an exception to this general rule applies when a mistrial is declared due to "manifest necessity" (citation omitted). *Ray* v. *Commonwealth,* 463 Mass. 1, 3, 972 N.E.2d 421 (2012). In such instances, the double jeopardy clause does not bar the State from retrying the defendant. See *id.*

To determine whether the declaration of a mistrial is manifestly necessary, a trial judge balances "the defendant's valued right to have his or her trial completed by a particular tribunal against the interest of the public in fair trials designed to end in just judgments" (quotations and citation omitted). *Commonwealth* v. *Edwards,* 491 Mass. 1, 17, 198 N.E.3d 740 (2022). A hung jury has long been recognized as "a traditional example" of manifest necessity, allowing retrial without offending the defendant's double jeopardy rights. *Commonwealth* v. *Troila,* 410 Mass. 203, 206, 571 N.E.2d 391 (1991). See *Richardson* v. *United States,* 468 U.S. 317, 326, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984) ("jeopardy does

[9] At the time this matter was reserved and reported, the defendant's retrial was scheduled to begin on January 27, 2025. The retrial has since been continued until April 2025.

not terminate when the jury is discharged because it is unable to agree").

The decision to declare a mistrial is entrusted to the "sound discretion" of the trial judge. *Commonwealth* v. *Bryan,* 476 Mass. 351, 352, 67 N.E.3d 705 (2017). Trial judges receive such discretion to avoid the possibility of coercive measures being used to force jury agreement, thereby protecting the fairness of the proceedings. See A *Juvenile* v. *Commonwealth,* 392 Mass. 52, 55, 465 N.E.2d 240 (1984). See also *Renico* v. *Lett,* 559 U.S. 766, 774, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010). In evaluating whether a trial judge abused his or her discretion in declaring a mistrial, a reviewing court considers whether the judge carefully explored "alternatives to a mistrial," and whether counsel were "given full opportunity to be heard" (citation omitted). *Commonwealth* v. *Taylor,* 486 Mass. 469, 484–485, 159 N.E.3d 143 (2020). If these principles were followed, and there is no claim of insufficient evidence to support a conviction, "double jeopardy will not prevent [the defendant's] retrial" (citation omitted).[10] *Ray,* 463 Mass. at 4, 972 N.E.2d 421.

Here, we discern no abuse of discretion in the trial judge's decision that the jury were at an impasse and that a mistrial was manifestly necessary. After extensive, multiday deliberations, the jury submitted several increasingly emphatic notes about their inability to reach a unanimous verdict. By the time the jury sent their first note, they had deliberated for approximately nineteen hours, over four days. That

[10] The defendant has not argued that the evidence presented at her first trial was legally insufficient to sustain a conviction, and we thus do not address the issue.

note stated that they had conducted an "exhaustive review of the evidence," and given "diligent consideration of all disputed evidence." Following the judge's instruction to continue their deliberations, the jury deliberated for another five to six hours – spanning a Friday afternoon and the following Monday morning – before sending a second note that was noticeably more definitive. That note stated jurors were "deeply divided by fundamental differences" and that "consensus [was] unattainable," echoing language from other cases where we have characterized a jury's report of deadlock as "unambiguous." See, e.g., *Ray,* 463 Mass. at 5, 972 N.E.2d 421 (concluding that jury note stating jurors were "hopelessly deadlocked" was "unambiguous" about their inability to agree); *Fuentes* v. *Commonwealth,* 448 Mass. 1017, 1018, 863 N.E.2d 43 (2007) (final note stating that jurors were "unable to come to a unanimous decision" unequivocally reflected that they were deadlocked).

The second note further emphasized that the deadlock arose not from "a lack of understanding or effort," but from "deeply held convictions that each of [the jurors] carr[ied]." By this point, the jury had already deliberated approximately twenty-four hours, see note 5, *supra,* and defense counsel described them as "hopelessly deadlocked." But the trial judge did not immediately conclude that all hope of attaining a verdict was lost. Instead, she issued the *Tuey-Rodriquez* charge, a standard instruction that encourages deadlocked juries to "reach a verdict by giving more serious consideration to opposing points of view" (citation omitted). *Commonwealth* v. *Chalue,* 486 Mass. 847, 860, 162 N.E.3d 1205 (2021).

After nearly four hours of additional deliberation – bringing the total to approximately twenty-eight hours – the jury submitted a third note that was even more emphatic. It stated that further deliberations "would be futile and only serve to force us to compromise [our] deeply held beliefs." While there is no "mechanical formula" for determining whether a jury is genuinely deadlocked, see *Ray,* 463 Mass. at 4-5, 972 N.E.2d 421, quoting *Illinois* v. *Somerville,* 410 U.S. 458, 462, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973), the trial judge acted well within her discretion in concluding the jury were at an impasse and a mistrial was manifestly necessary.

The defendant contends that, despite the jury's deadlock, the trial judge failed to adequately consider alternatives to declaring a mistrial. Yet, as discussed, the trial judge did consider and pursue such alternatives. After the first note reporting deadlock, the judge instructed jurors to continue their deliberations. After the second note, the judge issued the *Tuey-Rodriquez* charge. It was only when the jury submitted their third report of deadlock, at which point the judge was statutorily precluded from ordering them to continue deliberations without their consent, see G. L. c. 234A, § 68C, that the judge declared a mistrial. Nonetheless, the defendant argues that the judge should have inquired whether the jury had reached agreement on any of the charges. Had the judge done so, the defendant asserts, she would have discovered that the jury had agreed on counts one and three, allowing for a partial verdict. We disagree.

Rule 27 (b) of the Massachusetts Rules of Criminal Procedure, 378 Mass. 897 (1979), "gives a trial judge discretion to require a jury to return a verdict" for

charges on which they have unanimously agreed before declaring a mistrial (quotation and citation omitted). *Commonwealth* v. *Floyd P.,* 415 Mass. 826, 830, 615 N.E.2d 938 (1993). See Mass. R. Crim. P. 27 (b) ("judge *may* first require the jury to return verdicts on those charges upon which the jury can agree and direct that such verdicts be received and recorded" [emphasis added]). Rule 27 (d) also permits a judge to poll the jury "[w]hen a verdict is returned and before the verdict is recorded." Mass. R. Crim. P. 27 (d). However, "a judge is not required to accept" a partial verdict before declaring a mistrial, *Daniels* v. *Commonwealth,* 441 Mass. 1017, 1018 n.3, 808 N.E.2d 816 (2004), and is prohibited from doing so on a single indictment that contains lesser included offenses, see *Commonwealth* v. *Roth,* 437 Mass. 777, 787, 776 N.E.2d 437 (2002).

Here, the jury were instructed on three separate indictments, along with two lesser included offenses on count two, but the trial record offers no indication that a partial verdict was imminent or possible. The jury's first note simply stated they were "unable to reach a unanimous verdict," without reference to any specific charge. The second note reiterated that consensus was unattainable and acknowledged "the implications" of the jury's deadlock. Neither note suggested the jury had reached, or could reach, consensus on any subset of the charges,[11] and we

[11] As the trial judge observed in her memorandum of decision denying the defendant's motion to dismiss, it is particularly striking that the jury notes provided "no inkling" of agreement on any of the charges. Additionally, the notes did not request clarification on whether a partial verdict could be returned. This absence is particularly significant given the evident "care that went into writing the notes and how articulately they expressed the jurors' disagreement."

have cautioned against assuming a final verdict exists from general reports of deadlock. See *Roth,* 437 Mass. at 793–794, 776 N.E.2d 437.

In fact, the jury's third note implied they were deadlocked on *all* charges. That note stated, in part:

> "Some members of the jury firmly believe that the evidence surpasses the burden of proof establishing the elements of *the charges* [beyond] a reasonable doubt. Convers[e]ly, others find the evidence fails to meet this standard, and does not sufficiently establish the necessary elements of *the charges"* (emphases added).

Although the defendant relies on posttrial affidavits to suggest "the charges" referred only to count two and its lesser included offenses, we assess the trial judge's decision based on what was known at the time of her decision. See *Commonwealth* v. *Torres,* 453 Mass. 722, 736, 905 N.E.2d 101 (2009). As one court has observed, allowing posttrial juror accounts to affect the analysis "would create endless confusion and controversy" in cases where a mistrial has already been declared due to deadlock. *Fitzgerald* v. *Lile,* 732 F. Supp. 784, 789 (N.D. Ohio), aff'd, 918 F.2d 178 (6th Cir. 1990).

In short, the record before the trial judge suggested complete deadlock. The first and second notes provided no indication of a partial consensus, and the third note plainly implied the opposite. See *State* v. *Fennell,* 431 Md. 500, 522, 66 A.3d 630 (2013), and cases cited ("the mere theoretical availability of partial verdicts" does not obligate trial judge to conduct further inquiry where "no party has requested a partial verdict be taken or the jury does

not indicate that it has reached one"). Further still, these notes indicated that additional inquiry into the jury's deliberations risked producing a coerced verdict.

