No. 08-1403

IN THE

Supreme Court of the United States

CARISSA MARIE DANIELS,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici curiae in support of Petitioner are organizations whose members are engaged daily in the practice of criminal defense.[1] The Public

[1] Accompanying this brief are letters of consent to its filing. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief. No counsel for any party authored any part of this brief, and no person or entity, other that *amici*, has made a monetary contribution to the preparation or submission of this brief.

Defender Service for the District of Columbia ("PDS") provides and promotes quality representation to indigent adults and children facing a loss of liberty in the District of Columbia. The National Legal Aid and Defender Association ("NLADA") is the nation's oldest and largest nonprofit association of equal justice professionals. Its membership is comprised of approximately 3,000 offices that provide legal services to poor people, including the majority of public defender offices, coordinated assigned counsel systems, and legal services agencies around the nation. The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit association of criminal defense lawyers with a national membership of more than 10,000 attorneys. *Amici* have a keen interest in the resolution of uncertainty regarding the double jeopardy implications of "transition instructions" that control a jury's deliberations on lesser offenses.

SUMMARY OF ARGUMENT

For at least three decades, many state and some federal courts of appeals have adopted or approved "transition instructions" that allow a jury to return a verdict on a lesser offense if it is unable to reach agreement on the greater offense. The shared premise of these decisions is that a verdict on a lesser offense rendered by a jury that had a full opportunity to agree on the greater offense, but did not, represents a fair end to a criminal prosecution. Rather than deadlock, mistrial, and the need for a retrial, the "unable to agree" instruction allows the jury to resolve the case if the jurors agree on guilt of the less serious offense.

The question presented in this case is whether a verdict on a lesser offense returned in conformity with such an instruction merits the protection of the Fifth Amendment's Double Jeopardy Clause, which commands that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amdt. 5. The implications are wide. At stake is not only the finality of verdicts already rendered and to be rendered, but also the continued vitality of the instruction itself. Despite its considerable virtues in particular cases, the "unable to agree" approach should not survive if it allows the government both to obtain a guilty verdict on a lesser offense from one jury and to retry the defendant before another jury in an effort to do better the second time.

REASONS TO GRANT THE WRIT

I. THE "UNABLE TO AGREE" INSTRUCTION PROMOTES THE FAIR RESOLUTION OF CRIMINAL TRIALS WITHOUT THE NECESSITY OF DECLARING MISTRIALS.

Twenty-three jurisdictions now require or permit an "unable to agree" (sometimes also called a "reasonable efforts") transition instruction to structure a jury's deliberations in cases involving greater and lesser, or more serious and less serious, offenses. In the considered judgment of these courts, the "unable to agree" approach promotes fair deliberations that lead to fair results. Among the related virtues of the instruction cited by courts approving or requiring it are that the instruction reduces jury coercion, *State v. Thomas*, 533 N.E.2d 286, 292 (Ohio 1988); *State v. Allen*, 717 P.2d 1178, 1181 (Or. 1986); that it avoids interference with jury

deliberations, *People v. Hurst*, 238 N.W.2d 6, 10 (Mich. 1976); and that it "ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard," *United States v. Jackson*, 726 F.2d 1466, 1470 (9th Cir. 1984). The "acquittal first" instruction, in contrast, is said by these courts to "dilute[] the jury's freedom of decision" with respect to lesser offenses, *State v. Mays*, 582 S.E.2d 360, 367 (N.C. Ct. App. 2003), and to "encroach[] on the province of the jury to decide questions of fact and to arrive at a verdict based on all the evidence before it and all the various offenses on which it has been properly instructed," *State v. Thomas*, 533 N.E.2d 286, 292 (Ohio 1988) (footnote omitted).

Central to the rationale for the "unable to agree" approach is that it leads to fewer deadlocks and the consequent need for declaring mistrials, as well as the attendant costs (societal and to the defendant) of retrials, by permitting a jury unable to agree on a greater charge to return a verdict on a lesser charge if it is in agreement that the defendant is guilty of that charge. By allowing the jury unable to agree on the more serious offense to reach a verdict on a less serious one, the jury does not "hang." There is no need for a retrial because there has been no mistrial. *See State v. Davis*, 266 S.W.3d 896, 912 (Tenn. 2008) (Wade, J., concurring) ("The instruction . . . permits a jury the flexibility to avoid gridlock (and a resultant mistrial), to move deliberations forward when there is no unanimity, and to revisit the greater offense if developments so require."); *Green v. State*, 80 P.3d 93, 96 (Nev. 2003) ("Use of the 'unable to agree' instruction . . . reduces the risk of hung juries and the significant costs involved with retrial."); *State v. LeBlanc*, 924 P.2d 441, 442-43 (Ariz. 1996) (*en banc*) ("The 'reasonable efforts' approach also diminishes

