No. 12-1433

In the Supreme Court of the United States

JORIDA DAVIDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a retrial of petitioner is consistent with the Double Jeopardy Clause of the Fifth Amendment because petitioner consented to a mistrial through requested jury instructions and strategic silence at the time of the jury's dismissal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 48 A.3d 194. The memorandum opinion and order of the Superior Court for the District of Columbia (Pet. App. 27-75) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2012. A petition for rehearing en banc was denied on March 11, 2013 (Pet. App. 76). The petition for a writ of certiorari was filed on June 10, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

During a jury trial in the Superior Court for the District of Columbia, the jury informed the court that it was unable to reach a verdict on the charge of voluntary manslaughter, D.C. Code § 22-2105, but that that it had

found petitioner guilty of the lesser-included offense of negligent homicide, *id.* §§ 50-2203.01 and 50-2203.02, as well as two other offenses charged in separate counts. Pet. App. 31-33. After a grand jury returned a superseding indictment charging petitioner with voluntary manslaughter and involuntary manslaughter, D.C. Code § 22-2105, petitioner moved to dismiss that indictment on double-jeopardy grounds. Pet. App. 37-38, 42. The trial court denied the motion to dismiss. *Id.* at 74; see *id.* at 27-75. On petitioner's interlocutory appeal, the District of Columbia Court of Appeals affirmed in relevant part. *Id.* at 1-26.

1. While driving under the influence of alcohol in the early morning hours of October 7, 2010, petitioner struck and killed a pedestrian. A grand jury in the District of Columbia subsequently returned an indictment charging petitioner with voluntary manslaughter, leaving the scene of a collision involving personal injury, and driving under the influence of alcohol, all in violation of District of Columbia law. Pet. App. 2 & nn.1-4; Gov't C.A. Br. 1.

2. The case proceeded to trial, and petitioner asked that the jury be instructed on the lesser-included offense of negligent homicide as an alternative to the voluntary-manslaughter charge in Count 1. Petitioner further requested that the jury be instructed that it need only use "reasonable efforts" to reach a verdict on the greater offense of voluntary manslaughter before considering the lesser offense of negligent homicide. Pet. App. 3, 29; see Criminal Jury Instructions for the District of Columbia 2.401(A) & comment, at 2-101 to 2-102 (5th ed. 2012) (D.C. Jury Instructions) (explaining that the pattern instructions include an "instruction on 'reasonable efforts' * * * for use when it is requested

by the defendant"). The government initially proposed that the jury instead be given a so-called "acquittal first" instruction, but later withdrew that request. Gov't C.A. Br. 4. In accordance with petitioner's proposal, the trial court therefore instructed the jury that

> [a]s to the offense in Count 1, first, you should consider manslaughter. If your verdict is guilty, do not consider negligent homicide. If your verdict is not guilty, consider negligent homicide. And if, after making all reasonable efforts to reach a verdict on the greater charge you are unable to do so, you may go on to consider negligent homicide.

Pet. App. 59. After the jury instructions were given, petitioner confirmed that she did not object to this instruction. Gov't C.A. Br. 4.

During jury deliberations, jurors sent out two notes indicating that they were having difficulty with the manslaughter charge. One note asked the court to further define a term ("conscious disregard") relevant to the manslaughter charge, while a second note asked the court to further explain concepts of causation and foreseeability. After receiving answers to these questions, and after almost 15 hours of deliberations spread over multiple days, the jury sent out a final note stating, "[w]e have reached our decision on all three counts." Pet. App. 3, 29-30.

In response to this note, the trial judge announced that she "propose[d] to take the verdict" and confirmed that defense counsel wanted "a poll of the jury if there [was] a guilty verdict." Pet. App. 30. The court then brought the jury back into the courtroom to deliver its verdict. The following exchange with the foreperson ensued:

> THE COURT: * * * Ma'am, [h]as the jury reached a unanimous verdict on each of the counts?
>
> THE FOREPERSON: Yes.
>
> THE COURT: I'm going to start with Count 1. How doe[s] the jury find the defendant on the charge of manslaughter?
>
> THE FOREPERSON: We were unable to do so.
>
> THE COURT: And does that mean that you have not reached any verdict either way on that count, on that charge? Let me ask you the question again. Has the jury reached any verdict on the charge of manslaughter?
>
> THE FOREPERSON: No.
>
> THE COURT: All right. Moving on to the charge of negligent homicide. Has the jury reached a unanimous verdict on the charge of negligent homicide?
>
> THE FOREPERSON: Yes.
>
> THE COURT: How does the jury find the defendant on that charge?
>
> THE FOREPERSON: Guilty.