Judges must carefully avoid actions that might pressure jurors into compromising their genuine views of the evidence. See *Commonwealth* v. *Foster,* 411 Mass. 762, 765, 585 N.E.2d 331 (1992). And we have long recognized that "deadlocked juries are particularly susceptible to coercion." *Roth,* 437 Mass. at 791, 776 N.E.2d 437.

See *Commonwealth* v. *O'Brien,* 65 Mass. App. Ct. 291, 295, 839 N.E.2d 845 (2005), and cases cited. It is precisely for this reason that judges are statutorily prohibited from ordering further deliberations by a deadlocked jury that has twice reported being at an impasse after due and thorough deliberation, unless they explicitly consent or seek clarification on the law. See *Commonwealth* v. *Tiscione,* 482 Mass. 485, 492, 124 N.E.3d 690 (2019), quoting G. L. c. 234A, § 68C ("If, after 'due and thorough deliberation,' the jury report to the judge twice that they are deadlocked, 'they shall not be sent out again without their own consent, unless they ask from the court some further explanation of the law'"). The risk of coercion is also heightened when a judge inquires about the possibility of a partial verdict following a deadlock. As we have explained:

> "Where the jurors have twice reported themselves deadlocked, and have already heard the *Tuey-Rodriquez* charge, a judge's inquiry concerning partial verdicts cannot avoid communicating to the jury the judge's desire to salvage *something* from the trial. However the inquiry is articulated or explained, the

> import of the inquiry is unmistakable: 'Can't you at least decide a part of this case?' The inquiry, by its nature, plays on the deadlocked jurors' natural sense of frustration, disappointment, and failure. The jurors are confronted with the request, and asked to absorb its inherent complexity, at the worst possible time, when they are tired, anxious to be discharged, and perhaps angry at fellow jurors whom they blame for failing to reach agreement."

Roth, supra at 792, 776 N.E.2d 437.

In this case, the risks of coercion were evident. After receiving the third note, the judge was statutorily barred from ordering further deliberation without the jury's consent. See G. L. c. 234A, § 68C. Far from suggesting that consent might be obtained, the third note made clear that further deliberation would "only serve to force [the jurors] to compromise ... deeply held beliefs" rooted in "sincere adherence to [their] individual principles and moral convictions." See *Commonwealth* v. *Winbush,* 14 Mass. App. Ct. 680, 682, 442 N.E.2d 416 (1982) (statutory prohibition on ordering further deliberation was designed to prevent jurors "from being coerced into reaching a verdict in the face of views conscientiously reached and held"). Asking jurors whether they would nonetheless consent to further deliberation would have implicitly pressured them to compromise those beliefs in order to "salvage" some part of the trial. *Roth,* 437 Mass. at 792, 776 N.E.2d 437.

In these circumstances, "[t]here is simply too great a risk" that any resulting verdict "would merely be the product of one hasty, final attempt to satisfy the judge's apparent desire for some form of decision on

the case." *Id.* at 793, 776 N.E.2d 437. And if the judge were to inquire about the possibility of a partial verdict, "by definition, any further discussion amongst the jurors regarding their response to the judge's partial verdict inquiry would itself be further deliberation" in violation of the statute. Id. at 792, 776 N.E.2d 437.

Indeed, if the judge had inquired about a partial verdict on her own initiative, and the jury returned a verdict of guilty on any of the counts, "there is no question that this defendant would be making a strenuous – and potentially meritorious -argument that that guilty verdict was the product of coercive intrusion into the function of the jury." *Roth,* 437 Mass. at 792, 776 N.E.2d 437. Thus, given the entire course of jury deliberations, and the emphatic language of the third note that jurors were deadlocked on "the charges" and that further deliberation would be coercive, the judge acted within her discretion in declaring a mistrial without inquiring sua sponte about a partial verdict. See *Fuentes,* 448 Mass. at 1018–1019, 863 N.E.2d 43 (judge was not required to ask jury if they would consent to further deliberations before declaring mistrial because jury had already received *Tuey- Rodriquez* instruction and final note unequivocally stated they were deadlocked); *Daniels,* 441 Mass. at 1018 n.3, 808 N.E.2d 816.

For much the same reason, the trial judge's decisio not to poll the jury sua sponte to confirm the deadlock before declaring a mistrial did not constitute an abuse of discretion. As we explained in *Ray,* 463 Mass. at 5 n.5, 972 N.E.2d 421, polling jurors about "whether further instructions or deliberation would be likely to resolve the deadlock" is

discouraged due to the "risk of coercion inherent in questioning jurors, particularly in individual colloquies." A trial judge is not "required to consider every conceivable alternative before declaring a mistrial," and we discern no abuse of discretion in the judge not pursuing alternatives suggested, after the fact, by defense counsel based on information obtained after the mistrial was declared. *Commonwealth* v. *Cassidy,* 410 Mass. 174, 179, 571 N.E.2d 383 (1991) ("If an alternative which was neither suggested by counsel nor considered by the judge is later developed, we will not fault the judge, so long as an honest inquiry into alternatives is made"). See generally *Blueford* v. *Arkansas,* 566 U.S. 599, 609–610, 132 S.Ct. 2044, 182 L.Ed.2d 937 (2012) ("We have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse – let alone to consider giving the jury new options for a verdict").

The defendant further contends, separately from the availability of alternatives, that it was an abuse of discretion to declare a mistrial without first notifying defense counsel of the content of the third note and allowing an opportunity to be heard. First, it is worth noting that the trial judge discredited defense counsel's claim that he lacked such an opportunity. See generally *Commonwealth* v. *Garner,* 490 Mass. 90, 94, 188 N.E.3d 965 (2022) (appellate courts defer to credibility determinations of trial judge). The judge explained that she had previously sought defense counsel's views after receiving each of the first two jury notes, when counsel had argued that the jury were at an impasse. The only alternative proposed by defense counsel during these exchanges was the issuance of a *Tuey-Rodriquez* charge, which the judge granted. When the third note

prompted the mistrial, defense counsel neither objected nor expressed any dissatisfaction, even when the parties remained in the court room to schedule a subsequent status conference.

In any event, there is no indication that inviting defense counsel to participate in a third round of "consultation would have produced any fruitful alternatives." *Fuentes,* 448 Mass. at 1019, 863 N.E.2d 43. As discussed, the receipt of the third note barred the judge from "requiring further deliberation without the jury's consent" because they had already engaged in due and thorough deliberations and twice reported being deadlocked. *Commonwealth* v. *Carnes,* 457 Mass. 812, 829, 933 N.E.2d 598 (2010). Furthermore, nothing suggested that defense counsel would have requested an inquiry into the possibility of a partial verdict based on the content of the jury notes.[12] See *Oliver* v. *Justices of the N.Y. Supreme Court of N.Y. County,* 36 N.Y.2d 53, 58, 364 N.Y.S.2d 874, 324 N.E.2d 348 (1974) ("Having displayed no enthusiasm for the rendering of a partial verdict while the jury was still impaneled, and a guilty verdict still possible, the defense may not seek to overturn the court's order of mistrial after discharge of the jury ..."). While the more prudent course might

[12] It is difficult to imagine that a competent defense attorney, upon learning that some members of the jury "firmly believe[d]" the evidence proved "the elements of the charges" beyond a reasonable doubt, would request that the jury be instructed to return verdicts on any charges where agreement had been reached. As other courts have recognized, "[a] defendant may have a tactical reason for not requesting the trial court to question the jury about a partial verdict," and trial judges should not be required to inquire about partial verdicts on their own initiative. *State* v. *Tate,* 256 Conn. 262, 286 n.16, 773 A.2d 308 (2001).

have been to read the third note to counsel and provide yet another opportunity to be heard before declaring a mistrial, the trial judge did not abuse her discretion in failing to do so. See *Fuentes, supra.*

In sum, we conclude that the trial judge acted within her discretion in declaring a mistrial without first inquiring about a partial verdict or offering defense counsel an additional opportunity to be heard. Considering the length of jury deliberations, the judge's prior efforts to encourage consensus, and the increasingly emphatic tone of the jury notes indicating deadlock, it was clear the jury had reached an impasse. Furthermore, nothing suggested that the deadlock was limited to a specific charge; on the contrary, the notes contained no inkling of agreement, and the third note implied the jury were deadlocked on *all* charges. Under these circumstances, given the content of the notes and the fact that defense counsel did not request further inquiry, engaging in one sua sponte risked coercing a verdict. Thus, the judge appropriately exercised her discretion in declaring a mistrial based on manifest necessity. See *Daniels,* 441 Mass. at 1017, 808 N.E.2d 816, and cases cited (judge did not abuse discretion in declaring mistrial after four days of deliberation where jury had reported impasse and received *Tuey-Rodriquez* charge but remained unable to reach verdict and stated, in response to judicial inquiry, that additional deliberation would not result in verdict). See also *Fuentes,* 448 Mass. at 1018–1019, 863 N.E.2d 43 (no abuse of discretion in declaring mistrial without first asking whether jury would consent to deliberate further where jury had already been given *Tuey-Rodriquez* instruction and final jury

note "unequivocally stated that the jury were 'unable to come to a unanimous decision'").[13]

2. *Defendant's claims of acquittal.* The defendant separately argues that she cannot be retried on count one or count three, regardless of whether the mistrial declaration was proper. She contends that posttrial information from five deliberating jurors [14] – indicating the jury were deadlocked only on count two and had unanimously found her not guilty on counts one and three[15] – effectively amounts to an acquittal of those counts. Alternatively, she asserts that the trial judge abused her discretion in denying a posttrial inquiry to verify these accounts of juror deliberations. We examine each contention below.