the likelihood of a hung jury and the significant costs of retrial, by providing options that enable the fact finder to better gauge the fit between the state's proof and the offense being considered."); *State v. Labanowski*, 816 P.2d 26, 34 (Wash. 1991) (The instruction "promotes the efficient use of judicial resources; where unanimity is required, the refusal of just one juror to acquit or convict on the greater charge prevents the rendering of a verdict on the lesser charge and causes a mistrial even in cases where the jury would have been unanimous on a lesser offense."). *Cf. State v. Ferreira*, 791 P.2d 407, 409 (Haw. Ct. App. 1990) ("In our view, [the "acquittal first" approach] is inconsistent with Hawaii's statutory and judicial policy against a trial resulting in a hung jury when the jury cannot unanimously agree on the defendant's guilt or innocence of the offense charged but can unanimously agree on the defendant's guilt of a lesser included offense.").

Conversely, jurisdictions that require the "acquittal first" approach make the considered choice that the risk of hung juries, and the ensuing declaration of a mistrial and need for a retrial, are preferable to the encouragement of "compromise" verdicts under the alternative approach. *See State v. Sawyer*, 630 A.2d 1064, 1074 (Conn. 1993) (rejecting the "reasonable efforts" instruction as promoting compromise, while recognizing the possibility that the instruction makes deadlocked juries and mistrials less likely); *People v. Boettcher*, 505 N.E.2d 594, 597 (N.Y. 1987) (rejecting "unable to agree" instructions because "they give insufficient weight to the principle that it is the duty of the jury not to reach compromise verdicts based on sympathy for the

defendant or to appease holdouts . . .").[2] These courts assume, as do the courts that favor the "unable to agree" approach, that the verdict that results from that approach will be final. Some do so explicitly. *See Boettcher*, 505 N.E.2d at 597; *State v. Van Dyken*, 791 P.2d 1350, 1361 (Mont. 1990); *Sawyer*, 630 A.2d at 1074-75. For most, it is implicit in the recognition that the "unable to agree" approach reduces the risk of mistrials and costly retrials by allowing resolution of the case on the lesser offense.

Indeed, when Judge Friendly, in his influential opinion in *United States v. Tsanas*, 572 F.2d 340 (2d Cir. 1978), weighed the advantages and disadvantages of the "acquittal first" and the "unable to agree" instructions to either side, it was the risk of mistrials for juries hung on the greater offense under the "acquittal first" instruction that, depending on one's perspective, was either its main attraction (leaving the defendant without any conviction unless the government chose to retry him), or its major disadvantage (requiring the government to expend the cost of retrial). With respect to the "unable to agree" instruction, it was the enhanced likelihood of a resolution of the case with a guilty verdict on a lesser offense that, depending on one's perspective, was

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[2] Those favoring an "unable to agree" approach tend not to view the resultant verdicts as representing a compromise. *See Dresnek v. State,* 718 P.2d 156, 159 (Alaska 1986) (Rabinowitz, C.J., dissenting) ("A conviction on a lesser included charge is not a 'compromise' verdict if all the jurors agree that the defendant is guilty of this charge and genuinely disagree about whether the defendant is guilty of the greater charge."); *Green v. State,* 80 P.3d at 96 ("Use of the 'unable to agree' instruction reduces the risk of compromise verdicts by enabling the finders of fact to better gauge the fit between the evidence adduced at trial and the offenses being considered.").

either its advantage or its disadvantage. Under this approach, the defendant may avoid conviction on the greater offense, but at the cost of an easier conviction on the lesser, while the state increased its chances of securing a conviction, though for one less serious than it desired. *Id.* at 345-46. Judge Friendly assumed that the Double Jeopardy Clause would bar reprosecution of the greater offense under *Green v. United States*, 355 U.S. 184 (1957), and *Price v. Georgia*, 398 U.S. 323 (1970). *Tsanas*, 572 F.2d at 346 n.7. Finding the instructions evenly matched, the *Tsanas* court held that the trial court should instruct in the manner the defendant seasonably elects. *Id.* at 346.

Thus, both the proponents of the "unable to agree" approach as well as its opponents recognize that the instruction tends to avoid mistrials and retrials, not foster them, by allowing the jury to return a final verdict on a lesser offense rather than deadlock on a greater. The Supreme Court of Washington's decision that the jury's nonverdict on the greater offense was the equivalent of a declaration of a mistrial for a hung jury entitling the government to retry the greater charge is anathema to the "unable to agree" instruction's central premise.

