No. 08-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In criminal cases involving multiple charges arising from the same incident, courts typically instruct juries that they should begin their deliberations with the most serious charge. Twenty-three jurisdictions – fourteen states, the District of Columbia, and eight federal circuits – further require or permit courts to instruct juries that if they are unable to agree on whether a defendant is guilty of the most serious charge, they need not return a verdict on that charge and instead may proceed to consider less serious charges in descending order of severity. The question presented is whether the Double Jeopardy Clause prohibits retrial on a charge when a jury instructed in this manner does not return a verdict on it but finds the defendant guilty of a less serious offense.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Carissa Marie Daniels respectfully petitions for a writ of certiorari to review the judgment of the Washington Supreme Court in *State v. Daniels*, No. 76802-1.

OPINIONS BELOW

The opinion of Washington Supreme Court adhering to its original opinion upon rehearing (Pet. App. 1a) is published at 200 P.3d 711. The original opinion of the Washington Supreme Court (Pet. App. 24a) is published at 156 P.3d 905. The opinion of the Washington Court of Appeals (Pet. App. 36a) is published at 103 P.3d 249.

JURISDICTION

The original decision of the Washington Supreme Court was issued on May 3, 2007. Pet. App. 24a. The Washington Supreme Court granted petitioner's motion for reconsideration and issued additional opinions on February 12, 2009. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). Even though the Washington Supreme Court's decision contemplates further proceedings, the decision is "final" with respect to its double jeopardy ruling because the protections of the Double Jeopardy Clause "would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal [to this Court] could be taken . . . ." *Smalis v. Pennsylvania*, 476 U.S. 140, 143 n.4 (1986) (internal quotation marks and citation omitted); *accord Bullington v. Missouri*, 451 U.S. 430, 437 n.8 (1981); *Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

This case presents an important double jeopardy issue that arises when the government charges an individual with multiple crimes relating to the same incident and obtains a conviction for something less than the most serious charge. A bare majority of the Washington Supreme Court – in direct conflict with the law of the Ninth Circuit and with the understanding of many other jurisdictions – held that the government may retry an individual on a charge when the jury was instructed at the first trial that it did not need to return a verdict on the charge if it was unable to agree on it, and the jury, in fact, remained silent on the charge while finding the defendant guilty of a lesser offense.

1. This matter arises from a tragedy. When petitioner Carissa Marie Daniels was seventeen years old, she gave birth to a son. Pet. App. 37a. At the time, she was a high school student in Washington with no criminal record. She lived with her twenty-two-year-old boyfriend, Clarence Weatherspoon, who was not the father of the child. Weatherspoon did not have a job, so he often stayed at home to watch the baby while petitioner went to school or work. Report of Proceedings ("RP") 830-36.

Hardly a week after birth, the baby began to have health problems. Petitioner promptly took him

to the emergency room. The doctor, however, found nothing wrong with the baby. Pet. App. 37a. Over the following eight weeks, as her baby continued to ail, petitioner took him to his regular pediatrician or the emergency room on seven additional occasions seeking treatment. Pet. App. 37a-38a. But he did not get better.

Nine weeks after the baby's birth, he died. On the morning of his death, petitioner had left him in the care of her boyfriend. After receiving a call from her boyfriend that afternoon saying that her baby looked ill, petitioner came home, found her child limp, and called 911. When paramedics arrived, they determined that the child was dead.

As is common when a baby dies unexpectedly, an autopsy was performed. The autopsy suggested that shaken baby syndrome or blunt head trauma could have caused the child's death. Pet. App. 39a. Those inspecting the baby could not be sure of the cause of death, though, because it typically is "really hard to tell" whether a baby's ill health is caused by traumas or something congenital, or even "the flu." RP 180-81.

The State charged petitioner and her boyfriend with two crimes, (1) homicide by abuse and (2) second degree felony murder (predicated on either assault or criminal mistreatment), and put them both in jail. Pet. App. 24a. Homicide by abuse (absent any aggravating facts, and the State charged none) carries a sentencing range for first-time offenders of 240-320 months; second degree murder is punishable by 123-220 months. *See* WASH. REV. CODE §§ 9.94A.510, .515. Before trial, the State dropped both charges against the boyfriend and released him

from custody in exchange for his agreeing to testify against petitioner. RP 883-85.

At the conclusion of petitioner's trial, the court delivered the Washington State pattern jury instruction for cases involving multiple charges related to the same incident. *Compare* Pet. App. 26a n.2 *with* Wash. Crim. Jury Instr. 155.00. The instruction read in relevant part:

> When completing the verdict forms, you will first consider the crime of homicide by abuse as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. *If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.*
>
> If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of homicide by abuse, *or if after full and careful consideration of the evidence you cannot agree on that crime*, you will consider the alternatively charged crime of murder in the second degree . . . .

Pet. App. 26a n.2 (emphasis added).

