No. 10-1320

In the Supreme Court of the United States

ALEX BLUEFORD, PETITIONER

v.

STATE OF ARKANSAS

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the National Association of Criminal Defense Lawyers (NACDL) is a non-profit association of lawyers who practice criminal law before virtually every state and federal bar in the country.[1] NACDL's more than 12,800 member attorneys and the 35,000 members of its state, local, and international affiliates represent defendants in a wide variety of criminal cases, including in cases that may in-

[1] Counsel of record for the parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk. No party's counsel authored any part of this brief, and no person other than *amicus*, its members, and its counsel made any monetary contribution intended to fund its preparation or submission.

volve the double-jeopardy issue raised in the question presented. NACDL's members are interested in the resolution of the question presented because it will affect the rights of their current and future clients.

SUMMARY OF ARGUMENT

Petitioner said that the death of his girlfriend's son was an accident. The State tried to prove that it was intentional, but the twelve jurors declined to convict on the charges of capital and first-degree murder. The jury instead reported back that it could not agree on whether petitioner committed manslaughter. The court declared a mistrial.

In this brief, *amicus* argues the following. First, this Court's Double Jeopardy Clause cases—in particular, *Green* v. *United States*, 355 U. S. 184 (1957), and *Price* v. *Georgia*, 398 U. S. 323 (1970)—should dispose of the question presented. Those cases hold that when a jury decides to convict on a lesser offense, that constitutes an acquittal on any greater offense, and therefore bars retrial on those greater offenses. A jury's report that it reached and deadlocked on a lesser offense, and its discharge without any report or verdict on any greater offenses, should have the same effect.

Second, the prosecution failed in this case to demonstrate, as it was required to do, that a mistrial was necessary as to any offense but the one on which the jury reported a deadlock. As a result, petitioner may not be retried on those other offenses. The proper course is for the prosecutor to seek to inquire of the jury whether it can return a partial verdict, and for the court generally to make that inquiry unless the defendant objects.

ARGUMENT

I. *WHEN A JURY ANNOUNCES ONLY THAT IT IS DEADLOCKED ON A LESSER OFFENSE, THAT COUNTS AS AN ACQUITTAL ON EACH GREATER OFFENSE.*

A. A conviction on a lesser offense counts as an acquittal on a greater offense, and a deadlock on a lesser offense should have the same effect.

The question presented is controlled by this Court's decisions in *Green* and *Price*.

In *Green*, as here, the jury was instructed to consider a murder charge as well as lesser included offenses. *Green*, 355 U. S., at 185–186. There, the jury returned no verdict on murder, but all jurors voted to convict on a lesser offense. *Id.*, at 186. That conviction was held to have the effect of an acquittal on the greater charge, preventing retrial on that offense after a successful appeal. *Ibid.* Here, the jury returned no verdict on murder, and the prosecution failed to convince some jurors of guilt on manslaughter, so the jury reported a deadlock on that offense.

The critical parallel between this case and *Green* is that in both cases "the jury was authorized to find" petitioner guilty of either murder or a lesser offense, and declined to convict the defendant of murder. *Id.*, at 189–190. Petitioner "was in direct peril of being convicted and punished for * * * murder at his first trial," and though he "was forced to run the gantlet once on [the murder] charge[s]," the "jury refused to convict him." *Id.*, at 190. In *Green*, "[w]hen given the

choice between finding [the defendant] guilty of either first or second degree murder it chose the latter." *Ibid.* Here, when "given the choice," the jury declined the opportunity to convict on the greater charge and could not agree whether to convict on the lesser.

This parallel between the cases should produce a parallel result. In *Green,* the jury's choice not to convict on the greater charge meant that the defendant's jeopardy on the greater charge had ended, because "the jury was dismissed without returning any express verdict on [the greater] charge" even though "it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Id.*, at 191. The same is true here, and so the same result is required.

Price, which reaffirmed *Green*, also requires that same result. As *Price* explained, the Court "has consistently refused to rule that jeopardy for an offense continues after an acquittal." *Price*, 398 U. S., at 329. The Court there recognized no distinction between an "express" acquittal and one that was "implied by a conviction on a lesser included offense," as long as in the latter circumstance the jury had "a full opportunity to return a verdict on the greater charge." *Ibid.* Thus *Price*, like *Green*, bars a second murder trial here because the jury had the same "full opportunity" to convict on the murder charges, but did not do so.

