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File Name: 19a0224p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANTONIO L. SAULSBERRY,

Petitioner-Appellant,

v.

RANDY LEE, Warden,

Respondent-Appellee.

No. 17-6157

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 2:07-cv-02751—Jon Phipps McCalla, District Judge.

Argued: March 14, 2019

Decided and Filed: August 30, 2019

Before: SUTTON, WHITE, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Joshua M. Koppel, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Appellant. Michael M. Stahl, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Joshua M. Koppel, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Appellant. Michael M. Stahl, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

SUTTON, J., delivered an opinion and the judgment of the court. WHITE, J. (pg. 10), delivered a separate opinion concurring in the judgment. DONALD, J. (pp. 11–14), delivered a separate dissenting opinion.

OPINION

SUTTON, Circuit Judge. This tale of two trials began when Tennessee charged Antonio Saulsberry with (1) premeditated murder and (2) two counts of felony murder. The first jury convicted him of premeditated murder and did not return a verdict on the two felony murder counts, all consistent with the court's instructions to consider the felony murder counts *only* if it acquitted Saulsberry of premeditated murder. The state appellate court reversed Saulsberry's premeditated murder conviction and remanded for a second trial solely on the two felony murder counts. The second jury convicted Saulsberry on both felony murder counts, and he received a life sentence. He filed a federal habeas petition challenging his retrial on double jeopardy grounds. The district court denied the petition, and we affirm.

I.

In 1995, the manager of a Memphis restaurant was murdered during a closing-time robbery. Saulsberry worked at the restaurant and helped to plan the robbery. But he was not there during the robbery or when the restaurant's manager was shot and killed.

In 1997, Saulsberry went to trial in state court. In addition to a robbery count and a conspiracy count, he faced three counts of first-degree murder—premeditated murder, murder during a robbery, and murder during a burglary—all distinct offenses in Tennessee. The trial court forbade the jury from considering the murder counts together. Only if the jury found Saulsberry *not* guilty of premeditated murder could it "proceed to inquire whether [he is] guilty of [either count of felony murder]." R. 68-13 at 43.

The jury convicted Saulsberry of premeditated murder as well as robbery and conspiracy. He received a life sentence for the first conviction plus fifty years for the others. In line with the court's instructions, the jury did not return a verdict on the two felony murder counts.

The Tennessee Court of Criminal Appeals affirmed Saulsberry's robbery and conspiracy convictions. But it reversed the murder conviction for insufficient evidence. The court

remanded the case for a retrial on the two felony murder counts. *State v. Saulsberry*, No. 02C01-9710-CR-00406, 1998 WL 892281, at *6 (Tenn. Crim. App. Dec. 21, 1998). Saulsberry moved to dismiss the new prosecution on double jeopardy grounds, but the state courts rejected the argument. In 2010, a new jury convicted him of both counts of felony murder, and the trial court sentenced him to life in prison. *State v. Saulsberry*, No. W2010-01326-CCA-R3-CD, 2011 WL 1327664, at *1 (Tenn. Crim. App. Apr. 7, 2011). Saulsberry's direct appeal and applications for state post-conviction relief failed.

In 2007, Saulsberry filed an uncounseled § 2254 petition while awaiting retrial in Tennessee, arguing that the second trial for felony murder would violate the Double Jeopardy Clause. After more twists and turns, none relevant here, the district court denied Saulsberry's amended, counseled petition in 2017. We gave him permission to appeal and appointed new counsel.

II.

Standard of review. Acting pro se, Saulsberry in 2007 filed a § 2254 petition seeking to halt the second trial for the two felony murder counts on double jeopardy grounds. That petition creates two modest complications when it comes to our standard of review. The first is that we review *pre-judgment* petitions under the more general provisions of § 2241. The second is that a jury subsequently convicted him of two counts of felony murder, and we review *post-judgment* petitions under § 2254. That means he was right all along, and his original § 2254 petition must be treated like any other § 2254 petition. A brief refresher on a state prisoner's two roads to habeas relief confirms that Saulsberry's petition has come full circle.

