No. 15-___

IN THE

Supreme Court of the United States

EDWARD MICHAEL GLASMANN,

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

Mary Kay High
Chief Deputy
DEPARTMENT OF
ASSIGNED COUNSEL
949 Market Street
Suite 334
Tacoma, WA 98402

Jeffrey L. Fisher
Counsel of Record
Brian Wolfman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

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 lesser included offenses 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 the charge but finds the defendant guilty of a lesser offense.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISION 1

STATEMENT OF THE CASE 2

A. Legal Background 2

B. Facts And Procedural History 3

REASONS FOR GRANTING THE WRIT 7

I. Federal And State Courts Are Openly Divided Over The Double Jeopardy Implications Of "Unable To Agree" Jury Instructions 8

A. Basic Principles 8

B. The Conflict 12

II. This Issue Significantly Impacts The Administration Of Criminal Justice 17

III. This Case Is An Excellent Vehicle For Resolving The Question Presented 19

IV. The Decision Below Misconstrues The Double Jeopardy Clause 21

CONCLUSION 28

APPENDIX, Opinion of the Washington Supreme Court, May 7, 2015 ..... 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. United States, 164 U.S. 492 (1896)..... 23

Arizona v. Washington, 434 U.S. 497 (1978).....*passim*

Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978) 23

Ashe v. Swenson, 397 U.S. 436 (1970)..... 17

Bartkus v. Illinois, 359 U.S. 121 (1959) 8

Blueford v. Arkansas, 132 S. Ct. 2044 (2012) 25

Bordenkircher v. Hayes, 434 U.S. 357 (1978) 19

Brazzel v. Washington, 491 F.3d 976 (9th Cir. 2007) .....*passim*

Bullington v. Missouri, 451 U.S. 430 (1981) 1

Daniels v. Pastor, No. C09-5711BHS, 2010 WL 56041 (W.D. Wash. Jan. 2010) 18

Daniels v. Washington, 558 U.S. 819 (2009) 20

Dresnek v. State, 718 P.2d 156 (Alaska 1986)... 16, 24

Graham v. State, 27 P.3d 1026 (Okla. Crim. App. 2001)..... 11

Green v. State, 80 P.3d 93 (Nev. 2003)..... 11

Green v. United States, 355 U.S. 184 (1957) ....*passim*

Harris v. Washington, 404 U.S. 55 (1971) (per curiam) 1

Harris v. Young, 607 F.2d 1081 (4th Cir. 1979)..... 23

Holt v. United States, 805 A.2d 949 (D.C. 2002) 16

Illinois v. Somerville, 410 U.S. 458 (1973) 24

Lowenfield v. Phelps, 484 U.S. 231 (1988) 23

People v. Boettcher, 505 N.E.2d 594 (N.Y. 1987) 10, 16

People v. Pollick, 531 N.W.2d 159 (Mich. 1995) 11

In re Pers. Restraint of Glasmann, 286 P.3d 673 (Wash. 2012) 4, 5, 6, 20

Price v. Georgia, 398 U.S. 323 (1970) .....*passim*

Ramirez v. Senkowski, 1999 WL 642995 (2d Cir. Aug. 12, 1999) 25

Renico v. Lett, 559 U.S. 766 (2010) 21, 24

Richardson v. United States, 468 U.S. 317 (1984) .....*passim*

Ryan v. Arellano, 1999 WL 351079 (Ariz. App. June 4, 1999) 14

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) 27, 28

Sellner v. State, 95 P.3d 708 (Mont. 2004) 11

Selvester v. United States, 170 U.S. 262 (1898) 3, 9, 22

Shopbell v. State, 686 S.W.2d 521 (Mo. App. 1985) 15

Smalis v. Pennsylvania, 476 U.S. 140 (1986) 1

State v. Chamberlain, 819 P.2d 673 (N.M. 1991) 11

State v. Daniels, 156 P.3d 905 (Wash. 2007), *adhered to on recons.*, 200 P.3d 711 (Wash. 2009), *cert. denied*, 558 U.S. 819 (2009).....*passim*

