No. 15-36

IN THE

Supreme Court of the United States

EDWARD MICHAEL GLASMANN,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae in support of Petitioner are organizations whose members are engaged daily in the practice of criminal defense. The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit, professional bar association of criminal defense lawyers working to advance the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL has a national membership of more than 10,000 attorneys in 28 countries – and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys – including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committing to preserving fairness and promoting a rational and humane criminal justice system.

NACDL has frequently appeared as *amicus curiae* before the United States Supreme Court, the federal court of appeals, and the highest courts of numerous states. As relates to the issues before the Court in this case, NACDL has a keen interest in the resolution of uncertainty regarding the double jeopardy implications of the "unable to agree" or "reasonable efforts" instructions that control a jury's deliberations on lesser offenses.

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[1] No counsel for any party to these proceedings authored this brief in whole or in part. No entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Pursuant to Rule 37.2(a), Petitioner and Respondent have consented to the filing of this brief and waived the 10-day notice requirement, as reflected in the documents filed by amicus with the Clerk.

INTRODUCTION AND SUMMARY

A large majority of federal courts of appeals and nearly half of the states have adopted or approved instructions that allow a jury to return a verdict on a lesser offense if it is unable to reach agreement on the greater offense.[2] The rationale for these instructions is that a jury given a full opportunity to consider, but "unable to agree" on, the greater offense can resolve the case by rendering a verdict on a lesser offense instead of resorting to a deadlock and mistrial. This approach avoids costly retrials while allowing the jury to better correlate the evidence presented with the appropriate charge.

The question presented in this case is whether, given such an instruction, a jury's guilty verdict on the lesser offense terminates jeopardy on the greater offense under the Fifth Amendment's Double Jeopardy Clause that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . . " U.S. Const. amend V. This question has broad implications: the finality (or lack thereof) of these verdicts will affect the advice of counsel, the actions of litigants, and the administration of criminal justice.

The current uncertainty regarding how double jeopardy applies in these circumstances has resulted in conflicting law in overlapping state and federal jurisdictions. This framework is untenable – it denigrates the rights of defendants; complicates the decisionmaking of litigants; and drains the resources of the courts, the parties, and the prison system.

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[2] See Pet'r Br. 11 n.2 (listing jurisdictions).

ARGUMENT

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

Uncertainty with respect to the finality of a conviction on a lesser offense returned under an "unable to agree" jury instruction creates intractable problems for defense counsel, and for their clients, in the many jurisdictions that use such instructions. Moreover, these problems pervade the entire criminal process, from initial plea negotiations to appeal decisions.

1. Given this uncertainty, the decision to request or oppose a lesser offense instruction is no longer as obvious. In general, the failure to request this instruction would remove a "value[d] . . . procedural safeguard" and unfairly "enhance the risk of an unwarranted conviction." *Beck* v. *Alabama*, 447 U.S. 625, 637 (1980); see also *Keeble* v. *United States*, 412 U.S. 205, 208 (1973) ("it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater."). But, when the finality of a verdict returned on the lesser offense is uncertain, defense counsel must also consider that such a verdict may provide the government with a surer opportunity to obtain a conviction on the greater offense at a retrial.

This difficulty arises when the evidence is sufficient to support conviction on the lesser offense but not necessarily on the greater. Without the instruction, the government has an increased chance of conviction

on the greater offense in the first instance. The jury may convict on the greater offense if it does not have the option of the lesser offense, even if the latter is the most appropriate charge. *Beck*, 447 U.S. at 637. On the other hand, with the instruction, a verdict on the lesser offense is more probable but may not be final. If not final, the government has an increased chance of conviction on the greater offense at a retrial, having had the benefit of a trial run to observe defense strategy as well as its own weaknesses.

These competing considerations complicate defense counsel's strategy. Meanwhile, the uncertain finality renders an informed decision impossible.

Defense counsel's decision whether to request or to oppose an "unable to agree" instruction is likewise muddled by the uncertainty of whether the verdict on a lesser offense will be treated as final. If so, requesting the instruction will help avoid the possibility of a mistrial and potential retrial, with the accompanying "financial and emotional burden," the period of "stigma[]" caused by "an unresolved accusation of wrongdoing," and the increased risk of wrongful conviction. *Arizona* v. *Washington*, 494 U.S. 497, 503-04 (1978). However, if not final, then the advantages and disadvantages again heavily favor the prosecution. See 1 *The Public Defender Service for the District of Columbia, Criminal Practice Institute: Criminal Practice Manual* § 9.11 (2005) (cautioning criminal defense attorneys to "seriously consider requesting the 'acquittal first' jury instruction instead of 'reasonable efforts'" in the wake of *United States* v. *Allen*, 755 A.2d 402 (D.C. 2000), and *Holt* v. *United States*, 805 A.2d 949 (D.C. 2002), holding that retrial is not barred at least when the

jury expressly advises the court that it was unable to agree).