II. FAILING TO PROVIDE DOUBLE JEOPARDY PROTECTION TO VERDICTS RENDERED PURSUANT TO AN "UNABLE TO AGREE" INSTRUCTION IMPLICATES THE PROHIBITION AGAINST RETRIAL AFTER ACQUITTAL AND THE PROHIBITION AGAINST RETRIAL AFTER CONVICTION.

The Double Jeopardy Clause "protects against a second prosecution for the same offense after

acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted). Failing to accord finality to a jury's verdict rendered in conformity with the "unable to agree" instruction implicates the first two of these protections. The first protection is implicated because a conviction on a lesser offense by a jury that had a full opportunity to convict on the greater, but did not, is treated as though it were an acquittal on the greater. *See Green*, 355 U.S. at 191; *Price*, 398 U.S. at 329. The second protection is implicated because jeopardy on the lesser offense terminates with an unappealed conviction, *Ball v. United States*, 163 U.S. 662, 669 (1896) ("the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial"), yet a retrial of the greater offense can be had only by also retrying the lesser offense. *Brown v. Ohio*, 432 U.S. 161, 168 (1977) (holding that for purposes of the double jeopardy protection, the greater offense and the lesser included offense are the "same offence").

Fundamentally, the Double Jeopardy Clause affords the state "one and only one" "full and fair opportunity" to convict those who have violated its laws. *Arizona v. Washington*, 434 U.S. 497, 505 (1978). The prosecution, having been given its full and fair opportunity to convict Petitioner, should not be heard to complain that the jury, in conformity with its instruction, convicted her of less than the prosecution had sought.

1. Cleaving to a constricted view of *Green* and *Price*, the Supreme Court of Washington held that the Double Jeopardy Clause does not bar reprosecution on the greater charge because the

jury's nonverdict on that charge did not represent true "silence." Rather, the court assumed the jury disagreed on the greater offense as it had been instructed to leave the verdict form blank if it was unable to agree, and held that the disagreement was fatal to an implied acquittal. *State v. Daniels*, 156 P.3d 905, 910 (Wash. 2007). But *Green* rests on a second, broader premise than the assumption that silence signifies an actual acquittal of the defendant on the charge on which it failed to return a verdict. This Court explained *Green*'s broader premise as follows: "Second, and more broadly, the Court reasoned that petitioner's jeopardy on the greater charge had ended when the first jury 'was given a full opportunity to return a verdict' on that charge and instead reached a verdict on a lesser charge." *Price*, 398 U.S. at 329 (quoting *Green*, 355 U.S. at 191).

As Judge (later Justice) Marshall recognized, a jury's silence can represent any number of different results, including an acquittal, a failure to agree on the greater charge, an expression of sympathy by the jury, or a non-rational choice by the jury. *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, 856-57 (2d Cir. 1965). What matters is that "the silence permits only one certainty–the state had tried but failed to obtain a conviction" for the greater charge. *Id.* at 857.

Petitioner's jury was given a full opportunity to return a verdict on the greater offense, but instead returned a verdict on a lesser offense in conformity with the instruction that guided its deliberations. The instruction was the considered law of the state, required because it "allows the jury to correlate more closely the criminal acts with the particular criminal conviction," "promotes the efficient use of judicial

resources," and avoids "[s]uccessive trials" that "can burden a defendant while allowing the state to benefit from 'dress rehearsals.'" *Labanowski*, 816 P.2d at 34 (footnotes omitted). The public's interest was thus fully served when the jury resolved the case with its guilty verdict. Under the instruction, the government had its "full and fair opportunity" to convict the defendant. *Washington*, 434 U.S. at 505. It is entitled to no more.

Granting certiorari in this case will not only resolve the import of a jury's silence under the "unable to agree" instruction, but also should shed useful light on whether the analysis would be any different when a jury instructed in this manner actually voices its inability to agree on the greater charge. The United States Court of Appeals for the Eighth Circuit found the question a difficult one in *United States v. Bordeaux*, 121 F.3d 1187 (8th Cir. 1997). In *Bordeaux*, the jury returned a note with its guilty verdict on the lesser charge that revealed its disagreement on the greater charge. The note indicated that the jury had done as instructed: it had used "all reasonable efforts" to agree on the greater charge but was "unable to reach a verdict." Instead, it convicted of the lesser charge. *Id.* at 1188. The court recognized that this "Court's holdings [in *Green* and *Price*] were not based only on the 'implied acquittal' inferred from the blank verdict." It acknowledged "[a] second basis for prohibiting retrial on the greater offense . . . was that the jury, given the opportunity to convict on the greater offense, had been dismissed after returning a verdict on the lesser offense." *Id.* at 1192. Yet the court ruled:

> [A]lthough in light of *Green* and *Price* we find the question difficult, we hold that

> where the jury expressly indicates that it is unable to reach an agreement on the greater charge, a conviction on a lesser included offense does not constitute an implied acquittal of the greater offense and presents no bar to retrial on the greater offense.