The broader form of habeas relief is § 2241, which authorizes federal intervention for state prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). The narrower form of relief is § 2254, which applies to a subset of state prisoners. Out of respect for the final decisions of state courts, *see Williams v. Taylor*, 529 U.S. 420, 436 (2000), Congress bars federal courts from granting habeas relief to state prisoners who are "in custody pursuant to the judgment of a State court," 28 U.S.C.

§ 2254(b)(1), unless the inmate clears several additional obstacles, such as a more rigorous standard of review, *Felker v. Turpin*, 518 U.S. 651, 662 (1996).

Inmates with final state court judgments thus must travel down the § 2254 road, while pretrial detainees must travel down the § 2241 path. *Phillips v. Court of Common Pleas*, 668 F.3d 804, 809 (6th Cir. 2012). In reviewing habeas applications, substance trumps form. If the applicant is a pretrial detainee, we apply the § 2241 rules even if he brings a § 2254 application. *Christian v. Wellington*, 739 F.3d 294, 297–98 (6th Cir. 2014). And the reverse is true. We apply the § 2254 rules to an individual's post-judgment application even if he brings a § 2241 application. All of this explains the numerical gymnastics of this case. At first, Saulsberry was a beneficiary of the substance-trumps-form doctrine. That's why we could think of his inaccurately characterized § 2254 petition initially as a § 2241 petition. But what can be beneficial in one direction can be less so in the other. The same doctrine requires us to think about his current application as a § 2254 petition because his arguments all seek to remove him from "custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(b)(1); *see Christian*, 739 F.3d at 297–98; *Dominguez v. Kernan*, 906 F.3d 1127, 1137–38 (9th Cir. 2018).

The reality is that § 2254 is the "exclusive vehicle" of habeas relief for prisoners in custody under a state judgment. *Walker v. O'Brien*, 216 F.3d 626, 633 (7th Cir. 2000); *Dominguez*, 906 F.3d at 1135 ("Because § 2254 limits the general grant of habeas relief under § 2241 it is the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment." (quotation omitted)); *see* Bryan R. Means, *Postconviction Remedies* § 5:2 (2019) (concluding that the weight of authority identifies "§ 2254 [as] the exclusive avenue" for state prisoners in this setting). It offers no exception for a prisoner who filed a petition still pending at the time of his conviction. *Dominguez*, 906 F.3d at 1137 ("Courts and commentators have recognized that, if the petition is filed by a pre-trial detainee under § 2241 who is subsequently convicted, the federal court may convert the § 2241 petition to a § 2254 petition." (quotation omitted)); Means, *supra* (noting this means AEDPA applies to such a petitioner's claims). Any other approach would not make sense. Saulsberry's requested relief targets his *state judgment* in just the same way as if it preceded his petition. Every circuit that has considered the question agrees that it follows from the text of § 2254 and this practical reality of

prisoners' challenges that § 2254 governs a pending § 2241 petition in the event of a conviction. *See, e.g.*, *Hartfield v. Osborne*, 808 F.3d 1066, 1071–72 (5th Cir. 2015); *Yellowbear v. Wyo. Att'y Gen.*, 525 F.3d 921, 924 (10th Cir. 2008); *see also Jackson v. Coalter*, 337 F.3d 74, 78–79 (1st Cir. 2003); *Dominguez*, 906 F.3d at 1137–38.

As a result, we must apply the deferential standard of review established by the Antiterrorism and Effective Death Penalty Act. We thus measure the state court's decision against holdings of the United States Supreme Court. *White v. Woodall*, 572 U.S. 415, 419 (2014). And we thus may grant relief only if the decision was "contrary to, or involved an unreasonable application of" those rules. 28 U.S.C. § 2254(d)(1). That doesn't mean "merely wrong" or even "clear error." *White*, 572 U.S. at 419. Only an "objectively unreasonable" mistake, *id.*, one "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," slips through the needle's eye of § 2254, *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Saulsberry nonetheless maintains that we should treat his petition as a § 2241 challenge. In support, he offers an unpublished decision of this court that did not apply § 2254 rules to a pretrial petition despite the petitioner's intervening conviction. *See Smith v. Coleman*, 521 F. App'x 444, 447 & n.2 (6th Cir. 2013). But the cases on which *Smith* briefly relied, *see Dickerson v. Louisiana*, 816 F.2d 220 (5th Cir. 1987); *Stow v. Murashige*, 389 F.3d 880 (9th Cir. 2004), "do not address" that point. *Smith*, 521 F. App'x at 452 (White, J., concurring). Further, they arose in circuits that have since reached the opposite conclusion, *see Hartfield*, 808 F.3d at 1071–72 (holding that § 2254 governs a pending § 2241 petition in the event of a conviction); *Dominguez*, 906 F.3d at 1137–38 (holding that § 2241 governs a pending § 2254 petition in the event of a *vacated* judgment).