The jury left Verdict Form A blank and returned a guilty verdict on Verdict Form B. Pet. App. 26a. Form B, with the jury's writing in italics, stated: "We, the jury, having found the defendant, Carissa M. Daniels, not guilty of the crime of homicide by abuse as charged in Count I, or being unable to unanimously agree as to that charge, find the

defendant *Guilty* of the alternately charged crime of murder in the second degree." Pet. App. 41a. The trial court did not make any inquiry or finding as to whether the jury was deadlocked on the homicide by abuse charge. Nor did the jury offer any descriptions of its deliberations or conclusions in that respect. Pet. App. 16a (Sanders, J., dissenting).

After polling the jurors to confirm that they all had voted guilty on the second degree murder charge, the trial judge entered judgment on that charge and dismissed the jury. Pet. App. 41a. The trial judge did not declare a mistrial respecting the homicide by abuse charge, Pet. App. 9a, and the prosecution did not request any further proceedings with respect to that charge. Pet. App. 41a. The trial court sentenced petitioner to 195 months in prison.

2. Petitioner appealed her conviction for second degree felony murder. The Washington Court of Appeals reversed the conviction on the state-law ground that assault, one of the two predicate felonies the State charged for the offense, is not a proper predicate for felony murder. Pet. App. 41a-42a.

The court of appeals then requested supplemental briefing on what charges the State wished to, and could, bring in a retrial. The State asked for a remand "for a new trial on homicide by abuse or the alternative charge of felony murder in the second degree predicated on criminal mistreatment." State's Wash. Ct. App. Supp. Br. 10. The court of appeals held that while the State could reprosecute petitioner for second degree murder, the Double Jeopardy Clause barred the State from retrying petitioner for the more serious crime of homicide by abuse. Pet. App. 37a. The court of

appeals explained that the jury had been given "ample opportunity to convict" petitioner of that offense at the first trial but had instead left the verdict form blank. Pet. App. 50a. This silence, the court of appeals concluded, terminated jeopardy on that charge. Pet. App. 50a-51a.

3. The State asked the Washington Supreme Court to review the court of appeals' double jeopardy ruling, explaining that it presented a "significant question of constitutional law and an issue of substantial public interest." State's Pet. for Review 13. The Washington Supreme Court granted the State's petition for review and issued an opinion unanimously reversing the court of appeals. Pet. App. 27a. The court began by acknowledging, under *Green v. United States*, 355 U.S. 184, 188 (1957), that "[j]ury silence can act . . . to terminate jeopardy." Pet. App. 28a. At the same time, the Court noted that when deliberations result in a hung jury, a jury's inability to reach a verdict does not terminate jeopardy. Pet. App. 28a-30a (citing *Selvester v. United States*, 170 U.S. 262, 269 (1898), and *Richardson v. United States*, 468 U.S. 317, 325-26 (1984)). In the Washington Supreme Court's view, the latter line of cases controlled. Reciting the maxim that "[a] jury is presumed to follow the instructions given," the court reasoned that a jury's nonverdict is equivalent to a hung jury where, as here, the jury is instructed to leave a verdict form blank in the event that it is "unable to agree" on a verdict. Pet. App. 31a-32a. The Washington Supreme Court thus concluded that by successfully appealing her conviction, petitioner had revived the State's ability to prosecute her for the more serious

offense for which it was unable to obtain a conviction at her first trial. Pet. App. 28a n.3, 35a.

4. Just over one month later, the Ninth Circuit held in *Brazzel v. Washington*, 491 F.3d 976 (9th Cir. 2007), that a nonverdict resulting from Washington's pattern jury instructions terminates jeopardy as to a greater charge when the jury finds the defendant guilty of a less serious offense. The court explained 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." *Id.* at 984. Accordingly, the Ninth Circuit granted habeas relief to a Washington prisoner whom the State had prosecuted a second time under circumstances identical to this case. *Id.* at 987.

5. Following this Ninth Circuit decision, petitioner sought and was granted rehearing by the Washington Supreme Court. In a five-to-four decision, the Washington Supreme Court decided to "adhere to [its] prior published opinion." Pet. App. 1a. In a brief concurring opinion, Justice Madsen stated that the Ninth Circuit's decision in *Brazzel* "provides an interesting perspective, but I do not believe that it compels a different result upon reconsideration of this case." Pet. App. 1a.

Justice Sanders, the author of the original majority opinion, authored the principal dissent. Pet. App. 2a. He argued that his "original majority opinion erred by focusing too squarely on whether [petitioner's] jeopardy terminated on the homicide by abuse charge through an implied acquittal." Pet. App. 5a-6a. While Justice Sanders acknowledged that a "genuine[ly] deadlocked" jury does not

terminate jeopardy, he emphasized that "in [petitioner's] case the trial court neither declared a mistrial nor made a finding of genuine jury deadlock." Pet. App. 9a. Justice Sanders argued that even if the court could infer juror disagreement from a blank form, "[n]o instruction, standing alone, can instruct a jury how to hang; judicial intervention is always required." Pet. App. 11a (citing *Arizona v. Washington*, 434 U.S. 497, 509 (1978)). (Justice Chambers also filed a dissent maintaining that jeopardy terminates whenever "the jury is given the full opportunity to reach a verdict on a charge but does not and is silent as to its reasons . . . ." Pet. App. 22a-23a.)