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[13] Because we conclude that the trial judge acted within her discretion in determining that declaring a mistrial was manifestly necessary, we do not need to address the defendant's alternative argument that defense counsel did not consent to the mistrial. Similarly, we do not address the defendant's ancillary argument, raised here for the first time, that the court should have conducted a colloquy with the defendant before finding such consent. But see *Daniels,* 441 Mass. at 1018 n.2, 808 N.E.2d 816 ("That [the defendant] did not personally assent to the mistrial makes no difference"). Cf. *Poretta* v. *Commonwealth,* 409 Mass. 763, 766, 569 N.E.2d 794 (1991) ("there can be no doubt that the Federal Constitution does not condition the permissibility of retrial on the defendant's personal, explicit assent to a mistrial motion brought by his attorney").

[14] For purposes of adjudicating the motion to dismiss, the trial judge accepted the purported juror statements as true and accurate. For purposes of this discussion, we similarly proceed from the assumption that the affidavits are accurate.

[15] Juror C did not disclose information indicating whether the jury had unanimously agreed that the defendant was not guilty on count three.

a. *Claim of acquittal based on juror disclosures*

The double jeopardy clause of the United States Constitution prohibits retrial for the same offense after an acquittal. See *McElrath* v. *Georgia,* 601 U.S. 87, 93-94, 144 S.Ct. 651, 217 L.Ed.2d 419 (2024). See also G. L. c. 263, § 7. To determine whether an acquittal has occurred, we look to whether, "given the operation of state law," the jury "acted on [their] view that the prosecution had failed to prove its case" (citation omitted). *McElrath, supra* at 96, 144 S.Ct. 651. Because this presents a legal question, our review of the trial judge's decision is de novo. *Commonwealth* v. *Hebb,* 477 Mass. 409, 411, 77 N.E.3d 308 (2017).

Relevant here, "the fundamental requirements" for a jury's issuance of a verdict in a criminal case are set forth in Mass. R. Crim. P. 27 (a). *Roth,* 437 Mass. at 786, 776 N.E.2d 437. Pursuant to that rule, a valid jury verdict must be unanimous and "returned by the jury to the judge in open court." Mass. R. Crim. P. 27 (a). Our case law confirms that a criminal verdict is effective *only* when affirmed by jurors in open court. See *A Juvenile,* 392 Mass. at 56-57, 465 N.E.2d 240, quoting *Lawrence* v. *Stearns,* 11 Pick. 501, 502 (1831) ("The only verdict which can be received and regarded, as a complete and valid verdict of a jury, upon which a judgment can be rendered, is an open and public verdict, given in and assented to, in open court, as the unanimous act of the jury, and affirmed and entered of record, in the presence and under the sanction of the court"). In other words, the distinction between informal "agreement on a verdict" and the actual "return, receipt, and recording of a verdict" in open court is central – only the latter constitutes a final verdict of the jury on a criminal charge.

A Juvenile, supra, quoting *Commonwealth* v. *Kalinowski,* 12 Mass. App. Ct. 827, 830, 429 N.E.2d 368 (1981). We have consistently reaffirmed this long-standing distinction throughout our jurisprudence.[16]

In this case, it is undisputed that the jury did not announce a final verdict on any charge. Although the defendant has submitted affidavits claiming the jurors reached an agreement on counts one and three during deliberations, the only statements made in open court reflected the jury's *inability* to reach a unanimous verdict. As discussed, the jury submitted three separate notes to the judge indicating deadlock -culminating in a final note indicating that "[s]ome members of the jury firmly believe[d] that the evidence surpasse[d] the burden of proof establishing the elements of the charges," while others did not.

Far from an "affirmation in open court" of unanimous agreement on counts one and three, see

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[16] See *Commonwealth* v. *Tennison,* 440 Mass. 553, 561, 800 N.E.2d 285 (2003) (initial verdict "was sealed but not yet valid because it was not given and affirmed orally by the jurors in open court"); *Gelmette* v. *Commonwealth,* 426 Mass. 1003, 1003, 686 N.E.2d 198 (1997) (polling of jurors, after declaration of mistrial in murder case, showing that eleven had voted to convict defendant of lesser included offense of manslaughter, and one had voted to acquit, "was of no effect and ... did not constitute an acquittal on so much of the indictment as charged murder in the first and second degree"). See also *Rich* v. *Finley,* 325 Mass. 99, 105, 89 N.E.2d 213 (1949) (no final verdict where one juror died after jury had unanimously agreed to verdict, but before jury announced that verdict in open court); *Lawrence,* 11 Pick. at 502 (no final verdict where jury had come to unanimous agreement, but where one juror changed his mind following morning when jury met to return final verdict); *Kalinowski,* 12 Mass. App. Ct. at 830, 429 N.E.2d 368.

A Juvenile, 392 Mass. at 57, 465 N.E.2d 240, these notes clearly reflected a lack of consensus on "the charges." Even if the jury's deadlock pertained specifically to count two, their notes made no such distinction, nor did they indicate any verdict would be returned "to the judge in open court," as required by Mass. R. Crim. P. 27 (a). In the absence of a verdict returned, received, and recorded in open court, we cannot conclude that the jury "acted on [their] view that the prosecution had failed to prove its case" (citation omitted). *McElrath,* 601 U.S. at 96, 144 S.Ct. 651. See *Clark* v. *State,* 170 Tenn. 494, 502, 97 S.W.2d 644 (1936) ("however fully it may be made to appear that the jury arrived among themselves at the decision that [the defendant] was not guilty, there is no claim that they agreed to so report or return, or that they agreed to report any agreement whatever, except that they could not agree").[17]

The defendant nonetheless argues that "any lack of formality" in the jurors' intended dispositions of

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[17] The circumstances of *Clark,* 170 Tenn. 494, 97 S.W.2d 644, are very similar to those at issue here. There, a defendant argued that he had been acquitted at his first trial, after learning that the jury had agreed he was not guilty and had deadlocked only as to his codefendant. See id. at 497, 97 S.W.2d 644. Rejecting this argument, the Supreme Court of Tennessee explained:

> "Agreement on the issue of guilt or innocence is of the very essence of a verdict....
>
> "We have here no 'verdict' reported, and none 'agreed on and intended to be expressed.' It is conceded here that the report of disagreement was that intended to be reported. This determinative distinction runs through all the cases we have examined." (Citation omitted.)

Id. at 501, 503, 97 S.W.2d 644.

counts one and three should not prevent those dispositions from taking legal effect. However, the requirement that a verdict be returned and affirmed in open court is far from a mere formality. Rather, "[t]hese principles recognize that, as a practical matter, jurors may agree in the course of deliberations to a tentative compromise on the facts of a case or on the disposition of related charges as they attempt to reach unanimous agreement." *Floyd P.,* 415 Mass. At 831, 615 N.E.2d 938. See *Blueford,* 566 U.S. at 608, 132 S.Ct. 2044. Since "[a] jury should not be precluded from reconsidering a previous vote on any issue" (citation omitted),

A Juvenile, 392 Mass. at 56, 465 N.E.2d 240, tentative or conditional agreements reached amid deliberations "cannot have the force of a final verdict," *Floyd P., supra.* See *A Juvenile, supra* ("A jury should not be precluded from reconsidering a previous vote on any issue, and the weight of final adjudication should not be given to any jury action that is not returned in a final verdict" [citation omitted]).