For similar reasons, it is unclear whether to counsel a defendant to appeal a conviction on a lesser offense rendered pursuant to an "unable to agree" instruction. Uncertainty regarding the government's right to retry a defendant on the greater offense makes it difficult to advise such an appeal. The bizarre incentive structure makes defense counsel less inclined to encourage a meritorious appeal because of the danger of a more serious conviction on retrial.

2. The finality question impedes defense counsel's strategic decisionmaking and advice at all stages of the process. Without a clear rule on how double jeopardy applies, defense counsel cannot adequately evaluate the defendant's risk and the prosecution's leverage. Even during pretrial plea negotiations, long before the need to request a particular jury instruction arises, defense counsel must make decisions and give counsel that depend on the prosecution's chances of success at trial on particular charges – chances that would likely only increase upon retrial. Defense counsel must conduct a similar analysis when requesting jury instructions and filing an appeal. See, *e.g.*, *Wilson* v. *United States*, 922 A.2d 1192, 1196 (D.C. 2007) (the United States represented to the court that it would not seek "to resurrect" the greater offense of armed carjacking unless appellant's conviction for unarmed carjacking was reversed on appeal.).

Defense counsel, not knowing whether to fully appreciate the prosecution's leverage (if the verdict is not final) or discount it (if the verdict is final), is forced to give uninformed advice before and throughout the proceedings. It is unfair to expect

defendants to rely on advice that either undervalues or overvalues these risks when the law could be clarified.

II. CONFLICTING INTERPRETATIONS OF THE DOUBLE JEOPARDY CLAUSE BURDEN DEFENDANTS, DEFENSE COUNSEL, AND THE JUDICIAL SYSTEM.

Overlapping jurisdictions with conflicting applications of the Double Jeopardy Clause exacerbate the difficulties for counsel and consequent unfairness to defendants, and waste judicial resources. These results directly contradict the purpose of the Double Jeopardy Clause – to spare defendants the "embarrassment, expense, anxiety, and insecurity" of a second trial – and the rationale supporting the "unable to agree" instruction – to avoid costly retrials and promote the administration of justice. *United States* v. *DiFrancesco*, 449 U.S. 117, 136 (1980); *State* v. *Labanowski*, 816 P.2d 26, 34 (Wash. 1991) (footnotes omitted) ("[t]he 'unable to agree'" instruction "allows the jury to correlate more closely the criminal acts with the particular criminal conviction," "promotes the efficient use of judicial resources," and avoids "[s]uccessive trials" that "can burden a defendant while allowing the state to benefit from 'dress rehearsals.'").

Take, for example, the instant case, where the state court allows retrial on the greater offense but the federal court does not. This structure requires defendants to anticipate a retrial on the greater offense and possibly years of incarceration and protracted litigation before a federal court ultimately grants relief on the ground that the prior proceedings are constitutionally barred. In these circumstances, defense counsel must decide whether to prioritize the

end-game – guaranteed federal habeas relief on the greater offense charge – or to accept a compromise at an earlier stage in the hopes of decreasing total incarceration time and the financial and emotional costs of litigation.

In addition to the burden on individual defendants and defense counsel, the resulting proceedings are unnecessary and waste resources. This holds true whether the state or federal interpretation is correct. If Washington's interpretation is correct, then the defendant's appeal on this issue after retrial – and the resulting habeas litigation – was fruitless and could be easily dismissed. And, if the federal court's interpretation was correct, then the defendant should never have undergone a retrial on the greater offense or been subjected to any proceedings resulting from it. Furthermore, the years of unnecessary litigation and incarceration swell the already overwhelming burdens on court dockets and the prison system, and drain the resources of the judiciary and defense counsel organizations.

The danger of incorrect and conflicting interpretations cannot be ignored given the widespread use of the "unable to agree" instruction in both federal and state courts. The ease with which jurors can reach a determination that they are unable to agree on the greater charge and convict on the lesser guarantees that this question will reappear if left unresolved. Without further clarification from the Court, the unfairness to defendants, limitations on effective counsel, and burden on the system will continue.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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