Id. at 31-32. After the foreperson announced guilty verdicts on the remaining two counts, the trial court polled the jury. *Id.* at 33. The jurors each confirmed his or her agreement with the verdicts.[1] The trial court

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[1] The court of appeals later noted that "[t]he jury indicated its compliance with the 'reasonable efforts' instruction" by underlining the relevant portion of the instruction ("*And if, after making all reasonable efforts to reach a verdict on the charge of Manslaughter, you are* ***unable to do so***"), but that "[t]he record d[id] not reveal whether the trial judge looked at the verdict form before dismissing the jury." Pet. App. 4 n.6.

then thanked the jurors for their service and excused them. *Ibid.*

Following the jury's dismissal, the trial court and the parties discussed scheduling a sentencing hearing, and the trial court asked, "[I]s there anything further?" The government asked that petitioner be held without bond pending sentencing. After granting that request, the trial court again asked, "Is there anything further?" The government made no further requests, and petitioner's only request was for a 21-day window to file any post-trial motions. Pet. App. 34-35; Gov't C.A. Br. 6.

Later that afternoon, the trial court's law clerk sent an e-mail to counsel stating that "the Judge [had] neglected to enter a mistrial as to the [v]oluntary manslaughter charge this afternoon" and that the judge would "do so on the court docket so that the record accurately reflects the result as to that charge, unless there is any objection by either party." Pet. App. 5. In response, petitioner's counsel objected "to the entry of a mistrial on the Voluntary Manslaughter charge, and * * * to the implication that [petitioner] can be retried on that count." *Ibid.* The government responded that it had no objection to a mistrial on the manslaughter count. Gov't C.A. Br. 7.

3. The government subsequently obtained a superseding indictment charging petitioner with voluntary and involuntary manslaughter and also moved for entry of a mistrial on the docket *nunc pro tunc* to June 21, 2011, the date of the jury's verdict on the other charges. Pet. App. 5. Petitioner moved to dismiss the superseding indictment, arguing (among other things) that the Double Jeopardy Clause barred retrial for voluntary manslaughter. *Ibid.*; see *id.* at 10-11.

Following briefing and a hearing, the trial court granted the government's motion for entry of a mistrial on the docket and denied petitioner's motion to dismiss. Pet. App. 5, 27-75. As relevant here, the court determined that it had "declared a *de facto* mistrial * * * when it discharged the jury after taking verdicts on the lesser offense of negligent homicide and the two other charges [petitioner] faced." *Id.* at 38. The record in the case, the court thus concluded, "should reflect the termination of [petitioner's] trial on the manslaughter charge by mistrial declared on June 21, 2011." *Id.* at 42.

The trial court also rejected petitioner's double-jeopardy claim on two independent grounds. The court first concluded from the entirety of the record that petitioner had impliedly consented to a mistrial on the manslaughter count. The court based this conclusion on petitioner's request for a "reasonable efforts" instruction and subsequent failure either to object or to request "alternate action" when the court twice asked "if there was 'anything further'" following the jury's verdict, "and where it was obvious that the court was treating the outcome on the manslaughter charge as it if were a hung jury." Pet. App. 55-56. Instead, the court found, petitioner "deliberately and for tactical reasons stood silent, calculating that the government, or the court, or both, were failing to make a record that would withstand a double jeopardy challenge." *Id.* at 55.

The trial court separately determined that retrial was not barred under the Double Jeopardy Clause because the "totality of the circumstances"—the length of the jury's deliberations, the two jury notes, and the foreperson's statement "that the jury was 'unable' to reach a verdict" on the manslaughter charge—showed "that the jury was genuinely deadlocked on" that charge and that

declaration of a mistrial "therefore was based upon manifest necessity." Pet. App. 59-60.

4. On petitioner's interlocutory appeal, the court of appeals affirmed in relevant part. Pet. App. 1-26.[2] As an initial matter, the court of appeals rejected petitioner's threshold contentions that a mistrial had not occurred at all (because the trial court did not use the word "mistrial" at the time the jury was dismissed) and that the court thus had improperly "authorize[d] a *nunc pro tunc* docket entry." *Id.* at 10-11. The court of appeals further noted that petitioner had "not argue[d] on appeal that the jury's verdict constituted an 'implied acquittal' on the voluntary manslaughter charge." *Id.* at 12 n.9.