Requiring a jury to publicly affirm their verdict in open court thus serves a vital purpose – it ensures that the verdict agreed upon in private truly reflects the unanimous and deliberate judgment of each juror under public scrutiny, rather than a tentative compromise. See *Commonwealth* v. *Lawson,* 425 Mass. 528, 530, 682 N.E.2d 845 (1997). See also *People* v. *Thornton,* 155 Cal. App. 3d 845, 859, 202 Cal.Rptr. 448 (1984). Maintaining this distinction between private deliberations and public verdicts is essential to preserving both the confidentiality of jury discussions and the integrity of the judicial system. Thus, because the jury did not publicly affirm that

the defendant was not guilty of the charges, there was no acquittal barring retrial under the double jeopardy clause. See *A Juvenile,* 392 Mass. at 56-57, 465 N.E.2d 240 (signed verdict slips reflecting votes of not guilty, found in deliberation room after mistrial had been declared due to deadlock, did not constitute acquittals). See also *Commonwealth* v. *Mayfield,* 398 Mass. 615, 630, 500 N.E.2d 774 (1986) (information indicating that "jury were deadlocked, eleven to one, for conviction of murder but only in the second degree," and had purportedly agreed that defendant was not guilty of murder in first degree, did not bar retrial because "[t]here was no open and public verdict of not guilty").

b. *Request for posttrial juror inquiry.* Finally we consider the denial of the defendant's request for a posttrial juror inquiry. Generally, a judge is not obligated to investigate jury deliberations unless there is evidence that jurors were exposed to extraneous information or demonstrated racial or ethnic bias. See *Commonwealth* v. *Pytou Heang,* 458 Mass. 827, 858, 942 N.E.2d 927 (2011). Even in cases of alleged bias, however, judicial inquiry cannot delve into jurors' subjective reasoning or deliberative content. See *Matter of the Enforcement of a Subpoena,* 463 Mass. 162, 168, 972 N.E.2d 1022 (2012). Because the trial judge is afforded "broad discretion" in assessing whether a posttrial juror inquiry is appropriate, *Commonwealth* v. *Guisti,* 434 Mass. 245, 251, 747 N.E.2d 673 (2001), S.C., 449 Mass. 1018, 867 N.E.2d 740 (2007), we review that determination only for an abuse of discretion, see *Pytou Heang, supra.*

Here, the defendant concedes that the affidavits do not indicate exposure to extraneous matters or juror

bias that would suggest her right to an impartial jury was compromised. Contrast *Commonwealth* v. *McCalop,* 485 Mass. 790, 799, 152 N.E.3d 1114 (2020). Instead, she argues that the affidavits suggest an "unannounced verdict" warranting further inquiry. Yet, as discussed, a verdict, as a matter of law, requires a public announcement in open court. No verdict exists if none was announced, or even intended to be announced, by the jury before they were discharged. See *Commonwealth* v. *Brown,* 367 Mass. 24, 28, 323 N.E.2d 902 (1975), S.C., 378 Mass. 165, 390 N.E.2d 1107 (1979) and 470 Mass. 595, 24 N.E.3d 1025 (2015) ("once the jury have been discharged, they have no further power to deliberate or to agree to a verdict").

Allowing inquiry into a private agreement reached in the secrecy of the deliberation room would also contravene our prohibition on probing the content of juror deliberations. Maintaining the secrecy of those deliberations is a "bedrock of our judicial system" (citation omitted). *Commonwealth* v. *Moore,* 474 Mass. 541, 548, 52 N.E.3d 126 (2016), S.C., 489 Mass. 735, 187 N.E.3d 986 (2022). See *Woodward* v. *Leavitt,* 107 Mass. 453, 460 (1871). It not only prevents jury tampering but also upholds the finality of jury verdicts and fosters confidence in the judicial process. See *Commonwealth* v. *Fidler,* 377 Mass. 192, 195, 385 N.E.2d 513 (1979). Probing secret deliberations to determine whether the jurors may have privately agreed on a verdict they never returned would undermine these fundamental principles. See *Woodward, supra* at 471 (juror testimony as to "part which he [or she] took in the discussions and votes of the jury" is not permissible "because it relate[s] to the private deliberations of the jury"); *Brown* v. *State,* 661 So. 2d 309, 311 (Fla. Dist. Ct. App. 1995) (even

though postdischarge inquiry asked jurors to "disavow the nonexistence of a verdict rather than to impeach a verdict already in existence," it still constituted improper inquiry as to jurors' mental processes). Were it otherwise, "[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts" that might be used to set aside a final verdict (citation omitted). *Fidler, supra.*

Nor is the defendant merely seeking juror testimony as to a "mistake" entered on a final verdict slip. See Mass. G. Evid. § 606(c) (2024) (permitting juror testimony about mistakes "made in entering the verdict on the verdict form"). Here, there is no suggestion that the jury's failure to return a verdict was the result of a clerical error. The posttrial accounts do not dispute that the jurors had reached an impasse, as they reported, and had decided not to return a verdict slip on any charge, as occurred. Contrast *Brown,* 367 Mass. at 27-28, 323 N.E.2d 902, and cases cited (permitting testimony to correct clerical mistakes in verdict where jury, without outside influence, "immediately indicated" error in announced verdict). No juror expressed surprise or disagreement in court when the judge declared a mistrial based on the jury's report that they could not reach a unanimous verdict on "the charges." Contrast *Latino* v. *Crane Rental Co.,* 417 Mass. 426, 431, 630 N.E.2d 591 (1994) (juror inquiry permissible where jurors audibly answered "no" during polling of jury).

Additionally, the limited exception for juror testimony concerning mistaken verdicts only results in alteration of a verdict where there has been no "opportunity for outside influence." *Brown,* 367 Mass. at 29, 323 N.E.2d 902, and cases cited. Cf.

Commonwealth v. *DiBenedetto,* 94 Mass. App. Ct. 682, 684–685, 118 N.E.3d 151 (2019). Here, all the defendant's affidavits concern jurors' accounts to others after leaving "the control of the court." *Brown, supra* at 28, 323 N.E.2d 902. See *Dietz* v. *Bouldin,* 579 U.S. 40, 49, 136 S.Ct. 1885, 195 L.Ed.2d 161 (2016); *State* v. *Edwards,* 15 Wash. App. 848, 850–852, 552 P.2d 1095 (1976) (when jury leave "the sterility of the court's control ... contamination is presumed"). A posttrial inquiry of these jurors would similarly occur well after they became susceptible to outside influences and would not provide a recognized basis for altering the result of the first trial. See *Commonwealth* v. *Johnson,* 359 Pa. 287, 293–294, 59 A.2d 128 (1948) (court could not alter verdict of acquittal upon learning that jury had intended to convict defendant of lesser offense, where jury "had ample opportunity" to clarify or express disagreement with original verdict when it was announced in open court prior day). Thus, the trial judge did not err or abuse her discretion in denying the defendant's request for such an inquiry where it would not change the outcome of the defendant's first trial. The jury chose to report a deadlock, not a verdict, and no basis exists for further investigation into private discussions or subjective beliefs they declined to announce publicly in open court.

Conclusion. For the reasons stated above, the trial judge correctly denied the defendant's motion to dismiss and request for a posttrial juror inquiry. The case is remanded to the county court for entry of a judgment denying the defendant's petition for relief.

So ordered.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

Superior Court Criminal Action 22-00117

COMMONWEALTH

vs.

KAREN READ

MEMORANDUM OF DECISION AND ORDER ONDEFENDANT'S MOTION TO DISMISS

On June 9, 2022, a Norfolk County grand jury indicted defendant Karen Read on charges of murder in the second degree (Indictment 1), manslaughter while operating under the influence of alcohol (Indictment 2), and leaving the scene of personal injury and death (Indictment 3), following the death of her boyfriend, John O'Keefe, on January 29, 2022. Trial on the matter began in April 2024. There were eight weeks of evidence and nearly five days of deliberations. After the jurors expressed to the Court that they were deadlocked for a third time, the Court declared a mistrial.

The defendant now moves to dismiss the charges for murder in the second degree and leaving the scene of personal injury and death arguing that retrial would violate the double jeopardy protections of the federal and state constitutions because the jury, in fact, reached a unanimous decision to acquit the defendant on those charges. Alternatively, the de-

fendant argues that dismissal is required because there was no manifest necessity to support the declaration of the mistrial with respect to those charges. After careful consideration, this Court concludes that because the defendant was not acquitted of any charges and defense counsel consented to the Court's declaration of a mistrial, double jeopardy is not implicated by retrial of the defendant. The motion is therefore DENIED.

BACKGROUND

On June 25, 2024, the jury began its deliberations in the defendant's trial. In addition to the three indictments, the Court had instructed the jury to consider two lesser included offenses to manslaughter while operating under the influence of alcohol — involuntary manslaughter and motor vehicle homicide (OUI liquor and negligence).