Finally, Justice Sanders lamented the conflict between the Washington Supreme Court and the Ninth Circuit: "[P]rudence suggests this court's decisions should attempt to mirror that of the federal courts for the sake of judicial economy. We should not deny a defendant relief otherwise available by walking across the street to the federal courts." Pet. App. 10a n.10.

6. This petition follows.

REASONS FOR GRANTING THE WRIT

State and federal courts – most particularly, the Washington Supreme Court and the Ninth Circuit – are divided over the double jeopardy implications of a pattern jury instruction used in Washington and numerous other jurisdictions. Specifically, courts are split over whether the government may retry an individual on a criminal charge when the jury – after being instructed that it may return a guilty verdict on a less serious charge if unable to agree on that

charge – finds the defendant guilty on a less serious charge and remains silent on the more serious charge. A bare majority of the Washington Supreme Court held here that the government under these circumstances may retry the defendant for the greater offense. By contrast, the Ninth Circuit – consistent with other courts' views on the issue – interprets the Double Jeopardy Clause to forbid such a reprosecution.

This Court should resolve this disagreement now. The issue is important because the government frequently charges multiple, related crimes arising from the same incident; courts, prosecutors, defense attorneys, and defendants themselves need to know the rules governing the litigation of such cases. This case cleanly and directly raises the issue. And the Washington Supreme Court's holding is incorrect. The Double Jeopardy Clause allows the government to try someone twice for the same offense after failing to obtain a guilty verdict the first time around only when the trial judge declared a hung jury in the first trial based on a genuine and complete deadlock. A jury's finding a defendant guilty of a lesser offense following an unable-to-agree instruction does not satisfy these requirements.

I. Federal and State Courts Are Divided Over The Question Presented.

A. Background

1. The Double Jeopardy Clause protects people from facing prosecution for the same offense more than once. This right predates the Constitution: "Fear and abhorrence of governmental power to try

people twice for the same conduct is one of the oldest ideas found in western civilization." *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting); *accord* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 329-30 (1769). "The underlying idea . . . 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." *Green v. United States*, 355 U.S. 184, 187-88 (1957).

This Court gave content to this general prohibition in *Green* and in *Price v. Georgia*, 398 U.S. 323, 329 (1970). In those cases, this Court held that when a jury finds a defendant guilty of a lesser charge and remains silent on greater charge, he can be retried, in the event of a successful appeal, only for the lesser charge. This Court and others sometimes have referred to the jury's silence on the greater charge in this situation as an "implicit acquittal." *Green*, 355 U.S. at 190. But the bar against retrial does not necessarily rest on any assumption that the jury found the defendant not guilty of the greater offense. *Id.* at 190-91. It is sufficient for double jeopardy purposes that the jury was "given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Id.* at 191. Once that is established, the jury's silence is "treated no differently" than an acquittal, insofar as it terminates the government's

single opportunity to obtain a conviction on the charge. *Id.*; *accord Price*, 398 U.S. at 328-29.

To be sure, it has long been settled that the government may retry a defendant after "a trial court's declaration of a mistrial following a hung jury . . . ." *Richardson v. United States*, 468 U.S. 317, 326 (1984). This is because "[t]he Government, like the defendant, is entitled to resolution of [a] case by verdict from the jury . . . ." *Id.*; *see also Arizona v. Washington*, 434 U.S. 497, 509 (1978) ("genuinely deadlocked jury" allows retrial); *Selvester v. United States*, 170 U.S. 262, 269 (1897) (retrial is permissible when a jury's "disagreement is formally entered on the record" but not when jury is "silent"). But absent a hung jury or some other type of mistrial that prevents the jury from issuing a verdict, "the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Arizona v. Washington*, 434 U.S. at 505.

2. In light of this double jeopardy framework, "[t]he form in which the jury is asked to decide [cases involving multiple charges arising from the same incident] takes on a real importance." James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 181 (1995). Two basic approaches predominate. A majority of jurisdictions uses an "acquittal first" instruction, requiring juries to unanimously convict or acquit the defendant of an offense before considering less serious charges. Such an instruction avoids any double jeopardy problem by requiring the jury either to render a verdict on the most serious charge, which terminates jeopardy, or to

hang without reaching any other charges, thereby allowing a new trial on all charges. *See, e.g.*, Cal. Jury Inst. – Crim. 17.10; *State v. Davis*, 266 S.W.3d 896, 905-08 (Tenn. 2008); *People v. Boettcher*, 505 N.E.2d 594, 597 (N.Y. 1987). In an opinion surveying the pros and cons of the predominant approaches to multiple-count prosecutions, Judge Friendly observed that such an instruction also "avoid[s] the danger that the jury will not adequately discharge its duties with respect to the greater offense, and instead will move too quickly to the lesser one." *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978). At the same time, an acquittal-first instruction increases the odds that a new trial will be necessary because the instruction can "prevent the Government from obtaining a conviction on the lesser charge that would otherwise have been forthcoming" when the jury is divided on the greater offense but would unanimously vote guilty on a less serious charge. *Id.*