State v. Davis, 266 S.W.3d 896 (Tenn. 2008) 10

State v. Ervin, 147 P.3d 567 (Wash. 2006)..... 12

State v. Ferreira, 791 P.2d 407 (Haw. App. 1990) ... 11

State v. Labanowski, 816 P.2d 26 (Wash. 1991)..... 2, 5, 11

State v. LeBlanc, 924 P.2d 441 (Ariz. 1996) 10, 11, 14

State v. Low, 192 P.3d 867 (Utah 2008)..... 15

State v. Martinez, 905 P.2d 715 (N.M. 1995)..... 15

State v. Parker, 344 P.3d 363 (Kan. 2015)..... 11

State v. Powell, 608 A.2d 45 (Vt. 1992) 11

State v. Rodriguez, 7 P.3d 148 (Ariz. App. 2000)..... 14

State v. Sawyer, 630 A.2d 1064 (Conn. 1993) 11, 16

State v. Thomas, 533 N.E.2d 286 (Ohio 1988) 11

State v. Truax, 444 N.W.2d 432 (Wis. App. 1989) ... 11

State v. Wise, 879 S.W.2d 494 (Mo. 1994), *partially overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. 2008) 11

Tarwater v. Cupp, 748 P.2d 125 (Or. 1988)..... 11

United States v. Ailsworth, 948 F. Supp. 1485 (D. Kan. 1996)..... 25

United States v. Allen, 755 A.2d 402 (D.C. 2000)..... 11, 15, 16, 23

United States v. Balthazard, 360 F.3d 309 (1st Cir. 2004)..... 11

United States v. Bordeaux, 121 F.3d 1187 (8th Cir. 1997) 15

United States v. Byrski, 854 F.2d 955 (7th Cir. 1988) 23

United States v. DiFrancesco, 449 U.S. 117 (1980) 19

United States v. Gordy, 526 F.2d 631 (5th Cir. 1976) 23

United States v. Horn, 583 F.2d 1124 (10th Cir. 1978) 24

United States v. Jackson, 726 F.2d 1466 (9th Cir. 1984) 11

United States v. Jefferson, 566 F.3d 928 (9th Cir. 2009) 14

United States v. Jorn, 400 U.S. 470 (1971) 22

United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824) 22, 26

United States v. Razmilovic, 507 F.3d 130 (2d Cir. 2007) 24

United States v. Tsanas, 572 F.2d 340 (2d Cir. 1978) .....*passim*

United States v. Watts, 519 U.S. 148 (1997) (per curiam) 26

Waddington v. Sarausad, 555 U.S. 179 (2009)..... 18

Wade v. Hunter, 336 U.S. 684 (1949) 26

Weeks v. Angelone, 528 U.S. 225 (2000) 24

Whiting v. State, 966 P.2d 1082 (Haw. 1998) 15

Constitutional Authorities

U.S. Const., amend. v 1

Double Jeopardy Clause .....*passim*

Statutes and Rules

28 U.S.C. § 1257(a) 1

Cal. Jury Instr. – Crim. 17.10 10

Wash. Crim. Jury Instr. 155.00 5

Other Authorities

Blackstone, William, COMMENTARIES ON THE LAWS OF ENGLAND (1769) 8

FEDERAL JURY PRACTICE AND INSTRUCTIONS (6th ed. 2008) 11

Kassin, Saul M. & Lawrence S. Wrightsman, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES (1988) 25

Shellenberger, James A. & 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 (1995) 9, 10

Zitter, Jay M., *When Should Jury's Deliberation Proceed From Charged Offense To Lesser-Included Offense*, 26 A.L.R. 5th 603 (2015 Supp.) 11

PETITION FOR A WRIT OF CERTIORARI

Petitioner Edward Michael Glasmann respectfully petitions for a writ of certiorari to review the judgment of the Washington Supreme Court in *State v. Glasmann*, No. 88913-9.

OPINIONS BELOW

The opinion of Washington Supreme Court (Pet. App. 1a) is published at ___ P.3d ___, 2015 WL 2145735. The relevant order of the trial court is unpublished.