Carafas v. LaVallee does not alter this conclusion either. 391 U.S. 234 (1968). It stands for the idea that a prisoner's release does not moot a pending habeas petition. But Saulsberry remains in custody. No question of mootness exists. And *Carafas* does not remotely say (or hold) that we should treat a petition attacking a final state judgment as though it challenged pretrial detention.

Double jeopardy. Saulsberry contends that, by convicting him of premeditated murder and remaining silent on the two counts of felony murder, the first jury impliedly acquitted him of those counts. In rejecting this argument, the state court reasoned that a jury's silence on counts that the jury instructions precluded it from reaching does not amount to acquittal, implied or otherwise. *See, e.g.*, *State v. Madkins*, 989 S.W.2d 697, 699 (Tenn. 1999).

That conclusion is objectively reasonable. Here's what we know about the clearly established law. The Double Jeopardy Clause forbids the State from twice putting a person "in jeopardy" for the same offense. U.S. Const. amend. V. A person is "in jeopardy" as to each charged offense when the trial court empanels and swears the jury. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). Once a defendant's first stint in jeopardy ends, the Constitution bars a second stint for the same crimes.

Jeopardy ends in many ways. It ends when the jury convicts a defendant and his appeal fails. *Price v. Georgia*, 398 U.S. 323, 326 (1970). It ends after an acquittal. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). And it ends when, after a mistrial, "a trial is aborted before it is completed"—unless "manifest necessity" justifies stopping the proceedings or the defendant consents. *Arizona v. Washington*, 434 U.S. 497, 503–05 (1978). In each case, the Double Jeopardy Clause bars the State from a do-over for the same crime.

Those are the general principles. Here are the specific principles about implied acquittals.

Acquittals that a jury does not render through a formal verdict generally turn on form and substance. *Blueford v. Arkansas*, 566 U.S. 599, 606–08 (2012). Form: An acquittal is "a final resolution" of deliberations. *Id.* at 606. Substance: An acquittal in essence is a "ruling" by the factfinder that, "whatever its label, actually represents a resolution . . . of some or all of the factual elements of the offense charged." *Martin Linen Supply Co.*, 430 U.S. at 571.

Several breeds of implied acquittals exist under these principles. One type stems from a conviction on "lesser included offenses" when the court charges the jury to consider all of the offenses. *Ohio v. Johnson*, 467 U.S. 493, 501–02 (1984). When a jury passes over the greater

offense and selects its lesser incidents, it impliedly acquits the defendant of the greater offense. *Price*, 398 U.S. at 329.

An implied acquittal likewise arises when a jury charged to consider several counts is instructed it may convict on only one. *Jolly v. United States*, 170 U.S. 402, 408 (1898). The jury's choice of one count over the other, it's "legitimate" to assume, *Green v. United States*, 355 U.S. 184, 191 (1957), amounts to a "resolution" in the defendant's favor on the alternative count, *Blueford*, 566 U.S. at 606.

Gauged by this rule and these precedents, Saulsberry's first jury did not grant an implied acquittal with respect to the two felony murder counts. This was not a case in which the jury remained silent in the face of a free choice to convict on the felony murder counts. The court's instructions *forbade* the jury from considering these other counts. We must presume juries follow instructions, *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), and Saulsberry has not argued that his jury failed to do so. In a case in which the jury never considered whether the government had proven its case as to the two other felony murder counts, no cognizable double jeopardy claim arises.