Other cases are consistent and thus reinforce the point. *Selvester* v. *United States*, 170 U. S. 262 (1898), for example, prefigured *Green* and *Price* in explaining that "[d]oubtless, where a jury, although convicting as to some, are silent as to other, counts in an indictment, and are discharged without the consent of the accused * * * the effect of the discharge is

'equivalent to acquittal,' because, as the record affords no adequate legal cause for the discharge of the jury, any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent." *Id.*, at 269. So did *Dealy* v. *United States*, 152 U. S. 539 (1894), in the passage *Selevester* quoted: where a jury has omitted to return a verdict on one of the counts in the indictment, "the discharge of the jury under the circumstances was doubtless equivalent to a verdict of not guilty as to that count." *Id.*, at 542. See also *Ex parte Nielsen*, 131 U. S. 176, 190 (1889) ("If a conviction might have been had, and was not, there was an implied acquittal."); *Bullington* v. *Missouri*, 451 U. S. 430, 445 (1981) (imposition of life sentence signifies that "the jury has already acquitted the defendant of whatever was necessary to impose the death sentence").

It is not important to this logic that in this case the court happened to inquire of the jury whether it had voted on any other offenses, and that the jury reported that it was unanimous to acquit as to murder. Pet. Br. 9–10; Pet. App. 9a & 19a–20a. That surely does present a strong ground for reversing. See Pet. Br. § I. But a defendant's liberty should not turn on whether the court happens to be curious about the jury's votes, and *Green* and *Price* require reversal on broader grounds.

Because the jury was instructed not to consider a lesser offense before reaching unanimity on a greater, the fact that the jury reached the lesser offense of manslaughter demonstrates on its own (without the jury having to say it) that the jury had voted to acquit on the greater murder charges. Thus, where a jury is

given a "hard-transition" instruction, a report of a deadlock on a lesser charge is the strongest of evidence of an acquittal on a greater charge. Just as in *Green*, where the Court concluded that the "assumption" was "legitimate" that the "jury for one reason or another acquitted Green of murder in the first degree" (*Green*, 355 U. S., at 191), in a case like this the hard-transition instruction justifies the conclusion that when a jury reports a deadlock on a lesser offense it has "for one reason or another acquitted" the defendant of any greater offenses.

But *Green* goes farther, for it makes no distinction based on the order in which the jury was instructed to consider any offenses. The Court held in *Green* that it "need not rest alone" on the "assumption" that the jury in fact voted to acquit on the greater charge, because by operation of law the jury's failure to return a verdict on the greater offense terminated jeopardy as to that offense. *Id.*, at 191–192. As the Court explained, the jury was "given a full opportunity to return a verdict [on the greater charge] and no extraordinary circumstances appeared which prevented it from doing so." *Id.*, at 191. Therefore it was "clear" that "under established principles of former jeopardy" the defendant's "jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense." *Ibid.* The same is true in any case where the jury announces a deadlock as to a lesser offense. When that jury has neither reported a deadlock as to any greater offense, nor returned a verdict as to any such offense, the same "established principles of former jeopardy" preclude retrial on any such offense.

Moreover, the rule of the court below, if sustained, would create an anomaly in the law. As *Green* and *Price* hold, a jury's decision to convict on a lesser offense counts as an acquittal on any greater offense. In that situation, the state has convinced every member of a jury to vote for guilt on the lesser charge, and in truth there is no indication whether the jury was unanimous to acquit on the greater charge or whether the vote was split. Even so the lesser-offense conviction registers as an acquittal on the greater offense.

The guilt of a defendant in the situation of petitioner is more dubious, and so if anything his position should be stronger and better protected by the Clause. The prosecution in a deadlock case like this one has failed to obtain even the unanimous lesser-offense conviction that it succeeded in obtaining in *Green* and *Price*. The government in a case like this one has thus made a weaker showing of guilt on its first attempt to convict, so it would be anomalous to hold that a defendant like petitioner is less protected on retrial.

That anomaly should be avoided. If the defendant in the *Green* and *Price* scenario gets the benefit of the jury's decision not to convict on a greater offense, a defendant in a case like this one should get that benefit.