Id. at 1193. This reasoning is difficult to square with the reality that the Double Jeopardy Clause "represents a constitutional policy of finality for the defendant's benefit in . . . criminal proceedings." *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion) (footnote omitted). That finality interest does not lessen when a jury that has been allowed to convict on a lesser charge as a way of avoiding a mistrial expressly voices its inability to agree on the more serious charge.

2. The "unable to agree" jury instruction also implicates a defendant's right to finality after a conviction. In *Daniels*, the Supreme Court of Washington treated the jury's nonverdict on the greater offense as if it were a hung jury under *Richardson v. United States*, 468 U.S. 317 (1984). *Daniels*, 156 P.3d at 909. It did so notwithstanding that there was no "manifest necessity" to declare a mistrial, *United States v. Perez*, 9 Wheat. 579 (1824), and none was in fact declared. Instead, the jury returned a guilty verdict on the lesser offense in conformity with the instruction deemed by the state to be just. Thus "the ends of public justice" were "not defeated." *Id.*

Although Petitioner secured a reversal of her conviction on the less serious offense, it bears emphasis that if the hung jury analogy is correct, the state's right to retrial of the greater offense does not depend on the defendant obtaining a reversal of his

conviction on the lesser offense. The government's entitlement to a retrial under the hung jury cases is immediate. *Richardson*, 468 U.S. at 324-25. Yet such a retrial does violence to the core principle that a defendant's jeopardy terminates with an unreversed conviction. *See Ball*, 163 U.S. at 669; *Pearce*, 395 U.S. at 717; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 n.6 (1977) ("The Double Jeopardy Clause also accords nonappealable finality to a verdict of guilty entered by judge or jury, disabling the Government from seeking to punish a defendant more than once for the same offense.") (citation omitted). By retrying the greater offense, the state necessarily subjects the defendant to a retrial on the lesser offense on which the jury has already returned a guilty verdict. This Court held in *Brown*, 432 U.S. at 168, that when a state has already secured a conviction on a lesser included offense, reprosecution on the greater offense represents a forbidden second jeopardy for the same offense.

The Supreme Court of California, in *People v. Fields*, 914 P.2d 832, 842 (Cal. 1996), held on state statutory grounds that a retrial on the greater offense by a jury that returned a guilty verdict on the lesser offense was barred, reasoning that the state "fail[s] to offer solutions . . . to any of the numerous and formidable practical difficulties that would arise" if retrial were allowed. The concurring justice believed the result was compelled by the Double Jeopardy Clause because a retrial on the greater offense after a conviction on the lesser offense necessarily entails a retrial of the same offense. *Fields*, 914 P.2d at 845 (Mosk, J., concurring) (citing *Pearce* and *Brown*). *See also United States v. Rivas*, 2006 WL 2471889, at *3 (D. Colo. Aug. 23, 2006) ("[T]his Court concludes that the existence of an

unreversed conviction on the lesser offense prevents any retrial on the greater. . . . [T]he jeopardy he faced on that offense has been terminated by his conviction and sentence, and any subsequent retrial, on either the lesser or greater charge, would impermissibly place him in a second jeopardy for the same offense.").

The thorny problems associated with reprosecution of a greater offense following conviction on the lesser are not merely logistical: they demonstrate the double jeopardy concerns. Foremost among them is how to treat the conviction the government has already secured. None of the options is good. Vacating the conviction does violence to the defendant's interest in finality. Instructing the jury that the defendant has already been convicted of the lesser offense prejudices the defendant's presumption of innocence on the greater offense and may cause confusion in the jury with respect to its role. *See Fields*, 914 P.2d at 842 n.5 (citing the potential for unfair juror speculation). *Cf. United States v. Williams*, 568 F.2d 464, 470-71 (5th Cir. 1978) (finding prejudice to the accused from a jury learning that he had been convicted of the same offense by a prior jury, but the conviction had been reversed on appeal). Giving the jury a lesser offense instruction notwithstanding the prior conviction on the lesser charge may lead to an acquittal on the lesser charge. What, then, becomes of the prior conviction? As the California Supreme Court noted, "A defendant would appear to have a good argument that he is entitled to the double jeopardy effect of this acquittal, notwithstanding the previous, now inconsistent, conviction on the lesser offense."[3] *Fields*, 914 P.2d at