Twenty-three other jurisdictions, including Washington, require or allow courts to give an "unable to agree" or "reasonable efforts" instruction. *See Davis*, 266 S.W.3d at 906 (surveying jurisdictions); *State v. LeBlanc*, 924 P.2d 441, 445 (Ariz. 1996) (Martone, J., concurring in the judgment) (same); *State v. Sawyer*, 630 A.2d 1064, 1070 n.8 (Conn. 1993) (same); 26 A.L.R. 5th 603, § 4 (2009) (same).[1] Such an instruction permits a jury to

[1] The following jurisdictions require courts to give such an instruction: *State v. LeBlanc*, 924 P.2d 441, 442 (Ariz. 1996); *State v. Ferreira*, 791 P.2d 407, 408 (Haw. App. 1990); *State v. Korbel*, 647 P.2d 1301, 1305 (Kan. 1982); *People v. Pollick*, 531 N.W.2d 159, 161-62 (Mich. 1995); *State v. Wise*, 879 S.W.2d 494,

consider a less serious charge after making reasonable efforts (or some similarly phrased attempt) to reach a verdict on a more serious charge and finding itself unable to agree. The unable-to-agree instruction "facilitates the Government's chances of getting a conviction for something" by allowing juries to move to lesser offenses without hanging. *Tsanas*, 572 F.2d at 346. Yet this advantage comes at the price of increasing the

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517 (Mo. 1994), *partially overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885, 889 (Mo. 2008) (per curiam); *Green v. State*, 80 P.3d 93, 96-97 (Nev. 2003) (per curiam); *State v. Chamberlain*, 819 P.2d 673, 680-81 (N.M. 1991); *State v. Thomas*, 533 N.E.2d 286, 292-93 (Ohio 1988); *Graham v. State*, 27 P.3d 1026, 1027 & n.3 (Okla. Crim. App. 2001) (construing Okla. Uniform Jury Inst. Crim. 10-27); *Tarwater v. Cupp*, 748 P.2d 125, 126-28 (Or. 1988); *State v. Labanowski*, 816 P.2d 26, 27-28, 31 (Wash. 1991); *State v. Truax*, 444 N.W.2d 432, 436 (Wis. App. 1989); Fed. Crim. Jury Inst. 5th Cir. 1.33; Fed. Crim. Jury Inst. 6th Cir. 8.07; Fed. Crim. Jury Inst. 7th Cir. 7.02; Fed. Crim. Jury Inst. 8th Cir. 3.10; Fed. Crim. Jury Inst. 10th Cir. 1.33.

The following jurisdictions permit courts to give either kind of instruction, typically allowing defendants to choose which instruction they want given based upon their perceptions of advantages and drawbacks of each: *Sellner v. State*, 95 P.3d 708, 715-16 (Mont. 2004); *State v. Powell*, 608 A.2d 45, 47 (Vt. 1992); *United States v. Allen*, 755 A.2d 402, 410-11 (D.C. 2000); *United States v. Balthazard*, 360 F.3d 309, 320 (1st Cir. 2004); *Tsanas*, 572 F.2d 341, 346 (2d Cir. 1978); *United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984); *see also* 1A FEDERAL JURY PRACTICE AND INSTRUCTIONS § 20:05 (6th ed. 2008) (providing for both the acquittal-first and unable-to-agree instructions as acceptable ways to charge the jury).

chances the government will not obtain a conviction on "the [offense] that it prefers." *Id.* And when the government obtains a conviction pursuant to such an instruction only on a lesser offense, Judge Friendly opined that reprosecution of the greater "apparently is barred by the double jeopardy clause . . . ." *Id.* at 346 n.7 (citing *Green* and *Price*).

B. The Conflict

The Washington Supreme Court's decision in this case has created a conflict over whether the Double Jeopardy Clause allows the government, contrary to prevailing assumption recited by Judge Friendly, to have its cake and eat it too – that is, to use an unable-to-agree instruction to facilitate convictions on lesser charges and also to reprosecute defendants for more serious offenses when juries decline in first trials to return verdicts on such charges.

1. The Washington Supreme Court recognizes that a nonverdict resulting from an unable-to-agree instruction "is not the equivalent of a 'mistrial' on the charge[] upon which the jury" declined to return a verdict. *State v. Ervin*, 147 P.3d 567, 572 n.10 (Wash. 2006). Nevertheless, a majority of that court held here that a trial court need not declare a mistrial in order to trigger the hung jury exception to the Double Jeopardy Clause. All that is necessary, in the majority's view, is that the record show that the jury was unable to agree on a charge. Pet. App. 30a-31a. And the majority deemed jury silence following an unable-to-agree instruction to be tantamount to a disagreement on the record: "blank verdict forms indicate on their face that the jury was unable to

agree." Pet. App. 31a (quoting *Ervin*, 147 P.3d at 572). Accordingly, the Washington Supreme Court held that the State may retry defendants whenever juries, after being given unable-to-agree instructions, decline to return verdicts on charges.

