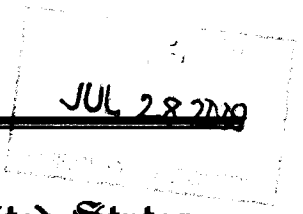
No. 08-1403



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

REPLY BRIEF FOR PETITIONER

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Under the "hung jury" exception to the Double Jeopardy Clause, the government may try someone twice for the same offense only when "the trial judge[] . . . declare[s] a mistrial [because] he considers the jury deadlocked." *Arizona v. Washington*, 434 U.S. 497, 510 (1978); *see also Richardson v. United States,* 468 U.S. 317, 326 (1984) (trial judge must "declar[e] . . . a mistrial"); *Selvester v. United States,* 170 U.S. 262, 270 (1898) (court must "ma[k]e [a] record" of jury deadlock); *cf. Sattazahn v. Pennsylvania,* 537 U.S. 101, 113 (2003) (plurality opinion) (finding retrial permissible where the judge found deadlock "dismissed the jury as hung"). The State, however, concedes that upon receiving a verdict finding the defendant guilty something less than the most serious charge, a trial court in an "unable to agree" system such as Washington's neither assesses deadlock concerning the most serious charge nor declares a mistrial. BIO 9-10. That concession is enough to dictate certiorari here and, ultimately, a reversal.

The State nonetheless opposes review here on three grounds. First, the State asserts that petitioner's claim is somehow not properly before this Court. Second, the State suggests that petitioner "overstates" the extent to which the Washington Supreme Court's decision conflicts with other courts' precedent. Third, the State offers an alternative defense of the Washington Supreme Court's ruling on the merits. None of these arguments succeed.

1. There can be no question that the double jeopardy question petitioner raises (and has raised

ever since the State announced its intention to retry her on the homicide by abuse charge) is properly before this Court. This Court has certiorari jurisdiction over all arguments "pressed or passed upon below." *United States v. Williams,* 504 U.S. 36, 41 (1992). It thus more than suffices that the Washington Supreme Court passed upon petitioner's double jeopardy claim not just once, but twice. Pet. App. 1a-35a. Indeed, when the Washington Supreme Court granted rehearing, it considered and rejected (by a 5-4 vote) the precise argument petitioner advances here: the argument, articulated in *Brazzel v. Washington*, 491 F.3d 976 (9th Cir. 2007), that the Double Jeopardy Clause prohibits retrial because the trial judge neither found the jury to be genuinely deadlocked in the first trial nor declared a mistrial.

Petitioner vigorously pressed this argument below as well. While the State complains that "petitioner did not object to the court's [unable to agree] instructions," (BIO 12), there was no need for petitioner to object to these pattern instructions in order to preserve her double jeopardy argument. Petitioner has never claimed that there is anything constitutionally infirm about a state's choosing – as Washington has – to use such instructions in multiple count cases. Pet. for Cert. 11-14. Petitioner merely maintains – echoing Judge Friendly's opinion in *United States v. Tsanas,* 572 F.2d 340 (2d Cir. 1978) – that once a state decides to use the "unable to agree" approach in order to claim the benefits of avoiding hung juries and facilitating convictions, it must also accept the corresponding burden of foregoing the ability to retry defendants on greater charges when juries convict only on lesser ones.

Nor can the State fault petitioner (*see* BIO 13-14) for failing to request further deliberations on the homicide by abuse charge or to request that the trial court declare a mistrial. To reiterate: there is nothing wrong with a trial court's using an "unable to agree" instruction and accepting a jury's partial guilty verdict in response to it. This approach has pros and cons for both parties; petitioner simply seeks to require the State to accept the consequences of using this approach. If the State had wished to try to preserve its ability to retry petitioner for the greater charge in the event of jury disagreement on it, *the State* might have asked the trial court to deviate from the "unable to agree" approach or to declare a mistrial when the jury came back silent on the greater charge. But petitioner surely was not required to do any such thing.

2. The State does not dispute that the Washington Supreme Court's decision breaks with the settled understanding of numerous jurisdictions concerning the double jeopardy implications of the "unable to agree" approach. *See* Pet. for Cert. 16-18. The State contends, however, that petitioner "overstates" the disagreement between the Washington Supreme Court and the Ninth Circuit on this issue. BIO 15. The State also suggests that the Washington Supreme Court's analysis accords to some extent with other courts' treatment of the issue. Neither claim withstands scrutiny.

The Ninth Circuit's decision in *Brazzel* speaks for itself. The Ninth Circuit held in unequivocal terms that "[u]nder federal law, an inability to agree with the option of compromise on a lesser alternate offense does not satisfy the high threshold of

disagreement required for a hung jury and mistrial to be declared." 491 F.3d at 984 (citing *Arizona v. Washington,* 434 U.S. at 509). The Ninth Circuit thus "considered the same [double jeopardy] question but reached the opposite conclusion" as the Washington Supreme Court. Pet. App. 5a (Sanders, J., dissenting). Lest there be any doubt, the Ninth Circuit has since reaffirmed that the Double Jeopardy Clause prohibits retrial when a jury is "silent" in response to an "unable to agree" instruction and convicts on a lesser charge. *See United States v. Jefferson,* 566 F.3d 928, 935-36 (9th Cir. 2009) (citing *Brazzel*, 491 F.3d at 981).