Turning to the constitutional question, the court of appeals explained that the Double Jeopardy Clause does not bar retrial when a defendant consents to a mistrial. Pet. App. 12-13. Such consent, the court explained, "need not be express, but may be implied from the totality of circumstances attendant on a declaration of mistrial." *Id.* at 13 (internal quotation marks and citation omitted). The court then determined from the totality of the circumstances that petitioner had impliedly consented to a mistrial. In particular, "where a 'reasonable efforts' instruction was explicitly requested by counsel, where the jury, so instructed, announced that it was unable to reach a verdict on the greater offense, and where counsel had an opportunity to object to a mistri-

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[2] The court of appeals held that, in light of the jury's guilty verdict on the negligent-homicide charge at the first trial, the Double Jeopardy Clause barred retrial on the involuntary-manslaughter count of the superseding indictment. Pet. App. 19-25. Petitioner separately appealed her convictions on the remaining counts at the first trial. That appeal remains pending before the court of appeals.

al," petitioner's consent could be implied from her "failure to object to the [] court's dismissal of the jury." *Id.* at 18 (alteration in original) (quoting *United States* v. *Ham*, 58 F.3d 78, 83 (4th Cir.), cert. denied, 516 U.S. 986 (1995)). Having concluded that petitioner consented to a mistrial, the court of appeals did not reach the trial court's alternative ruling that, even absent petitioner's consent, a mistrial was justified by the jury's deadlock and thus supported by manifest necessity. *Id.* at 19 n.13.

ARGUMENT

Petitioner renews her contention (Pet. 11-28) that the Double Jeopardy Clause prohibits her retrial on the voluntary-manslaughter charge. The court of appeals correctly rejected that contention, and its fact-bound ruling does not conflict with any holding of this Court, a state high court, or a federal court of appeals. In addition, the mistrial was supported by manifest necessity, providing an alternative ground for affirmance even if petitioner did not consent. Further review is unwarranted.

1. The court of appeals correctly held that the Double Jeopardy Clause does not bar petitioner's retrial on the voluntary-manslaughter charge. Pet. App. 1-26.

a. The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The "Clause protects against being tried twice for the same offense." *Blueford* v. *Arkansas*, 132 S. Ct. 2044, 2048 (2012). It "does not, however, bar a second trial if the first ended in a mistrial," *ibid.*, either because the jury is unable to agree on a verdict or because the defendant consents to a mistrial. See *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982); *United States* v.

Dinitz, 424 U.S. 600, 607 (1976). The defendant's consent to a mistrial may come in the form of a motion or express request for that result, see *Kennedy*, 456 U.S. at 672-673, but consent may also be inferred from the circumstances, such as where a defendant who is aware of the possibility of a mistrial declaration fails to object to dismissal of the jury despite an opportunity to do so. See, *e.g.*, *United States* v. *Ham*, 58 F.3d 78, 83-84 (4th Cir.), cert. denied, 516 U.S. 986 (1995); *United States* v. *DiPietro*, 936 F.2d 6, 9-10 (1st Cir. 1991).

The court of appeals correctly applied these principles in determining that petitioner's retrial on the voluntary manslaughter charged is not barred by the Double Jeopardy Clause because she impliedly consented to a mistrial on that charge. As the court explained, petitioner's requested jury instruction on reasonable efforts reflected a "legal strategy [that] anticipated that the jury might return a verdict without unanimously deciding all the charges." Pet. App. 16. The double-jeopardy implications of that choice should not have been lost on petitioner. Prior decisions of the court of appeals had established that, "where the jury hangs on a greater offense but convicts on a lesser-included, * * * the government may retry the defendant on the greater count." 1 Public Defender Service for the District of Columbia, *Criminal Practice Institute Practice Manual* 9.12 (2009 ed.) (citing *United States* v. *Allen*, 755 A.2d 402 (D.C. 2000), cert. denied, 533 U.S. 932 (2001), and *Holt* v. *United States*, 805 A.2d 949 (D.C. 2002)). In light of that case law, the Public Defender Service in the District of Columbia had advised defense counsel to "seriously consider requesting the 'acquittal first' jury instruction instead of 'reasonable efforts.'" *Ibid.* The prospect of a non-unanimous jury, and the concomitant

potential for a retrial on any hung counts, thus could not have caught petitioner off guard.