JURISDICTION

The decision of the Washington Supreme Court was issued on May 7, 2015. 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" under Section 1257(a) 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 openly divides state and federal courts.

A. Legal Background

The State of Washington, like other jurisdictions, has adopted procedures to guide juries in how to consider lesser included offenses. "When a jury is instructed on lesser included or lesser degrees of charged crimes, it should also be instructed that it is to first consider the crime charged and if after full and careful consideration of the evidence it cannot agree on a verdict as to that crime, it may then proceed to arrive at a verdict on a lesser crime." *State v. Labanowski*, 816 P.2d 26, 31 (Wash. 1991). This procedure raises an important double jeopardy question: If (i) a jury leaves a verdict form blank as to a greater offense but returns a conviction on a lesser offense, and (ii) the conviction is subsequently overturned, may the prosecution recharge the defendant not only with the lesser offense but also with the greater one?

In *State v. Daniels*, 156 P.3d 905 (Wash. 2007), *adhered to on recons.*, 200 P.3d 711 (Wash. 2009), *cert. denied*, 558 U.S. 819 (2009), the Washington Supreme Court held that the Double Jeopardy Clause permits such recharging. The Washington Supreme Court began by acknowledging that, under *Green v. United States*, 355 U.S. 184, 188 (1957), "[j]ury silence" after a full and fair opportunity to consider a charge "can act . . . to terminate jeopardy." 156 P.3d at 909. At the same time, the Washington Supreme Court noted that when deliberations result in a hung jury, a jury's inability to reach a verdict does not

terminate jeopardy. *Id.* (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 controls this situation. 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 the jury is instructed to leave a verdict form blank in the event that it is "unable to agree" on a verdict. *Id.* at 910.

About one month after this decision, the Ninth Circuit held in *Brazzel v. Washington*, 491 F.3d 976 (9th Cir. 2007), that jury silence 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.

Following this decision, the Washington Supreme Court granted reconsideration in *Daniels*. But the court then decided – over a four-Justice dissent and without any elaboration– to "adhere to [its] prior published opinion." 200 P.3d at 711.

B. Facts And Procedural History

2. One evening in 2004, petitioner Edward Glasmann and his fiancée, Angel Benson, rented a

motel room in Lakewood, Washington.[1] The couple ingested alcohol, methamphetamine, and ecstasy. As the night wore on, the couple began a heated argument. Petitioner kicked and punched Benson, and he subsequently forced her out of the motel room. Petitioner jumped into a car but it had no keys. He then jumped into another car and pulled Benson into it. Another motel guest witnessed the events and called 911.

As petitioner and Benson continued to struggle with one another, Benson was able to exit the car and fled to a neighboring minimart. Petitioner followed her inside, with responding police officers now closely behind. Petitioner grabbed Benson and placed her between him and the officers, but she broke free. An officer fired a stun gun at petitioner. Petitioner continued to struggle, but officers physically subdued him and dragged him out of the minimart and arrested him.

3. The State charged petitioner with first degree assault, first degree attempted robbery, first degree kidnapping, and obstruction of a law enforcement officer. Pet. App. 2a. "At trial, Glasmann did not deny culpability. Rather, he disputed the degree of the crimes charged," arguing that "the jury should convict only on lesser included offenses" because he did not have the requisite *mens rea* for first degree charges. *In re Pers. Restraint of Glasmann*, 286 P.3d 673, 676 (Wash. 2012).

---

[1] The background facts in this section are taken from *In re Pers. Restraint of Glasmann*, 286 P.3d 673, 675-76 (Wash. 2012).

After the trial, the court delivered the Washington State pattern jury instruction adopted in *Labanowski* and codified at Wash. Crim. Jury Instr. 155.00 for each of the charges that included lesser included offenses. The instruction read in relevant part:

> If you cannot agree on a verdict, do not fill in the blank provided [on the verdict form]. . . . If you find the defendant not guilty of the [higher crime], *or if after full and fair consideration of the evidence you cannot agree on that crime, you will consider the [relevant lesser crime].*

Pet. App. 2a (emphasis added and citation omitted).