On Friday, June 28, 2024, at approximately 12:10 p.m., the jury foreperson sent a note to the Court. It stated: "I am writing to inform you on behalf of the jury that despite our exhaustive review of the evidence and our diligent consideration of all disputed evidence, we have been unable to reach a unanimous verdict." The Court requested argument from the Commonwealth and the defendant as to whether there had been due and thorough deliberation from the jury. Assistant District Attorney Lally, on behalf of the Commonwealth, argued that the jury had not had sufficient time to deliberate and that therefore, it was far too early in the deliberative process to give the jury the *Tuey-Rodriguiez* instruction.[1] He also

[1] The use of the *Tuey-Rodriguiez* instruction is a matter of discretion of the trial judge. *Commonwealth v. Parreira,* 72 Mass. App. Ct. 308, 316 (2008). It is the "orthodox approach to

pointed out that although the note indicated that the jury had not yet come to a conclusion, it did not indicate that doing so was not possible. Attorney Yannetti, on behalf of the defendant, "disagree[d] with Mr. Lally's characterization of the note." He argued:

> "The word exhaustive is the word that I think is operative here. [The jury is] communicating to the court that they've exhausted all manner of compromise, all manner of persuasion and they're at an impasse. You know, this is a case where they jury has the legal instructions. They've only really asked one question, which was to try and get a report they were not allowed to get, and I think the message has been received that the evidence is closed and they won't get anything more. They've been essentially working nonstop over the last three, four days. We're approaching a weekend. They didn't come back with this at three o'clock or four o'clock. They're at twelve o'clock and they have nowhere to turn. So our position is the jury should be read the *Tuey-Rodriguez* model instructions and go from there."

The Court ruled that given the length of the trial, the number of exhibits and witnesses, the complexity of the issues, and that the jury had only been deliberating for three days, deliberations had not

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dealing with a deadlocked jury" see *Commonwealth v. Firmin,* 89 Mass. App. Ct. 62, 64 (2016) (citation omitted), and "designed to urge the jury to reach a verdict by giving more serious consideration to opposing points of *view." Commonwealth v. Semedo* 456 Mass. 1, 20 (2010).

been sufficiently due and thorough to warrant a *Tuey-Rodriguiez* instruction. It instructed the jury to continue deliberating.

On Monday, July 1, 2024, at approximately 10:45 a.m., the jury sent another note to this Court. This note stated:

> "Despite our commitment to the duty entrusted in us, we find ourselves deeply divided by fundamental differences in our opinions and state of mind. The divergence in our views are not rooted in a lack of understanding or effort but deeply held convictions that each of us carry, ultimately leading to a point where consensus is unattainable. We recognize the weight of this admission; and the implications it holds."

The Court again requested argument from counsel as to whether there had been due and thorough deliberations. The Commonwealth argued that the jury had been deliberating twenty-two to twenty-three hours but given the length of trial, number of exhibits and witnesses, and complexity of issues, they had not done a thorough deliberation up to this point. Attorney Yannetti, again, had a vastly different view. He argued:

> "Our view is that it is time for a *Tuey-Rodriguez* [instruction]. They have come back twice indicating essentially that they're hopelessly deadlocked but the content of this latest message is that they have been over all the evidence. The previous message said they did an exhaustive review. This time they said that . . . they have fundamental disagreements about what the evidence

> means. It's a matter of opinion. It's not a matter of lack of understanding. This court when you sent the jury out encouraged them not to take a straw vote, encouraged them to go over all the evidence in a very methodical manner. I think all indications are that they have done that. This is what *Tuey-Rodriguez* is for."

The Court agreed that the jury had engaged in due and thorough deliberations, noting that his jury had been "extraordinary" and it had never seen a note like this from a jury. It thereafter provided the jury of the full *Tuey-Rodriguez* instruction and asked them to return to the deliberations with those instructions in mind.[2]

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[2] The *Tuey-Rodriguez* instruction states: "Our Constitution and laws provide that in a criminal case, the principal I method for deciding questions of fact is the verdict of a jury. In most cases and perhaps strictly speaking in all cases' absolute certainly cannot be obtained nor is it expected. The verdict to which each juror agrees must of course be his or her own verdict, the result of his or her own convictions, and not merely an acquiescence in the conclusions Of other jurors. Still, in order to bring twelve minds to a unanimous result, you must examine the issues you have to decide with candor and with the proper regard and respect for each other's opinions. You should consider that it is desirable that this case be decided. You have been selected in the same manner and from the same source as any I future jury would be selected. There is no reason to suppose that this case will ever be submitted to twelve persons' who are more intelligent, more impartial, or more competent to decide it than you are or that more or clearer evidence will be produced at another trial. With all this in mind it is your duty to decide this case if you can do so conscientiously. In order to make a decision more attainable, the law always imposes the burden of proof on the Commonwealth to establish every essential element of each indictment beyond a reasonable doubt. If you are, left I with a reasonable doubt as to any essential element of any indictment, then the defendant is

That same day, at approximately 2:30 p.m., the jury sent another note to the Court. The Court stated to counsel that the jury was at an impasse. After the jurors filed into the courtroom, the Court read the note:

> "Despite our rigorous efforts we continue to find ourselves at an impasse. Our perspectives on the evidence are starkly divided. Some members of the jury firmly believe that the evidence surpasses the burden of proof establishing the elements of the charges beyond a reasonable doubt. Conversely, others find the evidence fails to meet this standard and does not sufficiently establish the necessary elements of the charges. The deep division is not due to lack of effort or diligence, but rather a sincere adherence to our individual principles and moral convictions. To continue to deliberate would

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entitled to the benefit of that doubt and must be found 'not guilty' on that indictment. In conferring together, you are to give proper respect I to each other's opinions, and listen with an open mind to each other's arguments. Where there is disagreement, those jurors who would find the defendant 'not guilty' should consider whether the doubt in their minds is a reasonable one if it makes no impression on the minds of the other jurors who are equally intelligent, who have heard the same evidence with the same attention, who have an equal desire to arrive at the truth and who have taken the same oath as jurors. At the same time, those jurors who would find the defendant 'guilty' ought seriously to ask themselves whether they may not reasonably doubt the correctness of their judgment if it is not shared by other members of the jury. They should ask themselves whether they should distrust the weight or sufficiency of the evidence if it has failed to convince the minds of their fellow jurors beyond a reasonable doubt."

> be futile and only serve to force us to compromise these deeply held beliefs."

After reading this note, the Court declared a mistrial and discharged the jury back to the deliberation room to wait for the judge. Counsel remained in the courtroom to discuss an agreeable date to return for a status conference.

On July 8, 2024, the defendant filed the instant motion to dismiss supported by affidavits from Attorney Yannetti and co-counsel, Attorney Jackson. Attorney Jackson's affidavit stated that on July 2, 2024, a juror in the case ("Juror A") contacted him. Attorney Jackson was able to identify the person as a deliberating juror based on his/her description of who he/she is, where he/she was seated, and certain identifying information (name and occupation) disclosed during the voir dire process. According to Attorney Jackson's affidavit, Juror A told him that he/she wished to inform him of the true results of the deliberations because he/she believed those results significantly impact the defendant's rights. Juror A said the jury unanimously agreed that the defendant was not guilty of Counts 1 and 3 and specifically that the murder charge was "off the table." First Jackson Affidavit at par. 5.

In his affidavit, Attorney Jackson also stated: "Neither Ms. Read nor her counsel consented to the entry of the mistrial. Defense counsel was denied the opportunity to request that the Court inquire on which count or counts the jury may have been deadlocked (including lesser included offenses), and on which count or counts the jury may have arrived at a verdict." *Id.* at pars. 9 and 10.

Attorney Yannetti's affidavit averred that on July 3, 2024, he received communications from two "informants" who had received information from two deliberating jurors in the case. The first informant ("Informant B") sent him a screenshot he/she had received from someone else ("Intermediary B") of text messages that Intermediary B had purportedly received from a juror ("Juror B"). Attorney Yannetti averred that he was able to positively identify which juror was Juror B based on a first name given to him from Informant B. In the screenshot, Juror B texted Intermediary B, "It was not guilty on second degree. And split in half for the second charge. When the judge sent us back with that Hernandez thing to look at the other side it turned into a bully match. I thought the prosecution didn't prove the case. No one thought she hit him on purpose or even thought she hit him on purpose. . . ." Yannetti Affidavit at par. 4.

Attorney Yannetti stated that another informant ("Informant C") contacted him on July 3, 2024. Informant C told him he or she personally knows a juror ("Juror C") and that Informant C and Juror C have a mutual friend ("Intermediary C") who is a current coworker and friend of Juror C. Intermediary C told Informant C via text message that Juror C was a deliberating juror; in the case. Intermediary C had a discussion over text message with Juror C about the experience of being a juror. Intermediary C said that Juror C said there was "no consideration for murder 2. Manslaughter started polling at 6/6 then ended deadlocked [at] 4no8yes. . ." Yannetti Affidavit at par. 10. Informant C texted back, "interesting. If there was no consideration for murder two, shouldn't she have been acquitted on that count[] and hung on

the remaining chargers [sic] goes back to the jury verdict slip that was confusing."[3] *Id*

Intermediary C texted, "she should've been acquitted I agree. Yes, the remaining charges were what they were hung on. And that instruction paper was very confusing." *Id*

Attorney Yannetti stated that based on the description of Juror C he received from Informant C and the description of what Juror C told Intermediary C, he could positively identify that Juror C was a deliberating juror.