Nor was this a case in which the trial judge deprived the defendant of an opportunity to object to the dismissal of a jury that had failed to return a unanimous verdict. Cf. *United States* v. *Jorn*, 400 U.S. 470, 487 (1970) (plurality opinion) (noting that "the trial judge acted so abruptly in discharging the jury that," had the defendant wanted "to object to the discharge of the jury, there would have been no opportunity to do so"). Instead, the trial court determined—and petitioner conceded on appeal, Pet. App. 17—that her counsel had the opportunity to object, including during a colloquy where the judge twice asked counsel whether there was "anything further" to cover before adjourning. *Id.* at 53; see, *e.g.*, *United States* v. *Gantley*, 172 F.3d 422, 429 (6th Cir. 1999) (finding consent to a mistrial where, among other things, counsel stayed silent after the judge "essentially invited an objection by asking counsel if there was 'anything else' to address").[3]

In short, the court of appeals correctly determined from the totality of the circumstances—defense counsel's strategic decisions to request a "reasonable efforts" instruction and, after the jury "announced that it was unable to reach a verdict on the greater offense" and was polled, to stand silent as the trial court dismissed

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[3] Petitioner's conceded opportunity to object distinguishes this case from the concerns expressed by the dissent in *Renico* v. *Lett*, 559 U.S. 766 (2010) (cited at Pet. 14). In the text preceding the footnote cited by petitioner, the *Renico* dissent agreed that "it would have been preferable if [the defendant] had tried to lodge an objection," but believed the absence of an objection to be "irrelevant" where "defense counsel was given no meaningful opportunity to do so." *Id.* at 794 (Stevens, J., dissenting).

the jury—that petitioner had consented to a mistrial on the voluntary manslaughter charge. Pet. App. 18; see also, *e.g.*, *Ham*, 58 F.3d at 84 & n.4 (finding defendant "impliedly consented to the district court's dismissal of the jury" when counsel failed to object as verdict was read, jury was polled, the court thanked jurors for their service, and the court dismissed them).

b. Petitioner's challenges to the court of appeals' fact-bound determination lack merit. She renews her contention (Pet. 25-28) that the court of appeals erred in applying the double-jeopardy rules governing mistrials because the trial court did not use the term "mistrial" in dismissing the jury and there was thus (she says) no mistrial to consent to.[4] As the court of appeals explained, however, the trial judge need not "articulate the pronouncement of a mistrial using some particular verbal formulation such as 'I declare a mistrial' or 'I order a mistrial.' The case law does not require that." Pet. App. 10 (quoting *United States* v. *Warren*, 593 F.3d 540, 545 (7th Cir.), cert. denied, 131 S. Ct. 428 (2010)); see also *Warren*, 593 F.3d at 546 (finding "no case law interpreting [the Federal Rules of Criminal Procedure] as requiring a formal 'order' or 'declaration'" of a mistrial). And what the judge here did was "certainly the functional equivalent" of such a formal declaration, Pet. App. 10 (quoting *Warren*, 593 F.3d at 546): the judge learned from the jurors that they were "unable" to reach a unanimous verdict on the manslaughter charge, *id.* at 3; "received the jury's verdict" on the remaining charges;

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[4] The trial court did use the term "mistrial" when, two hours after adjourning, the court's law clerk sent an e-mail to counsel stating that the judge had "neglected to enter a mistrial as to the [v]oluntary manslaughter charge" and that she would make that docket entry "unless there is any objection by either party." Pet. App. 5.

"conducted a poll to confirm that all jurors were in agreement[;] thanked the jurors for their service[;] and excused them from the courthouse." *Id.* at 10. No magic words were needed to give effect to the "obvious" fact "that the court was treating the outcome on the manslaughter charge as if it were a hung jury." *Id.* at 56.