"The jury deliberated for three hours and four minutes. [citation omitted]. The jury did not ask the court any questions while deliberating." Pet. App. 30a n.7 (Stephens, J., dissenting). When it returned its verdict, the jury left the verdict forms blank for first degree assault and first degree attempted robbery and instead found petitioner guilty of the second degree versions of those crimes. *Id.* 2a. The jury also found petitioner guilty of first degree kidnapping and obstruction of a law enforcement officer.

4. Petitioner sought post-conviction relief in the Washington courts, alleging prosecutorial misconduct during a particularly inflammatory closing argument. In 2012, the Washington Supreme agreed and reversed all of the convictions. Pet. App. 2a-3a (citing *In re Pers. Restraint of Glasmann*, 286 P.3d 673 (2012)).

5. "The State refiled all of the original charges," including the first degree assault and first degree attempted robbery charges. Pet. App. 3a. Glassman argued that the Double Jeopardy Clause barred his retried on these latter two charges. *Id.* The trial court rejected this argument, relying on the Washington Supreme Court's decision in *Daniels*. *Id.*

6. Petitioner appealed directly to the Washington Supreme Court, asking it to overrule *Daniels*. The court acknowledged that the Ninth Circuit has come to "the opposite conclusion about the conclusions that can be drawn from a blank verdict form when a jury is given an 'unable to agree' instruction." Pet. App. 5a-6a. But a majority of the Washington Supreme Court pronounced itself "unpersuaded by the Ninth Circuit's decision in *Brazzel*." *Id.* 10a. In the majority's view, unable-to-agree instructions allow retrial following silence on a higher charge because "leaving the verdict form blank necessarily mean[s] that the [jurors] were genuinely deadlocked on the charge." *Id.* 9a.

Three Justices dissented. According to the dissent, the majority's holding "violates controlling United States Supreme Court precedent" holding that "the determination of whether a manifest necessity has occurred to justify a retrial is solely within the trial court's discretion." Pet. App. 22a, 25a (Stephens, J., dissenting).

REASONS FOR GRANTING THE WRIT

State and federal courts – most pointedly, the Washington Supreme Court and the Ninth Circuit – are expressly divided over the double jeopardy implications of a pattern jury instruction used in Washington and many other jurisdictions. Specifically, courts are split over whether the prosecution may retry an individual on a criminal charge when the jury – after being instructed that it may return a guilty verdict on a lesser included offense if unable to agree on the charge – finds the defendant guilty of a lesser offense and remains silent on the more serious charge. The Washington Supreme Court holds that the prosecution 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 retrials.

This Court should resolve this disagreement. The prosecution frequently charges multiple crimes arising from the same incident; courts, prosecutors, defense attorneys, and defendants 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 prosecution 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 deadlock. A jury's finding a defendant guilty of a lesser offense following an unable-to-agree instruction does not satisfy this requirement.

I. Federal and State Courts Are Openly Divided Over The Double Jeopardy Implications Of "Unable To Agree" Jury Instructions.

A. Basic Principles

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 prosecution 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) (while Double Jeopardy Clause precludes retrial when jury is "silent," retrial is permissible when a jury's "disagreement is formally entered on the record"). 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." *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 narrow majority of jurisdictions uses an "acquittal first" instruction, which requires juries to unanimously convict or acquit the defendant of an offense before considering less serious charges. This 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.*, *State v. Davis*, 266 S.W.3d 896, 905-08 (Tenn. 2008); *People v. Boettcher*, 505 N.E.2d 594, 597 (N.Y. 1987); Cal. Jury Instr. – Crim. 17.10.