Attorney Yannetti later filed a supplemental affidavit in support of the defendant's motion to dismiss wherein he stated that he received an unsolicited phone call from an individual identifying himself/herself as Juror B. Juror B told Attorney Yannetti that he/she was familiar with the affidavit he had previously filed and confirmed the substance of the conversation between Informant B and Intermediary B. Juror B clarified that he/she meant to write, "No one thought she hit him on purpose or even knew that she had hit him." Yannetti Supplemental Affidavit at par. 4.

On July 10, 2024, Attorney Jackson submitted a supplemental affidavit stating that on July 8, 2024, another juror ("Juror D") contacted him. He identified this person as a juror by the description of who he/she is, where he/she was seated, and certain identifying information (name and occupation)

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[3] As noted below, defense counsel argued to the Court that the verdict slip for Indictment 2, which allowed the foreperson to check "guilty" for the lesser included offenses, would be confusing for the jury if they decided the defendant was not guilty of all the lesser included offenses.

disclosed during the voir dire process. Juror D told Attorney Jackson that "he/she was 'uncomfortable' with how the trial ended. . . . Juror D said that it was very troubling that the entire case ended without the jury being asked about each count, especially Count 1 and Count 3." Jackson Supplemental Affidavit at pars. 3-4. According to Jackson's Supplemental Affidavit, Juror D told him that the jury agreed that the defendant was not guilty on Counts 1 an 3, that they disagreed solely on Count 2's lesser offenses, but that they believed that they were compelled to come to a resolution on all counts before they could or should report verdicts on any counts. Juror D believed all jurors would corroborate his/her account. He/she also stated that if necessary, he/she would testify before the court as long as his/her identity remained protected.

On July 18, 2024, Attorney Jackson submitted a second supplemental affidavit stating that on July 17, 2024, he was contacted by another juror ("Juror E") who he identified by the description of who he/she is, where he/she was seated, and certain identifying information (name and occupation) disclosed during the voir dire process. Juror E also stated that the jury was unanimous on Counts 1 and 3, that the defendant was not guilty of those charges, and that they were deadlocked on one of the "lower charges" on Count 2. Jackson Second Supplemental Affidavit at par. 5.

On August 1,2024, the Commonwealth filed a Post-Trial Notice of Disclosure stating that ADA Lally had received two unsolicited voicemails from an individual identifying themselves as a deliberating juror stating that the jury had been unanimous on Counts 1 and 3. The Commonwealth also received

emails from three individuals identifying themselves as jurors stating that they wished to speak anonymously. In its response to the emails, the Commonwealth stated that it was ethically prohibited from inquiring as to the substance of the jury deliberations, and that it could not promise confidentiality as it may be required to disclose the substance of any conversation to the defendant or the Court. All three jurors declined to communicate farther with the Commonwealth.

DISCUSSION

The Fifth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment to the United States Constitution, and Massachusetts common and statutory law protect an individual defendant from being twice placed in jeopardy for the same crime. *Perrier v. Commonwealth,* 489 Mass. 28, 31 (2022). See *Commonwealth v. Taylor,* 486 Mass. 469, 483 (2020), quoting *Oregon v. Kennedy,* 456 U.S. 667, 671-672 (1982) ("[T]he [d]ouble [j]eopardy [c]lause affords a criminal defendant a 'valued right to have his trial completed by a particular tribunal' [citation omitted]). A defendant is entitled to protection from double jeopardy "if there had been some event, such as an acquittal, which terminates the original jeopardy," see *Commonwealth v. Hebb,* 477 Mass. 409, 413 (2017), or if a mistrial is entered "without the defendant's request or consent . . . unless there was a manifest necessity for the mistrial" (quotation and citations omitted). *Taylor,* 486 Mass. at 483. See *Hebb,* 477 Mass. at 413, quoting *Yeager v. United States*, 557 *U.S.* 110, 118 (2009) ("The 'interest in giving the prosecution one complete opportunity to convict those who have violated its laws' justifies

treating the jury's inability to reach a verdict as a nonevent that does not bar retrial.").

In her motion to dismiss, the defendant argues that retrial on Indictments 1 and 3 would violate the double jeopardy protections of the federal and state constitutions because, despite absence of a jury verdict, the jury, in fact, reached a unanimous decision to acquit her on those charges, or alternatively, because there was no manifest necessity to support the declaration of the mistrial with respect to the charges. After careful consid-eration, the Court concludes that the defendant's arguments are without merit.

I. Acquittal of the Defendant

The defendant first contends that she was acquitted on Indictments 1 and 3, and that therefore retrial is barred based on her attorneys' affidavits purporting to reflect statements by jurors that the jury reached a unanimous conclusion that she was not guilty on those charges. Although all the statements in the affidavits are from purported jurors who wish to remain anonymous, for the purposes of this motion, the Court accepts the statements as true and accurate.[4] Even doing so, any agreement among the jurors as to Counts 1 and 3 cannot be considered acquittals for purposes of double jeopardy.

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[4] While the Court accepts the averments as true and accurate, it disagrees with defense counsel's characterization of the statements as "strong and uncontradicted." The substance of the conversations directly contradicts the notes the jury wrote to the Court during deliberations, the last of which expresses disagreement over whether the Commonwealth met its burden as to the "elements of the *charges.*" (Emphasis added).

To trigger double jeopardy protection, [a]n acquittal requires a verdict on the facts and merits" (citations and quotations omitted). *Commonwealth v. Brown,* 470 Mass. 595, 603 (2015). See G. L. c. 263, § 7 ("A person shall not be held to answer on a second indictment or complaint for a crime of which he has been acquitted upon the facts and merits . . ."). And, "the only verdict which can be received and regarded, as a complete and valid verdict of a jury…, is an open and public verdict . . . affirmed in open court, as the unanimous act of the jury, and in presence of the whole panel, so that each juror has an opportunity to express his dissent to the court, in case his decision has been mistaken or misrepresented by the foreman or his fellows, or incase he has been forced into acquiescence by improper means" (citations omitted). *Commonwealth v. Zekirias,* 443 Mass. 27, 33 (2004). See Mass. R. Crim. P. 27(a) ("The verdict shall be unanimous. It shall be a general verdict returned by the jury to the judge in open court. The jury shall file a verdict slip with the clerk upon the return of the verdict."). As such, "the weight of final adjudication" cannot "be given to any jury action that is not returned in a final verdict" and a distinction must be made "between agreement on a verdict, and return, receipt, and recording of a verdict" (citations omitted). *A Juvenile v. Commonwealth,* 392 Mass. 52, 56-57 (1984).

Because there was no open and public verdict affirmed in open court rendered in this case, the defendant was not acquitted of any of the charges. The only unanimous act of the jury here was their representation to the Court that they were "at an impasse" and unable to agree on whether the Commonwealth had established beyond a reasonable doubt the elements of the *charges."* The

purported later attestations by some jurors, after they had been dismissed, that the jury had in fact agreed on some of the charges during deliberations do not have the "force of a final verdict." *Commonwealth v. Floyd P.,* 415 Mass. 826, 831 (1993). See *A Juvenile,* 392 Mass. at 57 (after mistrial was declared due to deadlock, judge did not err in refusing to accept signed verdict slips recovered from deliberation room showing "not guilty" because "[i]t is not enough to show that the jury may have agreed on some issues at some time; if that limited showing were to control, uncertainties would be invited"); see also *Blueford v. Arkansas, 566* U.S. 599, 606 (2012) (double jeopardy did not bar retrial after hung jury where foreperson reported unanimous vote on offense before deliberations had concluded but deadlock at conclusion).

The defendant argues that it is elevating form over substance to not accept that the statements in the affidavits reflect an acquittal of the defendants on Counts 1 and 3. However, the rendering of a verdict in open court is not a "ministerial act" as the defendant contends. Rather, it communicates the finality of the deliberations, and its pronouncement in open court ensures its unanimity. See *A Juvenile,* 392 Mass. at 57 ("Public affirmation in open court provides safeguards against mistakes."). Indeed, the authority upon which the defendant relies places particular importance upon the jury's pronouncement of its findings in open court. See *Blueford,* 566 U.S. at 613 (Sotomayor, J., dissenting) (arguing that "the forewoman's *announcement in open court* that the jury was 'unanimous against' conviction on capital and first-degree murder . . . was an acquittal for

double jeopardy purposes").[5] Thus, a "verdict in substance" is a "final collective decision . . . reached after full deliberation, consideration, and compromise among the individual jurors . . . And when that decision [is] *announced in open court,* it [becomes] entitled to full double jeopardy protection" (emphasis added). *Id.* at 616, citing *Commonwealth v. Roth,* 437 Mass. 777, 796 (2002) ("declining to give effect to 'the verdict received from the lips of the foreman in open court' would 'elevate form over substance"). Where there was no verdict announced in open court here, retrial of the defendant does not violate the principle of double jeopardy.

II. Manifest Necessity of Mistrial

The defendant's motion to dismiss also argues that double jeopardy bars re-prosecution ion because she did not consent to a mistrial and there was no manifest necessity to declare one. This argument, too, is without merit.