Petitioner also argues more broadly (Pet. 12-16) that the court of appeals erred in relying on her counsel's silence, because defense attorneys cannot be expected to "speak up to protect the government's opportunity to retry the accused." Pet. 13. But that view misapprehends the nature of the constitutional protections at stake. The Double Jeopardy Clause serves not just as a bar against a second trial, but to protect "the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978) (quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)). As the court of appeals concluded, an attorney interested "in obtaining a verdict from the first jury"—and thus "preserving" that "valued" aspect of the double-jeopardy right—can be expected to do so by objecting to the jury's dismissal. Pet. App. 18 (internal citation and quotation marks omitted). Moreover, potentially adverse consequences that flow from a defendant's failure to lodge a timely objection is not only a "familiar" aspect of criminal procedure generally, see *United States* v. *Olano*, 507 U.S. 725, 731 (1993), it also directly applies to double-jeopardy claims in particular. See, *e.g.*, *United States* v. *Honken*, 541 F.3d 1146, 1154 (8th Cir. 2008) (finding claim that an indictment is multiplicitous in violation of the Double Jeopardy Clause is waived if not raised before trial), cert. denied, 558 U.S. 1091 (2009). Accordingly, nothing "stunning" (Pet. 12) occurred when the court of appeals took defense

counsel's strategic silence as the jurors filed out the door as one circumstance signaling petitioner's consent to a mistrial on the voluntary-manslaughter charge.

2. Petitioner contends (Pet. 17-21) that this Court's review is warranted to resolve an asserted lower-court conflict over whether an attorney, faced with potential jury deadlock, is capable of consenting to a mistrial on his client's behalf. This Court has previously denied a petition for a writ of certiorari asserting the same circuit conflict, *Urgent* v. *United States*, 131 S. Ct. 999 (2011) (No. 10-6773), and the same result is warranted here.

a. Contrary to petitioner's suggestion, the courts of appeals widely agree that the decision to consent to a mistrial need not be made only by the defendant herself. The Court in *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (cited at Pet. 17), stated that a defendant "has the ultimate authority to make certain fundamental decisions regarding the case[:] * * * whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." At least two courts of appeals have interpreted *Jones* as setting forth the entire universe of decisions so fundamental as to be non-delegable to defense counsel. See *Sistrunk* v. *Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996); *United States* v. *Boyd*, 86 F.3d 719, 723 (7th Cir. 1996), cert. denied, 520 U.S. 1231 (1997). Two other circuits have specifically addressed the decision at issue here (whether to consent to a mistrial) and have held that it is not so fundamental. See *United States* v. *Washington*, 198 F.3d 721, 723 (8th Cir. 1999); *Watkins* v. *Kassulke*, 90 F.3d 138, 143 (6th Cir. 1996). And another circuit has held that "decisions regarding a mistrial" are broadly and appropriately committed to counsel. *United States* v. *Chapman*, 593 F.3d 365, 368 (4th Cir. 2010), cert. denied, 131 S. Ct. 900 (2011); see also *Galowski* v. *Mur-*

phy, 891 F.2d 629, 639 (7th Cir. 1989) ("The decision whether to move for a mistrial or instead to proceed to judgment with the expectation that the client will be acquitted is one of trial strategy."), cert. denied, 495 U.S. 921 (1990)).

b. Petitioner asserts (Pet. 18-19) that the above authorities are in conflict with the Tenth Circuit's decision in *United States* v. *Rich*, 589 F.2d 1025 (1978), and other cases that echo the "general sentiment" expressed in *Rich*. But the 35-year-old language from *Rich* upon which petitioner relies is dictum that is contrary to this Court's decisions.

In *Rich*, the court of appeals held that double jeopardy barred the defendant's retrial when the trial judge "sua sponte" discharged the jury, without defense counsel's consent. 589 F.2d at 1032. The court's holding is fully supported by its determination that the defendant's counsel had not consented to the mistrial: "We hold that [defense counsel] did not consent, expressly or impliedly, to the trial court's spontaneous, unilateral action in ordering the discharge of the jury." *Ibid.*

Rich went on to "further hold" that defense counsel "was not empowered or authorized * * * to waive [the defendant's] right to be tried by the chosen jury." 589 F.2d at 1032. Subsequent decisions by other courts have correctly characterized that statement as dictum. See *Watkins*, 90 F.3d at 141 (*Rich*'s treatment of defense counsel's authority to consent to a mistrial is "plainly dictum" and "wholly gratuitous"); *Washington*, 198 F.3d at 724 n.4 (describing the relevant portion of *Rich* as "*dictum*"). And no Tenth Circuit case has followed *Rich* to hold that consent to a mistrial is a fundamental decision that can be made only by the defendant.