As Judge Friendly observed years ago, an acquittal-first instruction "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, such an 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); Jay M. Zitter, *When Should Jury's Deliberation Proceed From Charged Offense To Lesser-Included Offense*, 26 A.L.R. 5th 603, at §§ 4-5 (2015 Supp.) (same).[2] Such an instruction permits a jury to consider a less serious charge after making "full and careful consideration" (or some similarly phrased attempt) to reach a verdict on a more serious charge and finding itself unable to

---

[2] 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. Parker*, 344 P.3d 363, 367-68 (Kan. 2015); *People v. Pollick*, 531 N.W.2d 159, 161-62 (Mich. 1995); *State v. Wise*, 879 S.W.2d 494, 517 (Mo. 1994), *partially overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885, 889 (Mo. 2008); *Green v. State*, 80 P.3d 93, 96-97 (Nev. 2003); *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, 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 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).

agree. Pet. App. 2a. In his opinion surveying the pros and cons of the predominate approaches, Judge Friendly noted that the unable-to-agree instruction also "facilitates the Government's chances of getting a conviction for something" by allowing juries to move to lesser offenses without hanging on the initial charge. *Tsanas*, 572 F.2d at 346. Yet this advantage comes at the price of increasing the chances the government will not obtain a conviction on "the [offense] that it prefers." *Id.* And when the prosecution 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 solidifies a conflict over whether the Double Jeopardy Clause allows the prosecution, contrary to long-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 those charges.

1. The Washington Supreme Court has recognized 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 jurors be given unable-to-agree instructions and "leave[] the verdict form blank." Pet. App. 9a; *accord State v. Daniels*, 156 P.3d 905 (Wash. 2007), *adhered to on recons.*, 200 P.3d 711 (Wash. 2009), *cert. denied*, 558 U.S. 819 (2009). "Given those instructions, the jurors leaving the verdict form blank necessarily mean[s] that they were genuinely deadlocked on the charge." Pet. App. 9a.

2. In *Brazzel v. Washington*, 491 F.3d 976 (9th Cir. 2007), the Ninth Circuit "came to the opposite conclusion." Pet. App. 5a. Granting habeas relief to a Washington prisoner, the Ninth Circuit explained that a trial court must actually declare a "hung jury and mistrial" 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 involve the level 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." [*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. When the jurors simply "cannot agree," 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; *see also United States v.*

Jefferson, 566 F.3d 928, 935-36 (9th Cir. 2009) (reaffirming that *Brazzel* dictates 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).

3. The Washington Supreme Court's decision also conflicts with settled understandings respecting the Double Jeopardy Clause in many 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 of Arizona 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.").[3]

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 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."); *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

---

[3] Courts in other states that use unable-to-agree instructions have held, without confirming that such instructions were given in the cases at issue, that the Double Jeopardy Clause bars retrial following jury silence on the higher charge. *See, e.g.*, *State v. Low*, 192 P.3d 867, 880-81 (Utah 2008); *Whiting v. State*, 966 P.2d 1082, 1085-87 (Haw. 1998); *Shopbell v. State*, 686 S.W.2d 521, 523-24 (Mo. App. 1985).

record. Here, the jury was not silent; it reported its inability to agree twice.") (internal citation omitted).[4]

Third, many jurisdictions have declined to adopt the unable-to-agree approach in part because of the double jeopardy problems entailed by that approach. 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 told it 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*).

---

[4] *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).

II. This Issue Significantly Impacts The Administration Of Criminal Justice.

This Court should resolve the double jeopardy question implications of unable-to-agree instructions because the confusion over the subject significantly impacts the administration of criminal justice across the country.

1. As a general matter, courts and litigants need certainty regarding the rules governing the different 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). 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.

2. More immediately, the Washington Supreme Court's holding in this case cements an unacceptable situation: The State, acting pursuant to its pattern jury instructions, may obtain convictions that local federal district courts are duty-bound to vacate on habeas review. In fact, after the Washington

Supreme Court decided *State v. Daniels*, 156 P.3d 905 (Wash. 2007), *adhered to on recons.*, 200 P.3d 711 (Wash. 2009), *cert. denied*, 558 U.S. 819 (2009), "[a] United States District Court followed [the Ninth Circuit's ruling in] *Brazzel* and granted Daniels relief because her double jeopardy clause rights had been violated." Pet. App. 19a (Stephens, J., dissenting) (citing *Daniels v. Pastor*, No. C09-5711BHS, 2010 WL 56041 (W.D. Wash. Jan. 2010)). And the Washington Supreme Court practically acknowledged that any future defendant "who wishes to obtain relief" may do so by "filing in federal court." Pet App. 10a-11a.