Saulsberry's case is at least one material step removed from each of the Supreme Court's implied-acquittal cases. In the greater-lesser-offense cases, the Court infers a favorable "resolution" on one count from the jury's verdict on others, based on the counts' relationship to each other and the fact that the jury considered them alongside each other. *Price*, 398 U.S. at 329. In the cases in which the jury must consider all of the counts but may convict on only one, its silence on the alternative counts implies a resolution in the defendant's favor. *Jolly*, 170 U.S. at 408. Neither set of cases applies here. In this instance, a case in which the jury could not consider anything but the first count, it's not possible to infer a "final resolution" in Saulsberry's favor of the other counts. Saulsberry's jury did not implicitly or explicitly acquit him of felony murder.

Absent a justified mistrial, Saulsberry counters, jeopardy must terminate whenever the trial court sends the jury home without rendering a verdict on a count—regardless of whether the jury considered the count, could consider the count, or resolved it in the defendant's favor. He

points to *Green v. United States* as supporting this rule. 355 U.S. 184. There, the Court inferred an acquittal from the jury's silence on a count, pointing to the fact that the jury convicted on the lesser included count. Under these circumstances, the Court first reasoned, it is "legitimate" to assume that "for one reason or another" the jury "refused" to convict Green on the greater offense. *Id.* at 190–91.

On top of that, the Court offered a second reason, on which Saulsberry hangs his hat and most of his case. The jury had "a full opportunity to return a verdict" on the greater offense, the Court said, and yet was discharged without rendering one, all without Green's consent or any "extraordinary circumstances" to justify that ending. *Id.* at 191. Saulsberry takes that language and turns it into this rule: Absent a permissible mistrial, jeopardy terminates with a jury's silence, no matter what. As an example of this rule in action, Saulsberry offers *Dealy v. United States*, in which the Court found the jury's silence on a count was "doubtless equivalent to a verdict of not guilty" despite the possibility that the jury simply "overlooked" the count. 152 U.S. 539, 542 (1894).

Saulsberry reads too much into *Green* and *Dealy*. They confirm only what we already know: that a jury's silence can equal acquittal when the circumstances make it fair to infer the jury as a matter of intent "refused" to convict, *Green*, 355 U.S. at 191, *and* "when the first jury 'was given a full opportunity to return a verdict' on that charge and instead reached a verdict on the lesser charge," whatever it intended, *Price*, 398 U.S. at 329 (quoting *Green*, 355 U.S. at 191). But there is a considerable difference in altitude between this point and the rule that Saulsberry insists *Green* "squarely hold[s]"—that silence always equals acquittal even where the jury did *not* have any opportunity to consider a count at all. Reply Br. 9. Every time the Supreme Court has deemed the jury's silence to constitute an acquittal, including *Green* and *Dealy*, the jury was directed to and had the "full opportunity" to make a choice. *Green*, 355 U.S. at 191. That choice gives the jury's silence meaning. But Saulsberry's jury had no choice as to the felony murder counts. All in all, the Tennessee court's refusal to find an implied acquittal in this circumstance hardly constituted "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

Saulsberry adds that two of *our* cases support him. It is of course U.S. Supreme Court case law that matters in the "existing law" inquiry. But he is mistaken anyway. *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988), is a pre-AEDPA case that, we said at the time, fell in between relevant principles from the Supreme Court and, we have said since, "is limited by the unusual situation we were addressing in that case." *United States v. Davis*, 873 F.2d 900, 906 (6th Cir. 1989). Saylor went to trial on a single count that encompassed several distinct legal theories. The prosecution did not object when the trial court inexplicably instructed the jury on just one theory. We did not allow retrial on one of the alternatives, troubled that the prosecution seemed to have it both ways: limiting the jury to one theory, and so avoiding any risk of acquittal on the alternatives, while retaining the ability to seek alternative instructions at any time, as well as the option of recycling the other theories for retrial. No "manipulation" of any kind was at work in Saulsberry's case, where the government simply went to the jury on every count, and the jury proceeded to consider them sequentially. *Saylor*, 845 F.2d at 1408.

Terry v. Potter, 111 F.3d 454 (6th Cir. 1997), in truth hurts Saulsberry's argument. It is a textbook implied-acquittal case in which the jury "had ample opportunity" to render a verdict on alternative, disjunctive counts, chose one, and (we said) impliedly acquitted on the alternative. *Id.* at 458. That takes us back to the key point: Saulsberry's jury had no chance to render a verdict on the felony murder counts.