Moreover, *Rich*'s explanation for why the decision to consent to a mistrial is personal cannot be squared with this Court's subsequent decision in *Jones*, *supra*, and later cases. *Rich* reasoned that "[i]nasmuch as this right is anchored to the United States Constitution, it cannot be waived by one other th[a]n the accused." 589 F.2d at 1032. But many decisions affect rights "anchored to the * * * Constitution," yet *Jones* identifies only four decisions that rank as fundamental. Indeed, the Court's holding in *Florida* v. *Nixon*, 543 U.S. 175, 187-189 (2004), squarely disproves the principle applied in *Rich*. The right to contest guilt at the guilt phase of a capital murder trial is "anchored to the * * * Constitution," yet *Nixon* holds that the defendant's consent is not required to authorize defense counsel to concede guilt under those circumstances. See *Gonzalez* v. *United States*, 553 U.S. 242, 243 (2008) (holding that defense counsel may consent to permit a magistrate judge to preside over jury selection in a felony trial).

Beyond *Rich*, petitioner points (Pet. 17, 19) to statements in various cases describing double jeopardy rights as "a personal privilege." She suggests based on that description that, to be valid, a waiver of double-jeopardy rights must be knowing, intelligent, and voluntary under the standard of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). But as petitioner appears to acknowledge (Pet. 21), her plea for a heightened waiver standard is contrary to this Court's decision in *Dinitz*, *supra*. The Court in *Dinitz* rejected the contention that "the defendant's interest in going forward before the first jury [i]s a constitutional right comparable to the right to counsel," waiver of which must satisfy the *Zerbst* standard. 424 U.S. at 609 n.11. That argument, the Court explained, "fails to recognize that the protection against

the burden of multiple prosecutions underlying the constitutional prohibition against double jeopardy may be served by a mistrial declaration and the concomitant relinquishment of the opportunity to obtain a verdict from the first jury." *Ibid.* And the Court read its earlier cases as having "implicitly rejected the contention that the permissibility of a retrial following a mistrial * * * depends on a knowing, voluntary, and intelligent waiver of a constitutional right." *Ibid.* As the court of appeals correctly noted (Pet. App. 15 n.10), *Dinitz* thus forecloses petitioner's plea for a heightened waiver standard.

Further undercutting any suggestion that relinquishment of double jeopardy rights requires a personal, knowing waiver is *United States* v. *Broce*, 488 U.S. 563 (1989). In that case, the Court held that a valid guilty plea foreclosed a potential double-jeopardy defense even absent an "intentional relinquishment or abandonment of a known right or privilege." *Id.* at 573 (quoting *Johnson*, 304 U.S. at 464). The Court required no such "conscious waiver" of the double-jeopardy defense. *Ibid.* Accordingly, in *Broce*, counsel's failure to discuss a potential double-jeopardy defense with the defendant, and the consequent lack of a personal relinquishment of that defense, had "no bearing." *Id.* at 572-574.

None of the cited court of appeals cases characterizing double-jeopardy rights as "personal" deviates from the principle stated in *Dinitz*. As an initial matter, those cases involved multiplicity claims rather than mistrials. Many of the cases, moreover, state outright that waivers of double-jeopardy rights "may be either express or implied." *Levin* v. *United States*, 5 F.2d 598, 600 (9th Cir.), cert. denied, 269 U.S. 562 (1925)); see

Brady v. *United States*, 24 F.2d 399, 405 (8th Cir. 1928) (same). And others, such as those from the Second and Third Circuits, come from courts of appeals that have separately held that a defendant may impliedly consent to a mistrial and, by so doing, waive double-jeopardy protections. See, *e.g.*, *Love* v. *Morton*, 112 F.3d 131, 138-139 (3d Cir. 1997); *United States* v. *Goldstein*, 479 F.2d 1061, 1067 (2d Cir.), cert. denied, 414 U.S. 873 (1973).

c. In any event, this case would not be an appropriate vehicle to resolve any issues about counsel's ability to consent to a mistrial. A defendant's consent is not required when a mistrial is otherwise supported by "manifest necessity." See *Kennedy*, 456 U.S. at 672. A jury's inability to reach a verdict "remains the prototypical example" of manifest necessity, *ibid.*, and the trial court here found, in denying petitioner's motion to dismiss the superseding indictment, that "the jury was genuinely deadlocked on the manslaughter charge" and that "[t]he mistrial therefore was based upon manifest necessity." Pet. App. 60; see Gov't C.A. Br. 28-38 (urging rejection of double-jeopardy claim on this ground); Pet. App. 19 n.13 (court of appeals noting that it need not decide this question).