2. In *Brazzel v. Washington*, 491 F.3d 976 (9th Cir. 2007), the Ninth Circuit – one of the federal circuits that uses an unable-to-agree instruction and the circuit with habeas jurisdiction over four states, including Washington, that do – "considered the same question but reached the opposite conclusion" as the Washington Supreme Court. Pet. App. 5a (Sanders, J., dissenting). Granting habeas relief to a Washington prisoner, the Ninth Circuit explained that a trial court must actually declare a "hung jury and mistrial" in order to open the door to retrial on a charge. *Brazzel*, 491 F.3d at 984. The Ninth Circuit further reasoned that the situation here does not satisfy the threshold of disagreement necessary to declare a hung jury and mistrial:

> The Supreme Court has characterized disagreement sufficient to warrant a mistrial as "hopeless" or "genuine" "deadlock." [*Arizona v. Washington*, 434 U.S. at 509.] Genuine deadlock is fundamentally different from a situation in which jurors are instructed that if they "cannot agree," they may compromise by convicting of a lesser alternative crime . . . .

Id. In the latter situation, the Ninth Circuit continued, "nothing in the record . . . indicates the jury's inability to agree was hopeless or irreconcilable – a manifest necessity permitting a retrial . . . ." *Id.* at 985.

3. The Washington Supreme Court's decision also breaks from settled understandings respecting the Double Jeopardy Clause in numerous other jurisdictions. Those understandings have been manifested in several ways.

First, some jurisdictions that use unable-to-agree instructions expressly assume – as Judge Friendly did in *Tsanas*, 572 F.2d at 346 n.7 – that jury silence on an offense, coupled with a conviction on a less serious charge, bars reprosecution for the offense. For instance, in the Arizona Supreme Court's decision adopting the unable-to-agree approach, a concurring justice assumed that the unable-to-agree instruction would produce "compromise verdict[s], which deprive[] the state of a re-trial on the greater charge." *LeBlanc*, 924 P.2d at 445 (Martone, J., concurring in the judgment). Indeed, in subsequent cases, the State has readily conceded that the Double Jeopardy Clause bars it from retrying defendants in such situations. *See State v. Rodriguez*, 7 P.3d 148, 151 n.4 (Ariz. App. 2000) ("The state has conceded that it cannot retry [the defendant] for aggravated DUI with a suspended license because it would 'clearly violate his double jeopardy rights.'"); *Ryan v. Arellano*, 1999 WL 351079, at *1 (Ariz. App. June 4, 1999) ("The State concedes that Petitioner cannot be retried for kidnapping.").[2]

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[2] Courts in other states that use unable-to-agree instructions have held that the Double Jeopardy Clause bars retrial following jury silence without confirming that such an instruction was given in the cases at issue. *See, e.g.*, *State v. Low*, 192 P.3d 867, 880-81 (Utah 2008); *Whiting v. State*, 966

Second, when courts in jurisdictions that use unable-to-agree instructions *have* allowed retrials on greater charges, they still have presumed, in light of *Green* and *Price*, that jury silence during initial trials is not enough to allow retrials when juries convict on lesser offenses. Instead, courts have allowed retrials only when juries made an "express statement" during the initial trial that they could not agree and when trial courts "declared a mistrial based on a hung jury as to the greater offense." *United States v. Bordeaux*, 121 F.3d 1187, 1192 (8th Cir. 1997); *see also Allen*, 755 A.2d at 408 ("In the implicit acquittal cases, the jury is completely silent as to the verdict on the particular charge . . . . In the hung jury cases, the jury's inability to agree appears expressly on the record. Here, the jury was not silent; it reported its inability to agree twice.") (internal citation omitted)[3]; *State v. Martinez*, 905 P.2d 715, 717 (N.M. 1995) ("There was no suggestion in either *Green* or *Price* that the jury was unable to reach a verdict on the greater offense. In this case the record shows that the jury was unable to reach a unanimous verdict on the attempted murder charge and in fact sent three separate notes to the trial court stating that it could agree only on the aggravated battery charge.").

P.2d 1082, 1085-87 (Haw. 1998); *Shopbell v. State*, 686 S.W.2d 521, 523-24 (Mo. App. 1985) (per curiam).

[3] *See also Holt v. United States*, 805 A.2d 949, 955 (D.C. 2002) ("As was the case in *Allen*, our decision is based on the jurors' explicit announcement, after they were sent back to continue deliberations on the PWID charge, that they could not come to a unanimous decision . . . .") (internal footnote omitted).