When a trial court interrupts a trial and declares a mistrial, Saulsberry submits, the jury often does not have a chance to consider any charges, and yet the Supreme Court has recognized that jeopardy terminates absent manifest necessity for the mistrial. True enough. But there was no mistrial here. That jeopardy can end by another means in another setting does not show an implied acquittal here. It simply leaves the state court's decision as one reasonable way, even if not the only reasonable way, of applying these precedents. Under AEDPA, that's all that matters.

We affirm.

CONCURRING IN THE JUDGMENT

HELENE N. WHITE, Circuit Judge, concurring in the judgment. I agree that the weight of authority supports that after the entry of the state-court judgment against him on retrial, Saulsberry's petition is subject to AEDPA deference under 18 U.S.C. § 2254.[1]

There is no need to revisit or apply this court's decisions in *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988) and *Terry v. Potter*, 111 F.3d 454 (6th Cir. 1997) because, as the lead opinion acknowledges, AEDPA requires that we look only to decisions of the Supreme Court. That is particularly true here because Respondent has not attempted to distinguish either case.

I agree that given the trial court's instructions to the jury, the jury's failure to render a verdict on the two felony-murder charges does not imply that it acquitted Saulsberry of these charges. However, double-jeopardy concerns are raised in circumstances other than where there is an implied acquittal. A defendant has a recognized interest in having his fate decided by the jury first impaneled to try him, absent manifest necessity. *See, e.g.*, *Terry*, 111 F.3d at 458 (holding that "[r]etrying [the petitioner] would violate his 'valued right to have his trial completed by a particular tribunal'" (quoting *Crist v. Bretz*, 437 U.S. 28, 36 (1978))). Still, the Supreme Court has not clearly addressed the circumstances presented here. I therefore agree that AEDPA requires that we affirm.

[1]I note that there is no claim that Tennessee stalled the district-court proceedings and rushed the retrial to gain the advantage of AEDPA's deference to state convictions.

DISSENT

BERNICE BOUIE DONALD, Circuit Judge, dissenting. Antonio Saulsberry was charged with felony murder; a jury was empaneled to hear his case; the prosecution, through the course of an entire trial, put on evidence in its attempt to prove that he committed felony murder; and the court asked the jury to review that evidence, deliberate, and determine whether he was guilty of felony murder. The jury returned a guilty verdict for a different crime, and then the court dismissed the jury. Because "the jury was dismissed without returning any express verdict on [felony murder] and without [Mr. Saulsberry's] consent[,]" *Green v. United States*, 355 U.S. 184, 190 (1957), Supreme Court precedent is clear that Mr. Saulsberry cannot be tried again on the same felony-murder charge. For that reason, I dissent.

As an initial matter, I do not agree that the state should receive AEDPA deference in this case. We provide AEDPA deference to state-court judgments because those judgments are presumed to be valid. Eric Johnson, *An Analysis of the Antiterrorism and Effective Death Penalty Act in Relation to State Administrative Orders: the State Court Judgment as the Genesis of Custody*, 29 New Eng. J. on Crim. & Civ. Confinement 153, 171–72 (2003). Such a presumption cannot exist where the conviction was obtained via a trial that was, itself, being challenged as a violation of the defendant's double-jeopardy rights. *See Christian v. Wellington*, 739 F.3d 294, 297 (6th Cir. 2014) ("A claim of double jeopardy is one such [habeas claim that may be filed by a pretrial detainee] because it is not only a defense against being punished twice for the same offense, but also a defense against being subjected to a second trial—a right we cannot vindicate after a trial is complete, no matter the outcome."). Mr. Saulsberry did what he was supposed to do at the time he was supposed to do it: file a habeas petition as a pretrial detainee challenging his detention. *See id.* The fact that it took longer for this Court to adjudicate that petition than it took for the state to obtain a conviction does not diminish Mr. Saulsberry's rights. *Smith v. Coleman*, 521 F. App'x 444, 447 n.2 (6th Cir. 2013) ("What determines [the] standard of review is the nature of the claims raised and the time the petitioner filed his petition, not the present status of the case pending against him." (internal citations and

quotation marks omitted)); *see also Glover v. Gillespie*, 502 F. App'x 661, 662 (9th Cir. 2012) ("Because Glover properly filed this petition under 28 U.S.C. § 2241 in the first instance, that section continues to apply notwithstanding his subsequent guilty plea.")