That determination was well within the "broad discretion" afforded trial judges to declare a mistrial in the context of jury deadlock. *Washington*, 434 U.S. at 509-510. As the trial court explained, "the totality of the circumstances before the court" at the time of the jury's return warranted the conclusion that the jury "was unable to reach a verdict" on the voluntary manslaughter charge "and that a mistrial should be declared." Pet. App. 59. The jury had deliberated for more than two days; it had "sent out two notes requesting clarification

of terms" relevant to the manslaughter charge; and, having been instructed to move on to the lesser-included offense only after using all "reasonable efforts" on the greater offense, it had told the court that it "was 'unable' to reach a verdict on the greater charge of manslaughter." *Id.* at 60. The trial court could reasonably conclude that those circumstances, taken together, established a genuine deadlock on the charge and justified a mistrial.

Because the trial court's double-jeopardy ruling is supported by manifest necessity, petitioner would not be entitled to relief even if the court of appeals had erred in holding that she consented to a mistrial. This case is therefore not an appropriate vehicle for reviewing the court of appeals' consent ruling.

3. Petitioner further seeks (Pet. 22-25) the Court's review to resolve an asserted conflict among lower courts on the double-jeopardy implications of the "reasonable efforts" jury instruction. No conflict exists on the scenario involved in this case. And this particular case would not be a suitable vehicle for addressing the issue in any event.

a. As petitioner points out (Pet. 22-23 & nn.4-5), state and federal jurisdictions employ different instructions (known as "transition" instructions) in cases where a jury is instructed on lesser-included offenses. Those jurisdictions using "acquittal first" (or "hard transition") instructions require that the jury complete its deliberations on the greater offense before considering the lesser-included one. See *Blueford*, 132 S. Ct. at 2054 (Sotomayor, J., dissenting). A "reasonable efforts" (or "unable to agree") instruction permits jurors to consider the lesser offense only after using all reasonable efforts to reach a unanimous verdict on the greater charge.

Pet. App. 3, 57. Courts have long recognized that neither "form of instruction is wrong as a matter of law" and that both present advantages and disadvantages from the standpoints of the prosecution and the defense. *United States* v. *Tsanas*, 572 F.2d 340, 345-346 (2d Cir.) (Friendly, J.), cert. denied, 435 U.S. 995 (1978).[5]

Contrary to petitioner's suggestion, however, there is no conflict among the lower courts in cases with circumstances like those here. Federal and state courts agree that when a jury returns a verdict of guilty on a lesser-included offense after deadlocking on the greater offense, retrying the defendant on the greater offense does not violate the Double Jeopardy Clause. See, *e.g.*, *United States* v. *Bordeaux*, 121 F.3d 1187, 1193 (8th Cir. 1997) ("[W]here the jury expressly indicates that it is unable to reach an agreement on the greater charge, a conviction on a lesser included offense does not constitute an implied acquittal of the greater offense and presents no bar to retrial on the greater offense."); *Paul* v. *Henderson*, 698 F.2d 589, 592 n.6 (2d Cir.) (no bar to

[5] Petitioner errs in stating (Pet. 22 n.4) that the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits "require" trial courts to give a reasonable efforts instruction. The commentary to the Sixth, Eighth, and Tenth Circuit rules cited by petitioner confirms that those courts afford trial judges discretion to give that instruction if the defendant requests it. See 6th Cir. Pattern Crim. Jury Instructions 8.07 comm. comment (2013); Manual of Model Crim. Jury Instructions for the 8th Cir. 3.10 comm. comment (2013); 10th Cir. Crim. Pattern Jury Instructions 1.33 comment (2011). The Fifth Circuit Pattern Jury Instructions (Criminal Cases) 1.33 (2012) does contain the reasonable-efforts language, but that court has not foreclosed giving a different instruction at a defendant's request. See *United States* v. *Buchner*, 7 F.3d 1149, 1153 n.5 (5th Cir. 1993), cert. denied, 510 U.S. 1207 (1994). And the Seventh Circuit Pattern Criminal Jury Instructions 7.02 (2012) cited by petitioner concerns a verdict form and does not address reasonable-efforts language.