[3] The United States acknowledged the complications attendant upon a retrial in its brief to the District of Columbia Court of

842 n.5. If, instead, the defendant is convicted again of the lesser charge, which conviction counts for purposes of appellate review or for the collateral consequences that may flow from the date of a conviction? On the other hand, denying the defendant an instruction on the lesser offense prejudices his chances of obtaining an acquittal on the greater offense. *See Beck v. Alabama*, 447 U.S. 625, 637 (1980) ("[T]he failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction."); *Keeble v. United States*, 412 U.S. 205, 208 (1973) ("[I]t is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.").

III. CONTINUED UNCERTAINTY REGARDING THE DOUBLE JEOPARDY IMPLICATIONS OF THE "UNABLE TO AGREE" INSTRUCTION HINDERS THE ADMINISTRATION OF JUSTICE.

Uncertainty with respect to the finality of a conviction on a lesser offense returned under an

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Appeals in *United States v. Allen*, 755 A.2d 402 (D.C. 2000). It wrote that a lesser offense instruction on retrial "could complicate matters because the second jury would have an opportunity to return a verdict that is inconsistent with the verdict from the first trial. That is, if the second jury acquitted on the lesser offense, the court would have to determine which verdict 'counts'–the guilty verdict from the first trial, or the acquittal from the second trial." *Reply Brief for Appellant* at 18 n.11, *United States of America v. Darrian Allen*, Cr. No. 98-CO-1580 (available at the Office of the Clerk of the Court of Appeals for the District of Columbia). The court, which held that retrial was not barred, offered no solutions. *Allen*, 755 A.2d at 411.

"unable to agree" jury instruction creates intractable problems for criminal defense attorneys advising their clients, and for the clients themselves, in the many jurisdictions that require or allow such a charge. For the reasons discussed above, the decision whether to request a lesser offense instruction is complicated by uncertainty regarding the finality of a verdict returned on the lesser offense. On the one hand, a verdict on the lesser offense may provide the government with a surer opportunity to obtain a conviction on the greater offense at a retrial. On the other hand, depriving the defendant of a lesser offense instruction removes a "valued procedural safeguard" and unfairly enhances the risk of an unwarranted conviction. *Beck*, 447 U.S. at 634.

For similar reasons, defense counsel's decision whether to request or to oppose an "unable to agree" instruction is impaired by uncertainty over whether a verdict on a lesser offense rendered pursuant to such an instruction will be treated as final. If it is not final, then the advantages and disadvantages of the approach that Judge Friendly assessed to be evenly balanced for each side, *Tsanas*, 572 F.2d at 346, instead tilt heavily in favor of the prosecution. In the District of Columbia, in the wake of *United States v. Allen*, 755 A.2d 402 (D.C. 2000), and *Holt v. United States*, 805 A.2d 949 (D.C. 2002), holding that retrial is not barred at least when the jury expressly advises the court that it was unable to agree, criminal defense attorneys are cautioned to "seriously consider requesting the 'acquittal first' jury instruction instead of 'reasonable efforts.'" 1 *The Public Defender Service for the District of Columbia, Criminal Practice Institute: Criminal Practice Manual* § 9.10 (2005/2006).

Advising a defendant whether to take an appeal after conviction on a lesser offense under an "unable to agree" instruction is particularly fraught when there is uncertainty regarding the government's right to retry a defendant on the greater offense. It may be difficult to advise a defendant to pursue such an appeal if the prosecution, otherwise satisfied with a verdict on the lesser offense, would subject the defendant to a retrial on the greater offense if his conviction on the lesser is reversed. In *Wilson v. United States*, 922 A.2d 1192, 1196 (D.C. 2007), for example, the United States represented to the court that it would not seek "to resurrect" the greater offense of armed carjacking unless appellant's conviction for unarmed carjacking was reversed on appeal.

Citing the vexing double jeopardy issues at stake in this case, Judge Chambers writes, "We need a clear beacon to chart our course and light the way for the lower courts." *State v. Daniels*, 200 P.3d 711, 717 (Wash. 2009) (Chambers, J., dissenting). *Amici* share the view that clarity is required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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