B. No formal verdict or judgment was needed to trigger the protections of the Double Jeopardy Clause.

It is no answer here that no verdict was formally received by the court on the greater offenses. That is not part of the analysis under *Green* and *Price*: to the

contrary, those cases address the precise question of how to treat a charge as to which there has been no formal verdict. *Green*'s second and "broad[er]" ground (*Price*, 398 U. S., at 329)—that discharge without a verdict and without justification operates as an acquittal—operates as a matter of law. Just what the jury said or did not say is not relevant to that analysis unless it goes to whether a mistrial was justified.

Second, based on *Green*'s first ground, the question is whether a jury's treatment of a lesser offense implies that it acquitted on the greater, and there the substance of what the jury did is what matters. What the jury did here, by stating that it was deadlocked but only so stating as to a lesser offense, was show that despite having had a "full and fair opportunity to present his evidence to an impartial jury" (*Arizona* v. *Washington*, 434 U. S. 497, 505 (1978)), the prosecutor had failed to convince a single juror that petitioner had meant to kill. If the jury had been deadlocked (or had voted to convict) on a greater offense, that would have been the headline in its report to the trial court. That there was no formal verdict entered has no bearing on that analysis.

This Court has never let courtroom formalities interfere with the "deeply ingrained" (*Green*, 355 U. S., at 187) protection against multiple trials. As noted, a verdict of acquittal bars retrial "even when 'not followed by any judgment.'" *Id.*, at 188 (quoting *United States* v. *Ball*, 163 U. S. 662, 671 (1896)). *Ball* is an important example of how the substance of what a jury decides controls over court formalities, for there the Court recognized that the defendant's judgment of acquittal was invalid (for having been entered on a

Sunday) but the verdict of acquittal still gave the defendant full protection against retrial. Moreover, "it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial." *Green*, 355 U. S., at 188. Indeed, as *Ball* observed in passing, "the reception of the verdict * * * is but a ministerial act." *Ball*, 163 U. S., at 671.

Ex parte Lange, 85 U. S. 163 (1873), further demonstrates the proposition that the question whether jeopardy has terminated is a function of the Double Jeopardy Clause—that is, of federal constitutional law. The Court there decided that it did not matter for double jeopardy purposes that a court purported to hold a judgment open to amendment during its term and thus considered itself free to edit an earlier imposed sentence when it found an error. *Id.*, at 167–168. Instead, for purposes of the Double Jeopardy Clause, the defendant had been punished a first time for his offense with the imposition of the original sentence, and the sentencing court had no power to impose a second, revised sentence on him. *Id.*, at 174.

Hudson v. *Louisiana*, 450 U. S. 40 (1981), supports the same point. The defendant there was found guilty of first-degree murder by a jury, but on a motion challenging the sufficiency of the evidence, the trial court agreed that that the evidence could not support the verdict. *Id.*, at 41. The problem was that "under Louisiana law" the "only means of challenging the sufficiency of the evidence" was to move for a new trial, so that was the motion the defendant made. *Ibid.* There never was a verdict of acquittal, nor did the trial court enter judgment for the defendant. But be-

cause the trial court decided in substance that the evidence could not sustain a guilty verdict, the Court held the defendant could not be retried. *Id.*, at 43.

The consequence of those decisions, in this case, is that the question whether petitioner was acquitted on the murder charges he faced does not turn on whether the trial court took a verdict or entered judgment, or on whether state law would have allowed the court to do either. The question under the "implicit acquittal" analysis is instead whether there are grounds to conclude that the jury in fact rejected particular charges against a defendant.

II. THE DOUBLE JEOPARDY CLAUSE PREVENTS RETRIAL UNLESS THE TRIAL COURT FIRST INQUIRES WHETHER A DEADLOCKED JURY CAN RETURN A PARTIAL VERDICT—OR A DEFENDANT WAIVES THAT INQUIRY.

This case thus presents an occasion to refine the age-old rule of this Court's double-jeopardy jurisprudence that the Double Jeopardy Clause precludes a trial judge from declaring a mistrial unless "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States* v. *Perez*, 9 Wheat. (22 U. S.) 579, 580 (1824). This rule is what *Green* relied on in referring to the lack of "extraordinary circumstances" to justify a discharge. *Green*, 355 U. S., at 191. But despite its age, has never before been applied by this Court in the particular but quite common situation presented here.