This situation is corrosive and untenable. In the past, the State of Washington has successfully sought certiorari after the Ninth Circuit held that a pattern jury instruction in the State gave rise to constitutional violations requiring habeas relief. *Waddington v. Sarausad*, 555 U.S. 179 (2009). This Court should grant certiorari here as well.

If the Washington Supreme Court's holding is correct, then the federal courts are thwarting state courts from conducting legitimate retrials. Indeed, the Ninth Circuit's holding in *Brazzel* governs not only trials in Washington but also four other states and district courts in the Ninth Circuit itself, all of which use unable-to-agree instructions. *See supra* at 11 n.2.

If, on the other hand, the Ninth Circuit is correct that defendants in petitioner's shoes may properly "file in federal court to obtain relief," Pet. App. 10a, real harm still persists for defendants in Washington and elsewhere. So long as this Court refrains from resolving the question presented, the prosecution can threaten to pursue more serious charges in a retrial

or on appeal. And 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, 363-64 (1978). If such leverage under these circumstances is constitutionally improper, defendants should not be subject to it.

Furthermore, 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 him deserve to know definitively whether the State can retry them on charges for which juries previously declined to return verdicts.

III. This Case Is An Excellent Vehicle For Resolving The Question Presented.

For two reasons, this case is an ideal vehicle for resolving whether retrials are permissible under these circumstances.

1. This case is procedurally clean. First of all, the case arises on direct review. It is thus free from the complications that sometimes arise in federal habeas cases.

The double jeopardy issue was also fully and fairly litigated below. In *Daniels*, the State opposed certiorari on the ground that the defendant never argued until her petition for rehearing in the Washington Supreme Court that "the trial court erred in not properly discerning and documenting

jury deadlock." Br. in Opp. at 14, *Daniels v. Washington*, 558 U.S. 819 (2009) (No. 08-1403). Therefore, the State contended, the defendant improperly sought review "of a claim in this Court when it was not raised in a timely manner before the state courts" or "determined below." *Id.* Here, by contrast, petitioner made this argument at each stage of review, and the Washington Supreme Court squarely rejected it. Pet. App. 3a-11a.

2. This case highlights the dangerous incentives that the Washington Supreme Court's rule creates. At petitioner's first trial, the State presented a highly inflammatory power point presentation at closing argument, including "unadmitted evidence" and "copies of [petitioner's] booking photograph altered by the addition of phrases calculated to influence the jury's assessment of Glasmann's guilt and veracity." *In re Pers. Restraint of Glasmann*, 286 P.3d 673, 678 (Wash. 2012). As a result of this "flagrant" and "ill intentioned" misconduct, the Washington Supreme Court vacated petitioner's convictions. *Id.* at 675.

Yet as a result of the Washington Supreme Court's permissive construction of the Double Jeopardy Clause, the State can now retry petitioner not only for the crimes of conviction but also for higher charges on which the jury declined to convict. This rule allows the State to benefit from its own misconduct by obtaining a second bite at the apple. Worse yet, it allows the State to "use[] the first trial as a trial run of [its] case and adjust[] the second case accordingly." Pet. App. 25a (Stephens, J., dissenting). This is profoundly unjust. This Court should put an end to such gamesmanship.

IV. 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 alone establish the type of 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. This Court has stressed that the trial court – using all of its experience and expertise – "is in the best position to assess all of the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate." *Arizona v. Washington*, 434 U.S. 497, 510 (1978). Consequently, "[t]he decision whether to grant a mistrial is *reserved to* the 'broad discretion' of *the trial judge*." *Renico v. Lett*, 559 U.S. 766, 774 (2010) (emphasis added). Absent such a declaration, a defendant's jeopardy terminates at the end of trial. *See Richardson v. United States*, 468 U.S. 317, 326 (1984) (the trial judge must "declar[e] . . . a mistrial" to trigger this exception to the general bar against trying someone twice for the same offense); *Washington*, 434 U.S. at 509-10 (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).

What is more, given the Constitution's abhorrence of successive prosecutions and their impositions on defendants, this Court has admonished from its earliest decisions 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 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." *Washington*, 434 U.S. at 509.