Third, many jurisdictions have declined to adopt the unable-to-agree approach in part because of the double jeopardy problems that they believe arise under such a system. In *Boettcher*, for example, the New York Court of Appeals noted that when a jury given an unable-to-agree instruction convicts on an offense without returning a verdict on a more serious charge, "retrial on the greater offense would be barred under settled double jeopardy principles." 505 N.E.2d at 597 (citing *Green*). After discussing *Price*, the Connecticut Supreme Court similarly chose the acquittal-first approach over the unable-to-agree approach on the ground that it "avoids the double jeopardy problems that inhere in an instruction requiring only that the jury make a reasonable effort to arrive at a unanimous verdict on the charged crime before considering the lesser offenses." *Sawyer*, 630 A.2d at 1075. The Alaska Supreme Court also adopted the acquittal-first approach when the State pointed out that when a jury "convicts on the lesser included offense, the jury's silence on the greater charged offense would serve as an 'implied acquittal,' precluding the state from retrying the defendant on that offense." *Dresnek v. State*, 718 P.2d 156, 159 (Alaska 1986) (Rabinowitz, C.J., dissenting) (citing *Price*).

II. The Question Presented Significantly Impacts The Administration Of Criminal Justice.

This Court should resolve the double jeopardy question presented now because the confusion over the subject significantly impacts the administration of criminal justice across the country.

1. As a general matter, it is important that courts and litigants understand the rules governing the various ways of instructing juries concerning multiple charges. "In more recent times, with . . . the extraordinary proliferation of overlapping and related statutory offenses, it [has become] possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe v. Swenson*, 397 U.S. 436, 445 n.10 (1970). Indeed, it is extremely common for prosecutors to charge individuals with committing multiple offenses arising from the same incident.

Given this practice, jurisdictions need a clear understanding of the double jeopardy rules that govern retrials when juries return guilty verdicts only on lesser charges. Not only do jurisdictions need to understand the pros and cons of adopting different pattern jury instructions, but prosecutors need to know the stakes of advocating one approach or another, and defense lawyers need to be able to advise clients such as petitioner whether they can appeal convictions on lesser charges without potentially exposing themselves to more serious convictions on remand.

The question whether the government may recharge successful appellants such as petitioner with more serious offenses on remand can also affect the dynamics of plea bargaining. A prosecutor who can threaten to pursue a more serious charge obviously has more leverage than one who cannot. *See, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 271 (2001) ("[A] prosecutor who possesses enough admissible evidence to pursue

successfully a prosecution on a certain serious offense against an accused but who nevertheless is willing to accept a guilty plea to a less serious offense is not proscribed by the ethical rules from charging the accused with the more serious offense to induce the defendant to plead guilty to the lesser offense."). But if such leverage is constitutionally improper, defendants should not be subject to it.

2. More immediately, the direct conflict between the Washington Supreme Court in this case and the Ninth Circuit in *Brazzel* creates an untenable situation: the State, acting pursuant to its pattern jury instructions, may obtain convictions that federal district courts in Washington are duty-bound to vacate on habeas review. *See* Pet. App. 10a n.10 (Sanders, J., dissenting); *cf. Waddington v. Sarausad*, 129 S. Ct. 823 (2009) (resolving case in which Ninth Circuit had held that a pattern jury instruction in Washington gave rise to constitutional violations requiring habeas relief). Federal courts have this duty even when, as in *Brazzel*, the State obtains a conviction in a new trial only on a lesser offense for which it obtained a conviction the first time around. *See Brazzel v. Washington*, 491 F.3d 976, 985-87 (9th Cir. 2007). Under this Court's decision in *Price*, the mere presence of a charge that is barred by the Double Jeopardy Clause irrevocably taints the entire trial, regardless of whether the jury returns guilty verdict only on a lesser charge. *Price v. Georgia*, 398 U.S. 323, 331 (1970); *Brazzel*, 491 F.3d at 986.

3. It is in everyone's interest that this Court promptly resolve the split over the question presented. This Court has held that defendants may seek federal habeas relief on double jeopardy grounds

before submitting to a new trial. *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 302-03 (1984). But even assuming that petitioner could do so here, it would be much better for this Court to consider this issue on direct review than on federal habeas review, where AEDPA's deferential mode of analysis can preclude federal courts from resolving constitutional questions on the merits. *See, e.g.*, *McMullen v. Tennis*, 562 F.3d 231, 241 (3d Cir. 2009) (denying relief on claim while noting that if confronted with an identical case on direct review, it "may be inclined to find a violation of the Double Jeopardy Clause").

Even putting aside AEDPA considerations, delay would harm both sides of this case. A central purpose of the Double Jeopardy Clause is to spare individuals the "embarrassment, expense, anxiety, and insecurity" of facing a second trial. *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980). (This is exactly why this Court regularly grants certiorari in double jeopardy cases in this procedural posture. *See supra* at 1.) Petitioner, and others like her, deserve to know now – not years from now – whether the State can retry them on charges for which juries previously declined to return verdicts.

For the State's part, so long as the current state of affairs persists, it faces the possibility of wasting governmental resources by pursuing convictions against petitioner and others like her that are destined to be vacated on federal habeas review. Better for the State to learn sooner rather than later whether such prosecutions are permissible.