Nevertheless, even if we were to provide AEDPA deference to his claim, Mr. Saulsberry should still prevail. The Double Jeopardy Clause prohibits the state from "twice put[ting] [any person] in jeopardy of life or limb" for "the same offence." U.S. Const. amend. V; *see also Benton v. Maryland*, 395 U.S. 784, 794 (1969) (the Double Jeopardy Clause applies to states through the Fourteenth Amendment). It is a protection that stands on strong policy:

> [T]he underlying idea [of the Double Jeopardy Clause], 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 him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 795–96 (quotation marks and citation omitted).

To effectuate that policy, the Supreme Court has held—in categorical terms—that "a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again." *Green*, 355 U.S. at 188 (citation omitted). The exception to this rule, as noted in *Green*, is when "unforeseeable circumstances arise during the first trial making its completion impossible, such as the failure of a jury to agree on a verdict." *Id.* (quotation marks and citation omitted). Applying *Green* to this case, sequential jury instructions do not amount to an extraordinary circumstance making the completion of Mr. Saulsberry's first trial impossible.[1] Mr. Saulsberry should not have been put through the ordeal of a second trial on the same charges.

The majority disagrees. It contends that applying *Green* in such a way "reads too much into *Green*" because that case really stands for the proposition that a jury must have rendered an

[1]This is particularly true as the state supreme court had previously "urged" its trial courts not to use sequential jury instructions. *State v. Howard*, 30 S.W.3d 271, 275 n.4, 277-278 (Tenn. 2000).

acquittal, either implicitly or explicitly, for jeopardy to end. Maj. Op. at 9. The problem for the majority is that *Green* explicitly disavows its interpretation of the case:

> Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder. ***But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree***. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense.

355 U.S. at 190–91. In the Supreme Court's *own* words, *Green* does not require an acquittal, implicit or otherwise, for jeopardy to end; rather, jeopardy ended when the jury "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Id.* The majority's take on *Green* is thus indefensible.

As for Mr. Saulsberry's specific case, the majority finds that jeopardy did not end because the jury "had no chance to render a verdict on the felony murder counts." Maj. Opinion at 10. That finding is impossible to square with the facts of this case: the jury was empaneled; the prosecution marshaled its resources and presented its evidence to prove that Mr. Saulsberry had committed felony murder; and the jury was sent to deliberate whether Mr. Saulsberry was guilty of felony murder. Just because the jury was told not to announce a verdict on felony murder if they found Mr. Saulsberry guilty of a different charge does not mean that the jury did not have a "chance" to find Mr. Saulsberry guilty of felony murder. Indeed, the Supreme Court has been clear that jeopardy ends when the court dismisses the jury without sufficient reason after the jury was empaneled, *Arizona v. Washington*, 434 U.S. 497, 503–05 (1978), *a fortiori*, jeopardy must end after the jury actually deliberates the charge, *see Wade v. Hunter*, 336 U.S. 684, 688 (1949) (explaining that a defendant has a "valued *right* to have his trial completed by a particular tribunal" (emphasis added)).

The practical application of the majority's decision further illuminates its error. The Supreme Court has made clear that *any* retrial of an accused "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." *Arizona*, 434 U.S. at 503–04 (footnotes omitted). "Consequently, . . . the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Id.* at 505. Yet, under today's decision, prosecutors who wish to have a second, third, fourth, etc. bite at the apple may simply request sequential jury instructions. If they lose on the most serious alleged offense? No problem; they are free to try again and, possibly, again and again. The Constitution clearly demands more.

The jury was given a full opportunity to return a verdict against Mr. Saulsberry for felony murder, but they were dismissed without doing so. A sequential jury instruction given at the discretion of the trial judge is not an extraordinary circumstance that required such an outcome. The Constitution therefore prohibits the state from having put Mr. Saulsberry through another trial on the same charge. I dissent.