Several propositions are settled. First, a criminal defendant can generally be tried only and exactly once for a particular offense. *E.g.*, *Washington*, 434

U. S., at 505. Second, a defendant has a "valued right" to obtain a verdict from the jury first empanelled to try him. *E.g.*, *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949). Third, a court has authority to declare a mistrial and discharge the jury. *E.g.*, *Perez*, 9 Wheat., at 580. But fourth, that discharge ends the government's one opportunity to secure a conviction unless the government satisfies its "heavy burden" of "demonstrat[ing]" a "high degree" of "necessity" for the discharge. *E.g.*, *Washington*, 434 U. S., at 505–506.

The precise and new question here is, what must the government "demonstrate" when it has asked a trial court to submit more than one offense to the jury, and the jury reports back that it cannot agree—but does not say what it cannot agree about. The correct answer under this Court's cases is that in shouldering its "heavy burden" the prosecutor must have the court ask whether the jury can return a verdict on any count. This is also sensible, and does not offend the concerns that underlie the "manifest necessity" exception to the one-trial rule.

A. The caselaw and common sense support seeking a partial verdict.

Three principles from the caselaw support requiring the prosecutor and court to extract any factfinding that can be gotten before discharging a reportedly hung jury.

First, seeking a partial verdict is called for because it minimizes the burden that retrial imposes on a defendant and from which the Double Jeopardy Clause protects him. The Court has recognized that a criminal trial is horrible for the defendant, that being

tried for a greater offense is proportionally worse than being tried for a lesser, and that a defendant has a constitutionally protected interest in securing any acquittal available. As the Court observed based on the facts in *Price*—in an observation equally relevant to the facts here—"[T]o be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly." *Price*, 398 U. S., at 331. And "[t]here is a significant difference to an accused whether he is being tried for murder or manslaughter." *Id.*, at 331 n.10. A defendant therefore has a "valued right" to obtain a verdict from the "particular tribunal" empanelled to try him. *Wade*, 336 U. S., at 689. These facts support receiving as much verdict as possible from the first empanelled jury.

Second, the partial-verdict approach is supported by the common sense rule, which is consistent with the cases, that before ordering the "extraordinary" (*Downum* v. *United States*, 372 U. S. 734, 736 (1963)) remedy of a mistrial, a trial court must satisfy itself that there are not less drastic alternatives. As the leading case holds, the power to declare a mistrial "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Perez*, 9 Wheat., at 580. Where such an alternative exists and does not threaten the integrity of the proceedings, the need for a mistrial—far from being "plain and obvious," as *Perez* requires (*ibid.*)—is entirely absent. In short, a trial court does not exercise "sound discretion" (*Simmons* v. *United States*, 142 U. S. 148, 153 (1891)) simply by pronouncing a jury hung: it may only "discharge a *genuinely* deadlocked jury" (*Washington*, 434 U. S., at 509, 510 n.28 (emphasis added)).

Thus in *United States* v. *Jorn*, 400 U. S. 470 (1971), the Court held that retrial was barred, with Justice Harlan explaining for the plurality that the trial court should not have discharged the jury without considering available alternatives. The record showed that the court could have and should have considered a continuance that would have allowed the government to address the problem with its witnesses, rather than ordering an immediate discharge. This was not "a scrupulous exercise of judicial discretion." *Jorn*, 400 U. S., at 485 (plurality opinion); see also *Illinois* v. *Somerville*, 410 U. S. 458, 469 (1973) (explaining that the Court held in *Jorn* that "there was no 'manifest necessity' for the mistrial, as opposed to less drastic alternatives"). And the courts of appeals are virtually uniform in holding that whether a trial court considered alternatives is probative of whether the court acted properly in declaring a mistrial.[2] That includes a number of cases in which courts examined the existence of alternatives in deciding specifically whether discharging a reportedly deadlocked jury was proper.[3]

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[2] See, *e.g.*, *United States* v. *Pierce*, 593 F.2d 415, 417 (CA1 1979); *United States* v. *Huang*, 960 F.2d 1128, 1136 (CA2 1992); *United States* v. *Allick*, 274 F. App'x 128, 134–135 (CA3 2008) (unpub'd); *Harris* v. *Young*, 607 F.2d 1081, 1085–1086 & 1085 n.4 (CA4 1979); *United States* v. *Bauman*, 887 F.2d 546, 550 (CA5 1989); *United States* v. *Byrski*, 854 F.2d 955, 962 (CA7 1988); *Long* v. *Humphrey*, 184 F.3d 758, 761 (CA8 1999); *United States* v. *Sanders*, 591 F.2d 1293, 1299 (CA9 1979); *Walck* v. *Edmondson*, 472 F.3d 1227, 1240 (CA10 2007).