The Washington Supreme Court's decision allowing retrials based on jury silence runs afoul of these principles. Jury silence alone cannot establish the hopeless deadlock required for a hung jury. Only a trial judge may declare a mistrial on that basis. Put another way, a jury cannot "hang itself." Pet. App. 27a (Stephens, J., dissenting).

The Washington Supreme Court resisted this straightforward reasoning, apparently believing it to be unduly formalistic. When a jury signals it is unable to agree on a charge, the Washington Supreme Court reasoned, "a trial judge [can] do nothing other than" declare a mistrial. Pet. App. 9a n.2. But this is demonstrably incorrect. For one thing, a trial judge always retains the power in this situation to give an "*Allen* charge" – an instruction encouraging additional deliberations towards unanimity. *See Lowenfield v. Phelps*, 484 U.S. 231, 237-38 (1988); *Allen v. United States*, 164 U.S. 492 (1896). A trial court may also take the more modest steps of polling the jurors or inquiring as to how serious the purported deadlock is.[5]

Indeed, even when a jury announces in open court that it is "unable to agree," this Court has explained that a court cannot "necessarily" assume that a unanimous verdict cannot be reached. *Lett*, 559 U.S. at 778. And several federal courts of appeals have held that the Double Jeopardy Clause bars retrials when trial judges declare mistrials based on juries' initial expressions of deadlock,

---

[5] 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).

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); *see also Illinois v. Somerville*, 410 U.S. 458, 462 (1973) (courts may not use "mechanical formula" to determine necessity of mistrial). Regardless of whether these categorical holdings are correct, they leave no doubt that a trial court has the *power* to probe whether a jury that signals it is unable to agree on a charge is truly deadlocked. That is enough to defeat the Washington Supreme Court's logic.

It makes no difference that juries in jurisdictions using "unable to agree" instructions are told to consider lesser offenses only "after full and careful consideration" of a greater offense. Pet. App. 2a. A jury, to be sure, "is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). But without a trial judge's probing for specifics regarding deliberations, there is simply no way to know from a jury's mere silence whether it "vigorously deliberate[d] the greater charge" or considered it acceptable to "quickly slide" after an early straw poll "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). And even if the jury did vigorously debate the greater charge, nothing in "unable to agree" instructions tells jurors after reaching a verdict on a lesser charge to revisit the greater charge. Absent such an instruction, it is impossible from silence alone to discern whether jurors who initially voted to convict on the greater offense came to believe through further deliberations that the

defendant was actually not guilty of that charge. *See Blueford v. Arkansas*, 132 S. Ct. 2044, 2051 (2012) (describing how jurors sometimes "rethink[]" their initial "stance[s] on a greater offense" while deliberating on a lesser offense).

In short, absent intervention and questioning from the trial judge, there is simply no way to know from jury silence following an "unable to agree" instruction whether the jury might have been able to reach a verdict on the greater charge – as juries often do – after further guidance and encouragement from the trial judge. *See* Saul M. Kassin & Lawrence S. Wrightsman, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 193-94 (1988).[6] This uncertainty is simply too palpable for the State to discharge its "high" burden of showing that the jury was indeed hopelessly deadlocked. *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. *Washington*, 434 U.S. at 505-06 & n.18 (quoting *Perez*, 22 U.S. (9 Wheat.) at 580). 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);

---

[6] 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).

accord Richardson, 468 U.S. at 323-26. But the situation is decidedly different when the prosecution actually secures a guilty verdict on something less than the most serious charge. In this circumstance, the prosecution 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 in this context to dispense with the "general rule" that "the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Washington*, 434 U.S. at 505.

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

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003), does not hold otherwise. In that case, 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 prosecution 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 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 that 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. This case offers the opportunity to confirm that the Clause does, in fact, apply in this situation.

CONCLUSION

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

Respectfully submitted,

Mary Kay High
Chief Deputy
DEPARTMENT OF
ASSIGNED COUNSEL
949 Market Street
Suite 334
Tacoma, WA 98402

Jeffrey L. Fisher
Counsel of Record
Brian Wolfman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

July 8, 2015