III. The Decision Below Misconstrues The Double Jeopardy Clause.

The Washington Supreme Court erred in holding that jeopardy does not terminate when a jury in an unable-to-agree jurisdiction remains silent on a charge and finds the defendant guilty of a less serious offense. This is so for two independent reasons. First, regardless of how a jury is instructed, the *inaction* of leaving a verdict form blank does not amount to the type of hopeless deadlock required to satisfy the Double Jeopardy Clause's hung jury exception. Second, even if jury silence in this situation were tantamount to a hung jury, the jury's simultaneous conviction on a lesser charge negates any manifest necessity for declaring a mistrial on the greater charge.

1. There is no doubt that "a trial court's declaration of a mistrial following a hung jury" continues the original jeopardy to which a defendant is subjected. *Richardson v. United States*, 468 U.S. 317, 326 (1984). At the same time, this Court repeatedly has emphasized that the trial judge must actually "declar[e] . . . a mistrial" in order to trigger this exception to the general bar against trying someone twice for the same offense. *Id.*; *see also Arizona v. Washington*, 434 U.S. 497, 509-10 (1978) (mistrial based on the "trial judge's belief that the jury is unable to reach a verdict" triggers the hung jury exception; the "trial judge's decision to declare a mistrial when he considers the jury deadlocked" triggers the hung jury exception); *Selvester v. United States*, 170 U.S. 262, 270 (1898) (If, "after the case had been submitted to the jury, they reported their inability to agree, *and the court made a record of it*

and discharged them, such discharge" would not terminate jeopardy) (emphasis added).

Furthermore, given the Constitution's abhorrence of successive prosecutions and their impositions on defendants, this Court has admonished from its earliest decisions on the subject that, "the power [to discharge the jury without giving a verdict] ought to be used with the greatest caution . . . ." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). A court may declare a mistrial only after "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." *United States v. Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion); *see also Arizona v. Washington*, 434 U.S. at 506 ("[W]e require a 'high degree' [of necessity] before concluding that a mistrial is appropriate."). In other words, trial judges may not declare a hung jury unless they reasonably conclude that the jury is "genuinely deadlocked." *Id.* at 509.

The Washington Supreme Court's decision allowing retrials based on nonverdicts runs afoul of these requirements. First, the Washington system fails to require judges to formally declare mistrials as to the charges on which juries remain silent. *See* Pet. App. 9a (Sanders, J., dissenting). Instead, it treats jury inactions in light of their instructions as sufficient to constitute hung juries. This is improper. The double jeopardy exception for hung juries depends on trial judges' using their experience and expertise to declare mistrials only when juries are truly and hopelessly deadlocked. As Justice Sanders noted in dissent on rehearing, "[n]o instruction,

standing alone, can instruct a jury how to hang; judicial intervention is always required." Pet. App. 11a.

Second, the Washington Supreme Court affords these jury nonverdicts a mandatory presumption of "genuine[] deadlock" based on nothing more than language in an instruction. *Arizona v. Washington*, 434 U.S. at 509; *see* Pet. App. 31a-32a. Such a presumption cannot be squared with this Court's instruction that courts "assess all the factors" to determine whether jury is truly hung. *Arizona v. Washington*, 434 U.S. at 510 n.28; *see also Illinois v. Somerville*, 410 U.S. 458, 462 (1973) (courts may not use "mechanical formula" to determine necessity of mistrial).[4] Indeed, federal courts of appeals have squarely held that the Double Jeopardy Clause bars retrials when trial judges declare mistrials based on juries' initial expressions of deadlock, without at least questioning the jurors concerning the situation or encouraging further deliberations. *See, e.g.*, *United States v. Razmilovic*, 507 F.3d 130, 139-40 (2d Cir. 2007); *United States v. Horn*, 583 F.2d 1124, 1129 (10th Cir. 1978).

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[4] The courts of appeals have identified various factors that trial courts should consider in deciding whether a jury is genuinely deadlocked. Most common among these are: (1) the jury's own expression of hopeless deadlock, (2) the length of jury deliberations, in light of the length and complexity of the trial, and (3) the adequacy of alternatives to mistrial. *See, e.g.*, *United States v. Byrski*, 854 F.2d 955, 961 & n.10 (7th Cir. 1988); *Harris v. Young*, 607 F.2d 1081, 1085 n.4 (4th Cir. 1979); *Arnold v. McCarthy*, 566 F.2d 1377, 1386-87 (9th Cir. 1978); *United States v. Gordy*, 526 F.2d 631, 635-36 (5th Cir. 1976).