[3] See, *e.g.*, *United States* v. *Clark*, 613 F.2d 391, 400 (CA2 1979) (no "reasonable alternatives to ordering of a mistrial"

Thus, a trial court should examine less drastic alternatives than declaring a complete mistrial before taking that ultimate step. And inquiring into whether the jury can deliver a partial verdict is just such a partial solution. A trial court should thus take that step in the course of acting with the "greatest caution." *Perez*, 9 Wheat., at 580.

Third, the fact that this Court's caselaw puts the onus on the government to show the requisite "high degree" of necessity for a mistrial supports requiring the government to initiate the inquiry into whether the jury can return a partial verdict. When a jury returns with a report that it has hung, that surely demonstrates that there is some element of the case that may be retried. See *Perez*, 9 Wheat., at 580. But if it is the government's burden to prove guilt in the first instance, and if it is then the government's burden to show that any mistrial is necessary, the government should also bear the burden to show which aspects of the case cannot be resolved by the empanelled jury.

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where jury was deadlocked); *United States* v. *Mark*, 284 F. App'x 970, 973 (CA3 2008) (unpub'd) ("[f]actors to be considered include * * * the judge's prudent consideration of reasonable alternatives"); *United States* v. *Gordy*, 526 F.2d 631, 636–637 (CA5 1976) (court should consider questioning jurors or encouraging further deliberations); *United States* v. *Salvador*, 740 F.2d 752, 755 (CA9 1984) (questioning jurors individually would have been futile and potentially coercive, and there was "no other reasonable alternative" to a mistrial); *United States* v. *Horn*, 583 F.2d 1124 (CA10 1978) (mistrial not justified where judge failed to ask jury whether it would be unable to reach a verdict).

* * *

Under *Perez*, a government that has taken its "one complete opportunity" (*Washington*, 434 U. S., at 509) to convince a jury of guilt, but which has failed, does get a mulligan. But given how extreme and burdensome a deviation from the one-trial rule this chance for a do-over is, it should be limited to the actual questions on which the jury has failed to agree, and not extend to those issues on which it has or may reach a unanimous conclusion. The government, with the aid of the trial court, should just ask which is which.

B. Where the defendant does not object, seeking a partial verdict does not impede the two interests that justify allowing retrial after a mistrial.

Requiring the government to ask the court to receive a partial verdict also squares with the rationales for allowing retrial after a deadlock and consequent discharge of the jury. As the Court recognized in *Washington*, the exception to the one-trial rule that is permitted in such cases is based on two interests: the public interest in "giving the prosecution one complete opportunity to convict those who have violated its laws," and the public interest in ensuring "just judgments" by avoiding coercion of juries. *Washington*, 434 U. S., at 509–510. Requiring a partial-verdict inquiry does nothing to impede either interest.

As to the first, if the jury has in fact ruled out a conviction on any charge, the government has had its one opportunity to convict and has simply failed to carry its burden. The government loses nothing to

which it is entitled by the court taking a partial verdict as to that charge.

As to the second, the stated concern is that a jury will succumb to perceived pressure from the trial judge to reach a verdict, and that jurors will change their votes based on a desire to produce a verdict rather than based on their own assessments of the evidence. That hypothetical concern may have some force in the dire (though imaginary) situation to which one English court alluded in justifying the "necessity" exception, in which jurors might be held "till death" in order to extract a verdict. See *Winsor* v. *The Queen*, L.R. 1 Q.B. 289, 390 (1866) (quoted in *Washington*, 434 U. S., at 506 n.21). In the face of that concern about imposing undue pressure, allowing a mistrial is an important safety valve.

But whatever concern about undue pressure seeking a partial verdict may raise, that concern is outweighed by the defendant's important rights under the Double Jeopardy Clause. The question to the jury may often be answered—as the court's questions were here—by the jury foreperson without need for further deliberation, and in such cases the concern about undue pressure is minimal. In cases where the jury must retire before responding, the request is still unlikely to be more burdensome than the *Allen* charge that this Court approved in the nineteenth century and which is in daily use in courts throughout the country. See *Allen* v. *United States*, 164 U. S. 492, 501–502 (1896); see also, *e.g.*, *Yeager* v. *United States*, 129 S. Ct. 2360, 2364 (2009) (noting that trial court gave *Allen* charge). As long as the defendant has no objection to the request for a partial verdict, there

can be little concern about coercion producing an unfair result.