"A defendant's consent to a mistrial removes any double jeopardy bar to retrial" (quotation and citation omitted). *Pellegrine v. Commonwealth,* 446 Mass. 1004, 1005 (2006). Consent may be explicit or implicit. Explicit consent may occur by either moving for a mistrial or agreeing to one. *Commonwealth v. Edwards,* 491 Mass. 1, 13 (2022). Consent to a

[5] In written and oral argument, the defendant also relies on language from *Taylor,* 486 Mass. at 482. *Taylor* discussed whether a judicial determination to terminate proceeding based on a procedural ground implicated double jeopardy. The Supreme Judicial Court explained, "What constitutes an 'acquittal' is not to be controlled by tile form of the judge's action," and that the determination does not depend on "checkmarks on a form." *Id.* This language in *Taylor* does not inform the Court as to the circumstances here.

mistrial may be implied "where a defendant had the opportunity to object [to a declaration of a mistrial] and failed to do so." *Pellegrine,* 446 Mass. at 1005. See *United States v. McIntosh,* 380 F.3d 548, 554 (1st Cir. 2004) ("Where the defendant sits silently by and does not object to the declaration of a mistrial even though he has a fair opportunity to do so, a court may presume hist consent" [quotation and citation omitted]). See also *United States v. You,* 382 F.3d 958, 964-965 (9th Cir. 2004), cert. denied, 543 U.S. 1076 (2005) ("a court may infer consent only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order" [quotations and citations omitted]); *United States v. Goldstein,* 479 F.2d 1061, 1067 (2d Cir. 1973) ("Consent [to a mistrial] need not be express, but may be implied from the totality of the circumstances attendant on a declaration of a mistrial.").

As noted, the Court here declared a mistrial after the jury reported three times that they were deadlocked. After the second time, the Court determined that the jury had engaged in due and thorough deliberations and gave the *Tuey-Rodriguez* instruction before sending the jury to deliberate further. Massachusetts General Laws c. 234A, § 68C, provides that if "a jury, after due and thorough deliberation, returns to court without having agreed on a verdict, the court may state anew the evidence or any part of the evidence, explain to them anew the law applicable to the case and send them out for further deliberation; *but if they return a second time without; having agreed on a verdict, they shall not be sent out again without their own consent,* unless they ask from the court some further explanation of the law" (emphasis added). See *Commonwealth v. Jenkins,* 416 Mass. 736, 737 (1994) ("If, after due and

thorough deliberation, the jury twice advise the judge that they are unable to reach a verdict, the judge may not properly' send the jury out again without their consent, unless the jury ask for some further explanation of the law."). In their note to the Court, the jury specifically stated, "[t]o continue to deliberate would be futile and only serve to force us to compromise these deeply held beliefs," making, it clear that they would not consent to continuing their deliberations.

Attorney Yannetti *twice* argued for the Court to give the *Tuey-Rodriguez* instruction-the final step before the Court would declare a mistrial. See *Jenkins,* 416 Mass. at 737; see also *Ray v. Commonwealth,* 463 Mass. 1, 4 (2012) (counsels' request for *Tuey-Rodriquez* instruction "permit[ed] the inference that both parties were provided an opportunity to be heard on possible alternatives to a mistrial"). Specifically, on Friday, June 28, 2024, after three days of deliberations, when the jury sent their first note indicating that they had engaged in an "exhaustive review of the evidence" and "ha[d] been unable to reach a unanimous verdict,"

Attorney Yannetti argued that the jury had engaged in due and thorough deliberations, was at an impasse, and should be given the *Tuey-Rodriguez* instruction. The following Monday, when the jury sent a second note after deliberating for approximately two hours, stating that "consensus was unattainable," Attorney Yannetti again argued that due and thorough deliberations had occurred and described the jury as "hopelessly deadlocked." Defense counsel, in arguing twice that due and thorough deliberations had occurred and pushing for the instruction, presumably was aware of the legal

implications if the jury returned deadlocked again. Nevertheless, in a remarkable turnaround, defense counsel now argues that the result they twice advocated for was "sudden" and "unexpected." See Defendant Karen Read's Motion to Dismiss at 8.

Although the Court did not specifically ask defense counsel if they had any objection to the declaration of a mistrial, counsel had multiple opportunities to voice an objection if they in fact had one. While waiting for the jury to enter the courtroom after the Court announced the jury was again at an impasse on the afternoon of July 1, 2024, defense counsel could have asked to be heard on the issue. During the subsequent discussion about scheduling a status hearing right after the Court declared a mistrial, counsel had yet another opportunity to inform the Court of its dissatisfaction. Lastly, counsel could have communicated to the Court any objection or request to poll the jurors while the jury was still at the courthouse waiting in the deliberation room after the declaration of the mistrial. Instead, defense counsel said nothing to the Court about the mistrial and then proceeded to the courthouse steps where Attorney Jackson declared to the media and onlookers that the "[Commonwealth] failed miserably and will continue to fail" with its prosecution of the defendant.[6]

It strains credulity to believe that if defense counsel wanted to voice any objection to the Court, it would not have been heard. Significantly, defense counsel were no shrinking violets. Neither Attorney Jackson nor Attorney Yannetti has ever needed this Court to inquire whether counsel had an objection in order to be heard, and the Court has never denied

[6] See https://www.youtube.com/watch?v=TrsJPBRVqDg

counsel the opportunity to be heard in open court or at sidebar. The Court reconvened many times at counsel's request. Just days before the declaration of mistrial, defense counsel asked to address the Court while the jury was deliberating to raise an objection about the verdict slip. Attorney Jackson was not shy in informing the Court that he wanted to "make [his] argument" and that the Court's decision about the verdict slip was "not how it should be and it's over our strong objection." [7] Attorney Jackson went so far as to suggest that "it was almost like the Court is directing a verdict of the subordinate charges" by not making changes he wanted. The Court finds it hard to believe that when counsel heard that the jury was at an impasse for a third time and a mistrial was inevitable, at perhaps the most crucial point in the trial, counsel would sit silently if they did not consent to a mistrial.

As such, the Court does not credit Attorney Jackson's averment that he lacked an opportunity to be heard. Defense counsel's silence despite ample opportunity to be heard is deemed consent. See *Pellegrine,* 446 Mass. at 1005 (when trial judge on own initiative declared mistrial, defendant's silence was deemed consent where there was ample time to object despite not being directly asked by judge). Cf. *Commonwealth v. Phetsaya,* 40 Mass. App. Ct. 293 298 (1996) (silence was not consent where judge's conduct was "so intimidating to defense counsel . . . as to foreclose any objection from defense counsel to the declaration of a mistrial").

Even assuming *arguendo* that the defendant here did not consent to the mistrial, the law is clear that a

[7] See https://www.youtube.com/watch?v=BjPsNvnLXVO

retrial is permissible so long as there was manifest necessity for the mistrial. *Taylor,* 486 Mass. at 483. "The trial judge's belief that the jury is unable to reach a verdict has long been considered the classic basis for a proper mistrial" (quotation and citation omitted). *Ray,* 463 Mass. at 3. See *Oregon,* 456 U.S. at 672 (describing "hung jury" as "prototypical example" of manifest necessity). Because the Court here had no doubt based on the jury's rotes to the Court that it was unable to reach a unanimous verdict and the jury represented to the Court that continued deliberations would be futile, there was manifest necessity for the mistrial based on the deadlock.

As stated above, the foreperson, on behalf of the jury in this case, sent the Court three notes, none of which indicated agreement on any of the charges. In the first note, the jury wrote that they had been "unable to reach a unanimous verdict." In the second note, they stated that they were "deeply divided by fundamental differences in our opinions and state of mind" arid that "consensus is unattainable." In their third and final note, after they had been given the Tue*y Rodriguez* instruction, the jury stated that they continued to be "at an impasse." They described themselves as "starkly divided" on their "perspectives on the evidence" explaining:

> "Some members of the jury firmly believe that the evidence surpasses the burden of proof establishing the elements of the charges beyond a reasonable doubt. Conversely, others find the evidence fails to meet this standard and does not sufficiently establish the necessary elements of the charges. The deep division is not due to lack

> of effort or diligence, but rather a sincere adherence to our individual principles and moral convictions. To continue to deliberate would be futile and only serve to force us to compromise these deeply held beliefs."

The only reasonable interpretation of these notes, and specifically the final note, was that the jury could not agree on any of the three charges and further deliberations would serve no purpose.[8]

For the defense to now claim that the notes were susceptible to different interpretations such that the Court should have inquired further rings hollow, particularly where Attorney Yannetti had twice argued that the jury had engaged in due and thorough deliberations and could, not agree. See *United States v. Keene,* 287 F.3d 229, 234 (1st Cir. 2002) (no abuse of discretion in declaring a mistrial given "the increasingly adamant manner in which the jurors announced that they were deadlocked"). Moreover, defense counsel's conduct immediately after the declaration of the mistrial in no way suggests that they thought otherwise.