retrial on deadlocked felony murder count following conviction of predicate felony because "the jeopardy never terminated"), cert. denied, 464 U.S. 835 (1983); *People* v. *Fields*, 914 P.2d 832, 838 (Cal. 1996) (Double Jeopardy Clause does not prohibit retrial on greater offense "when the jury expressly deadlocks on the greater offense but returns a verdict of conviction on the lesser included offense."); *Rower* v. *State*, 472 S.E.2d 297, 298 (Ga. 1996) (holding that "where * * * the State seeks to prosecute a defendant for two offenses in a single prosecution, one of which is included in the other, and the defendant receives a mistrial on the greater offense, the remaining conviction of the lesser offense does not bar retrial of the greater offense," and noting that "[t]he case law from around the country is completely in line with this principle") (internal quotation marks and citations omitted); *State* v. *Griffiths*, 659 A.2d 876, 878-880 (Md. 1995); *Commonwealth* v. *McCane*, 539 A.2d 340, 345-346 (Pa. 1988); *State* v. *Martinez*, 905 P.2d 715, 716-718 (N.M. 1995).

The state high court decisions cited by petitioner (Pet. 23-24) are not to the contrary. *People* v. *Boettcher*, 505 N.E.2d 594, 595-598 (1987), involved the application of a New York statute under which a verdict of guilty on a lesser-included offense served as an acquittal on the greater offense, thus implicating the "implied acquittal" rule of this Court's decisions in *Green* v. *United States*, 355 U.S. 184 (1957), and *Price* v. *Georgia*, 398 U.S. 323 (1970). The Arizona Supreme Court's decision in *State* v. *LeBlanc*, 924 P.2d 441 (1996), as well as the Connecticut Supreme Court's decision in *State* v. *Sawyer*, 630 A.2d 1064 (1993), involved the question of whether the jury should be given an acquittal-first instruction, which requires it to acquit on the charged offense before con-

sidering a lesser-included offense. Although some of these state cases discussed the potential double-jeopardy implications of a particular jury instruction, see *id.* at 1075; *Dresnek* v. *State*, 718 P.2d 156, 159 (Alaska 1986) (Rabinowitz, C.J., dissenting), no double jeopardy issue was actually presented.

This Court's recent decision in *Blueford*, *supra*, also provides no basis for reviewing the double-jeopardy consequences of the reasonable-efforts instruction. See Pet. 25. The jury in *Blueford* was given an acquittal-first instruction, not a reasonable-efforts instruction. See 132 S. Ct. at 2049; *id.* at 2054 (Sotomayor, J., dissenting). And as petitioner acknowledges (Pet. 25), this Court held even under the former instruction that a jury's report, before completing deliberations, that it had voted unanimously against conviction on a greater charge did *not* constitute an acquittal terminating jeopardy on that charge. 132 S. Ct. at 2050-2052. If a report of a unanimous vote against guilt does not terminate jeopardy on the greater charge, then neither (*a fortiori*) should a jury's statement that it was unable to agree on a unanimous verdict. Pet. App. 3-4.

b. In any event, this case would not be an appropriate vehicle for addressing the double-jeopardy implications of the reasonable-efforts instruction, for two reasons.

First, to the extent that any lower courts considering the reasonable-efforts instruction have assumed that a jury's failure to return a verdict on a greater offense could preclude retrial once the jury has found guilt on a lesser-included offense, they made that assumption based on the implied-acquittal rule articulated in this Court's decisions in *Green*, *supra*, and *Price*, *supra*. Those decisions bar retrial on the greater charge when

the jury is silent on that charge but convicts on a lesser-included offense. See, *e.g.*, *Sawyer*, 630 A.2d at 1075. Petitioner, however, did not argue below (Pet. App. 12 n.9) and does not argue in this Court that the jury's inability to reach a unanimous verdict on the voluntary manslaughter charge amounted to an implied acquittal. And as the court of appeals noted, such an argument would have been unavailing because "the jury expressly indicated that it was unable to reach an agreement on the greater charge." *Ibid.* (citation, internal quotation marks, and alterations omitted).

Second, this case would not be an appropriate vehicle for addressing the double-jeopardy implications of a reasonable-efforts instruction because petitioner affirmatively requested that instruction. As explained above, District of Columbia courts, like those of many other state and federal jurisdictions, leave to the defendant the choice whether to request a reasonable-efforts instruction. See D.C. Jury Instructions 2.401(A) & comment, at 2-101 to 2-102. Petitioner chose to request one as part of her "legal strategy," Pet. App. 16, and was presumably aware of the risks of that strategy, see *Tsanas*, 572 F.2d at 345-346, including the double-jeopardy implications under the court of appeals' prior decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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