A more complicated picture will emerge in future cases where the defendant waives his right to the partial-verdict inquiry or objects to the request for a partial verdict. The partial-verdict inquiry is constitutionally required to protect the government's right to retry a defendant as to any offenses on which the jury actually is deadlocked. It follows that as far as the Constitution is concerned, the defendant can choose not to insist on the inquiry. In some mistrial cases where the government proposes to seek a partial verdict, a defendant might indicate that he would accept retrial in full. In such a case, there would be no constitutional need for the court to seek a partial verdict. In some cases the defendant might decline to waive his right to the inquiry but object to the charge nonetheless.[4] The range of factual circumstances in

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[4] A defendant's objection to a partial verdict inquiry in a "soft transition" case would be particularly significant. There may be some concern about coercion in such cases, where the jury's deliberations are not structured by the instruction and so the jury may not complete deliberations on greater offenses before considering the lesser offense on which it ultimately reports a deadlock. Therefore, as one court in a soft-transition jurisdiction has worried, seeking a partial verdict could "invite[] a report that may be based on only preliminary, tentative deliberations (if any) on that level of offense, or hasty resumption of deliberations concerning that level of offense in an effort to satisfy the judge's apparent desire for a decision." See *Massachusetts* v. *Roth*, 776 N.E.2d 437, 449 (Mass. 2002). The concern is less in a hard-transition case: "the taking of a partial verdict" in such a case "poses fewer problems than would be encountered" in a soft-transition case because the hard-transition instruction "re-

which the government seeks a partial verdict and the defendant objects demand to be addressed as they arise. The proper action for the court to take in such cases, and the consequences for the double-jeopardy analysis, should not be resolved on these facts, where no partial inquiry was proposed and the defendant consequently took no position on whether such an inquiry should proceed.

C. The deference ordinarily accorded to the trial court in declaring a mistrial is categorically inappropriate when the court fails to at least consider seeking a partial verdict before discharging.

Notwithstanding that a trial court's decision to declare a mistrial is generally given deference, that deference is categorically inappropriate in a case like this one. A trial court must earn the deference of a reviewing court by making a considered judgment that takes all relevant factors into account: "[r]eviewing courts have an obligation to satisfy themselves that * * * the trial judge exercised 'sound discretion' in declaring a mistrial." *Washington*, 434 U. S., at 514 (quoting *Perez*, 9 Wheat., at 580). The problem here is that there was no evident consideration by the trial court of whether a less drastic alternative like seeking a partial verdict was called for in order to limit the hazards and burdens that multiple trials would impose on petitioner. In such a circums-

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quires the jury to reach a genuine 'verdict' on the offense as charged before considering any other level of offense." *Id.*, at 449 n.14.

tance, "the reason for * * * deference by an appellate court disappears." *Washington*, 434 U. S., at 510 n.28.

In other words, a trial judge cannot satisfy his obligation to exercise sound discretion simply by pronouncing a jury hung. Appellate courts do not grant "absolute deference to trial judges" who declare mistrials on the basis of hung juries; rather, the exercise of discretion must be sound and related to the public interest in securing a just result. *Renico* v. *Lett*, 130 S. Ct. 1855, 1863 (2010).

No doubt there are cases in which, based on facts with which the trial is more "conversant" than "any reviewing court can possibly be" (*Washington*, 434 U. S., at 514), the trial court could perceive some risk in seeking a partial verdict. In such a case, notwithstanding the relatively modest nature of the inquiry proposed here, deference would be appropriate if the Court declined the government's request to seek a partial verdict. That conclusion is required (and is all that is required) by this Court's admonition that cases of mistrial "turn on the particular facts and thus escape meaningful categorization." *Somerville*, 410 U. S., at 464.

But what categorically does not deserve deference is a trial court's decision to enter a mistrial without any consideration for whether the burden that declaration would impose on the defendant is justified or whether less burdensome alternatives are available. Here, reducing that burden only required asking whether the jury could return a partial verdict.

* * *

Based on the foregoing, the prosecution's failure to seek an inquiry into whether the jury would return a

partial verdict means that the government did not demonstrate the need for a mistrial on all offenses. The government therefore has no more right to try petitioner for murder.

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

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