The defendant contends that the Court failed to carefully consider that as an alternative to a mistrial, it could have "simply ask[ed] the jury to specify the charge(s) on which it was deadlocked." Defendant Karen Read's Motion to Dismiss at 8. However, "[t]he question whether a mistrial is appropriate in the

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[8] Given the care that went into writing the notes and how articulately they expressed the jurors' disagreement, it strikes this Court as odd that there was no inkling of an indication of agreement in the content of the notes or that if the jurors were uncertain whether they could return a partial verdict, they would not have asked the Court.

circumstances of a given case is not answered by application of a 'mechanical formula.'" *Ray,* 463 Mass. at 4, quoting *Illinois v. Somerville,* 410 U.S. 458, 462 (1973). See *Commonwealth v. Bryant,* 447 Mass. 494, 503 (2006) (decision: whether to declare a mistrial is within the discretion of the trial judge). Rather, the Court considers several facts such as the statements in a jury's note concerning their inability to reach an agreement, the time spent in deliberations, and the length and complexity of the trial. *Ray,* 463 Mass. at 4-5. See *Renico v. Lett,* 559 U.S. 766, 775 (2010) ("we have never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse").

Where here, the jury had been deliberating five days, had returned to the Court three times stating they could not agree, had been given the *Tuey-Rodrigez* instruction and returned hours later with a note plainly indicating that they could not agree as to the "elements of the *charges"* and that "to continue to deliberate would be futile," asking the jury on which charges they were deadlocked was not necessary to determine that there was manifest necessity for a mistrial. See *Fuentes v. Commonwealth,* 448 Mass. 1017, 1018-1019 (2007) (where final note from the foreperson unequivocally stated that the jury were "unable to come to a unanimous decision," judge was not required to inquire whether there was any reasonable probability of unanimous verdicts or if the jury would consent to further deliberations); *Ray,* 463 Mass. at 6 n.5 (judge did not err in declining to poll

jury on whether further instructions or deliberation would be likely to resolve the deadlock).

Moreover, the defendant's argument ignores the fact that one of the three charges had lesser included offenses. Therefore, if upon questioning, the jury had indicated to the Court that they were not deadlocked on all the charges, the only option would have been for the Court to send the jury back for further deliberations. See *A Juvenile,* 392 Mass. at 56 (judge should not inquire as to partial verdicts on lesser included offenses). Such action would be improperly coercive under the circumstances. It has been repeatedly recognized that deadlocked juries [a]re particularly susceptible to coercion. *Roth,* 437 Mass. at 791. "Where the jurors have twice reported themselves deadlocked, and have already heard the *Tuey-Rodriquez* charge, a judge's inquiry concerning partial verdicts cannot avoid communicating to the jury the judge's desire to salvage *something* from the trial." *Id* at 792 (emphasis in original). Where here the jury had before it one indictment which included lesser included offenses, had three times reported themselves deadlocked on separate charges, had already heard the *Tuey-Rodriguez* charge, and had sent a final note indicating that continued deliberations would only "serve to force [them] to compromise [their] deeply held beliefs," sending them to deliberate further would have been improperly coercive.[9]

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[9] It is the Court's view that under these circumstances, even posing the question to the jury of whether they actually were deadlocked would have implied to the jurors that the Court wanted them to resume deliberations to reach a verdict. Given that Attorney Jackson had already expressed concern that the Court was "directing a verdict of the subordinate charges," the Court was extremely cautious to not give any appearance of

The defendant's argument suggests that questioning or polling jurors who report a deadlock is best practice or at least commonly done by trial judges. However, the defendant has not cited any cases saying as much and indeed, such an inquiry is not undertaken in the regular course.[10] For a judge to make such an inquiry on her own accord could impede upon the strategic decision of counsel to not make such a request. The defendant's argument is based on hindsight. No one other than the jury knew that questioning the jurors as to their deadlock would have yielded a favorable outcome for the defendant. It is likely for that reason, defense counsel consented to this Court's declaration of a mistrial.

III. Post-Trial Inquiry

The defendant alternatively requests that the Court allow counsel to conduct a post-trial inquiry of the jurors to "substantiate the existence of an acquittal." Defendant Karen Read's Motion to Dismiss at 9. Such an inquiry is impermissible.

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partiality. See *United States v. Hotz.* 620 F.2d 5. 7 (1st Cir. 1980) (noting that a court must avoid putting pressure on the jury).

[10] The defendant relies on *Commonwealth v. Foster,* 411 Mass. 762 (1992) and *Commonwealth v. LaFontaine,* 32 Mass. App. Ct. 529 (1992) to argue that there would be nothing coercive about asking a jury reporting a deadlock whether they had reached a unanimous verdict on any of the counts. Because neither the jury in *Foster* nor the jury in *LaFontaine* reported being deadlock in its deliberations, and none of the offenses charged had lesser included offenses, there was clearly no risk of coercion in the courts seeking partial verdicts on the separate indictments in those case. The circumstances here are markedly different.

The defendant's argument relies solely on *Commonwealth v. McCalop,* 485 Mass. 790 (2020). In *McCalop,* the Supreme Judicial Court held that the trial court should have allowed the defendant's motion for jurors' names and contact information based on the post-trial statement of a deliberating juror regarding racist statements made during deliberations. *Id.* at 791. The Supreme Judicial Court explained, "[t]he presence of even one juror who is not impartial violated a defendant's right to trial by an impartial jury." *Id.* at 798, quoting *Commonwealth v. McCowen,* 458 Mass. 461, 494 (2010). Recognizing that "[r]acial bias in the jury system is 'a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice,'" the *McCalop* court held that the defendant should have been given a "fair opportunity to obtain an affidavit from that juror setting forth with some specificity who among the jurors made statements reflecting racial bias . . . and the statements that were made."

McCalop, 485 Mass. at 799, quoting *Pena-Rodriguez v. Colorado,* 580 U.S. 206, 224 (2017). The defendant's argument here does not implicate racial bias or her right to receive an impartial trial. Thus, the reasoning the Court employed in *McCalop* does not extend to this case. See *Commonwealth v. DiBenedetto,* 94 Mass. App. Ct. 682, 687 (2019) (declining to extend racial bias exception to inquiry of jury unanimity because "infection of the criminal justice system with racial or ethnic bias is a unique type of constitutional deprivation that requires a vigilant response not warranted in the circumstances presented here").

The defendant's request effectively seeks permission from the Court to inquire from deliberating jurors that which is impermissible—information regarding the substance of the jury's deliberations. "The secrecy of jury deliberations has served as a bedrock of our judicial system, and inquiry into the 'jury's deliberative processes . . . would intrude improperly into the jury's function" (quotation and citation omitted). *Commonwealth v. Moore,* 474 Mass. 541, 548 (2016). It is simply not the case, given the content of the jury's final note to the Court, that any inquiry to jurors now could be limited solely to the results of the deliberative process and not implicate the process itself. Any inquiry would necessarily require the Court to understand why the jury's final note communicated a deadlock on the charges when post-trial, certain deliberating jurors are purportedly stating that the jury was, in fact, unanimous on most of the charges. While the defendant contends that the conflict is reflective of the fact that the instructions given to the jury by the Court were confusing, determining whether this is true would necessarily require inquiry into the back and forth among the jurors during deliberations.

See *DiBenedetto,* 94 Mass. App. Ct. at 686 ("The judge is precluded from inquiring into the; internal decision making process of the jury as a whole or of the individual juror being questioned . . . Accordingly, evidence that jurors misunderstood the instructions of the presiding judge . . . cannot be considered" [internal quotations and citations omitted]). Thus, such an inquiry is prohibited.

The defense counsel has not cited one case suggesting the post-trial inquiry they now seek is appropriate or that it could change the outcome of the

proceedings.[11] For the reason already discussed, an acquittal of the defendant now on Indictments 1 and 3 based on conclusions purportedly reached during the jury's deliberations is not possible. Therefore, there is no reason for the Court to allow post-trial inquiry of the jurors. See *A Juvenile,* 392 Mass at 57 (no error in denial of motion to subpoena the foreman where process would only serve to impeach jury's report to the judge in open court).

CONCLUSION AND ORDER

This Court recognizes that the bar on retrials following acquittals is "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *Taylor,* 486 Mass. at 481', quoting *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977). However, where there was no acquittal on any of the charges in the defendant's first trial, there is no risk of subjecting the defendant to double jeopardy by retrial on all the charges.

Therefore, the Defendant's Motion to Dismiss is DENIED.

Date: August 22, 2024

/s/ Beverly J. Cannone
Beverly J. Canone
Justice of the Superior Court

[11] Cases that defense counsel referred to at the hearing on this motion concerning post-trial inquiry of jurors where juror bias or outside influence was at issue are readily distinguishable from the circumstances here.