A mandatory presumption of deadlock is particularly inappropriate in a context of jury silence because a jury's silence neither guarantees that it followed its instructions nor that it was really incapable of reaching agreement on the charge at issue. In urging the Alaska Supreme Court to adopt the acquittal first-approach instead of the unable-to-agree approach, for example, the State of Alaska explained that the latter approach "inevitably will lead to 'compromise verdicts' where the jury will not vigorously deliberate the greater charge, but instead will quickly slide to the common ground of a guilty verdict on the lesser included charge." *Dresnek v. State*, 718 P.2d 156, 159 (Alaska 1986) (Rabinowitz, C.J., dissenting). To put the point in concrete terms: there is no way to know from the jury's silence in this case (or any other) whether it abandoned the greater charge after an early straw poll or only after exhaustive deliberations made clear it was hopelessly deadlocked. That being so, there also is no way to know whether the jury might have been able to reach a verdict on that charge – as juries often do, SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 193-94 (1988) – after further guidance and encouragement from the trial judge.[5] This uncertainty is simply too palpable for the State to discharge its "high" burden

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[5] For examples of juries reporting an inability to agree and then returning not guilty verdicts after being instructed to continue deliberating, see *Ramirez v. Senkowski*, 1999 WL 642995, at *2 (2d Cir. Aug. 12, 1999); *United States v. Ailsworth*, 948 F. Supp. 1485, 1505 (D. Kan. 1996).

of showing that the jury was indeed hopelessly deadlocked. *Arizona v. Washington*, 434 U.S. at 506.

2. Even if a trial court makes a formal and legitimate finding of deadlock, the Double Jeopardy Clause tolerates a retrial only if a "manifest necessity" for such action exists. *Arizona v. Washington*, 434 U.S. at 505-06 & n.18 (quoting *Perez*, 22 U.S. (9 Wheat.) at 580). While there is a manifest necessity to "protect society from those guilty of crimes" when a jury hangs in a criminal case and returns no verdict at all, *Wade v. Hunter*, 336 U.S. 684, 689 (1949); *accord Richardson*, 468 U.S. at 323-26, the situation is decidedly different when the government actually secures a guilty verdict on something less than the most serious charge. In this circumstance, the government still is able to punish the defendant (sometimes just as severely as if it had obtained a conviction on the more serious charge, *see United States v. Watts*, 519 U.S. 148 (1997) (per curiam)). Accordingly, there is no manifest necessity to dispense with the "general rule" that "the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Arizona v. Washington*, 434 U.S. at 505.

Indeed, allowing the government in an unable-to-agree jurisdiction to treat a nonverdict on a charge as a partially hung jury would unfairly allow it to obtain the benefit of "facilitat[ing] the Government's chances of getting a conviction for something" at an initial trial, *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978), while avoiding the corresponding burden, once such a conviction is obtained, of foregoing the chance for a more serious conviction. Until now, jurisdictions have assumed that using an unable-to-

agree instruction necessarily involved this trade off. *See supra* at 16-18. But if the Washington Supreme Court's decision is correct, then using an "unable to agree" instruction is an entirely risk-free proposition for the State. In a difficult case, the State can obtain a preview of the charged individual's defense while securing a low-level conviction, and then pursue a conviction for a greater offense as soon as that trial is over, provided it charged the more serious crime at the outset and the jury returned a compromise verdict. Such power to conduct piecemeal prosecutions cannot be squared with the basic rule that jeopardy terminates after a jury is "given a full opportunity to return a verdict and no extraordinary circumstances . . . prevent[] it from doing so." *Green v. United States*, 355 U.S. 184, 191 (1957).

The result is no different where, as here, the government initially accepts the lesser conviction and the defendant succeeds in having it set aside on appeal. In *Green*, this Court squarely rejected the notion that "secur[ing] the reversal of an erroneous conviction of one offense" requires a defendant to "surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in the appeal." *Id.* at 193.[6] Once a

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[6] *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), does not hold to the contrary. In *Sattazahn*, the Court held that when a jury in a capital case deadlocks over whether to return the death penalty and the defendant therefore receives a life sentence, the state may seek the death penalty a second time if the defendant succeeds in getting his conviction overturned on appeal. *Id.* at 114-15. But the Court did not equate the

defendant "run[s] the gauntlet" of trial, *Richardson*, 468 U.S. at 321 (internal quotation marks and citation omitted), and the government accepts the result, the government cannot plausibly claim a manifest necessity the second time around in obtaining a more serious conviction.

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possibility of a jury returning a death sentence with a jury finding a defendant guilty of a greater offense; only three Justices among the five in the majority took the position that "aggravating circumstances that make a defendant eligible for the death penalty operate as the functional equivalent of an element of a greater offense." *Id.* at 111 (plurality opinion) (internal quotation marks and citation omitted). The four dissenting Justices shared the view that the aggravating facts necessary to expose the defendant to capital punishment constituted elements of a greater offense and concluded, for precisely this reason, that the double jeopardy principles established in *Green* precluded the state from seeking the death penalty at the second trial. *See id.* at 126-27 (Ginsburg, J., dissenting). Neither of the other two Members of the Court addressed whether the Double Jeopardy Clause bars retrial on an offense when the jury hangs on the offense and finds the defendant guilty of a less serious offense, but then the defendant succeeds in getting that conviction reversed on appeal.

CONCLUSION

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

Respectfully submitted,

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