Although the State speculates that the Ninth Circuit might not find the Washington Supreme Court's holding so unreasonable as to warrant granting habeas relief to Washington prisoners under AEDPA in future cases, this speculation misapprehends the import of *Brazzel.* The Ninth Circuit is another jurisdiction that uses an "unable to agree" instruction, Pet. for Cert. 12-13 n.1, and *Brazzel*'s analysis of the double jeopardy consequences of that system directly conflicts with the Washington Supreme Court's. That suffices to establish a conflict warranting certiorari.

Furthermore, *Brazzel* does indeed place the Ninth Circuit directly at loggerheads with the Washington courts in terms of habeas review. "[A] habeas petition raising a double jeopardy challenge to a petitioner's pending retrial in state court is properly treated as a petition filed pursuant to 28 U.S.C. § 2241," not § 2254. *Wilson v. Belleque,* 554 F.3d 816, 821 (9th Cir. 2009), *pet'n for cert. filed* (No. 08-10214). And "[a] petition filed pursuant to § 2241

is not reviewed under the deferential standards imposed by AEDPA"; it is reviewed *de novo*. *Id.* at 828 (citing *Stow v. Murashige*, 389 F.3d 880, 888 (9th Cir. 2004)). So the disagreement between the Washington Supreme Court and the Ninth Circuit means that Washington courts must allow prosecutions that federal courts are duty bound to prevent. Pet. App. 10a n.10 (Sanders, J., dissenting). This type of federal-state clash practically *requires* certiorari.

Contrary to the State's assertion (BIO 19), the fact that the Ninth Circuit distinguished the Washington Supreme Court's holding in a different case, *State v. Ervin,* 147 P.3d 567 (Wash. 2006), does not lessen this conflict. In *Ervin* (as in *United States v. Bordeaux,* 121 F.3d 1187 (8th Cir. 1997), and the other cases cited at BIO 19-21), the jury expressly informed the court that it was hopelessly deadlocked on the charge at issue. Here, by contrast, as in *Brazzel*, 491 F.3d at 985, the jury was completely silent, and the trial court failed to find any deadlock. No court besides the Washington Supreme Court has ever concluded that retrial is permitted under these circumstances, and the Ninth Circuit and other courts hold that it is prohibited. Certiorari is required to resolve *that* split of authority.

3. The Washington Supreme Court reasoned that the Double Jeopardy Clause allows retrial following jury silence in an "unable to agree" system because such silence is tantamount to formal disagreement on the record – that is, tantamount to a hung jury. Pet. App. 28a-32a. Faced now with the actuality that the "hung jury" exception to double jeopardy requires the trial court to find a "manifest necessity" for a new trial based on "genuine deadlock," *see* Pet. for Cert.

22-26; *supra* at 1, the State does not defend the Washington Supreme Court's reasoning. Instead of arguing that a manifest necessity is present here, the State suggests that retrial is permitted under these circumstances because petitioner caused her trial to end without the jury rendering verdict on the greater charge. BIO 11.

But the line of authority the State cites for this proposition is worlds apart from this case. In *Oregon v. Kennedy,* 456 U.S. 667 (1982), and *United States v. Dinitz,* 424 U.S. 600 (1976), the defendants actually sought mistrials due to serious trial error, and the courts in fact declared mistrials. Because the defendants took action that prevented juries from rendering verdicts, this Court held that the prosecution did not have to show a manifest necessity for retrying the defendants. *See Kennedy,* 456 U.S. at 672; *Dinitz,* 424 U.S. at 607-10.

That situation bears no resemblance to this one, in which no error occurred at trial, no one asked for a mistrial, and no mistrial was declared. Petitioner simply argues that the State must accept the consequences of the entirely legitimate jury instructions that were used in the case. Under these circumstances, when the trial ran its full course and the defendant did not in any way prevent the jury from returning a verdict, it has been settled for nearly two centuries that the government must show a "manifest necessity" to deviate from the general rule that "the prosecutor is entitled to one, and only one, opportunity to require the accused to stand trial" on a given charge. *Arizona v. Washington,* 434 U.S. at 505-06 & n.18 (quoting *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824)); *see also Green v.*

United States, 355 U.S. 184, 191 (1957) (retrial barred where the jury "was given a full opportunity to return a verdict and no extraordinary circumstances prevented appeared which prevented it from doing so").

* * *

The purpose of the Double Jeopardy Clause is to prevent the government from subjecting individuals to "a continuing state of anxiety and insecurity," not to mention the accordant "expense," of elongated litigation and repeated trials. *Green*, 355 U.S. at 187-88. The Washington Supreme Court's decision in this case has created just such a situation for petitioner, for other Washington defendants, and indeed for all defendants in the twenty-three jurisdictions that use "unable to agree" instructions. *See* Amicus Br. of Public Defender Serv., et al. This Court should grant certiorari to remove the uncertainty that now permeates multi-count prosecutions and appeals in such jurisdictions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2009