No. 19-605

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

PHILIP JOHN MARTIN,

Respondent.

On Petition for a Writ of Certiorari
to the Arizona Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The State of Arizona charged Philip Martin with first-degree murder. After a trial, the jury returned a verdict of guilty on second-degree murder, indicating that it was unable to reach agreement on the charge of first-degree murder. The State did not seek, and the trial court did not declare, a mistrial as to the greater offense. As the State has conceded, the jury's conviction of Martin on second-degree murder precluded the State from retrying Martin for first-degree murder at that point and would have done so after an unsuccessful appeal. But Martin succeeded on appeal, overturning his conviction on second-degree murder. On remand, the State again indicted and tried Martin for first-degree murder. The question presented is:

Whether the Fifth Amendment's bar on double jeopardy prohibits retrial of a defendant on a greater offense when a jury convicts him on a lesser-included offense while indicating that it could not reach agreement on the greater offense, no mistrial is declared as to the greater offense, and the defendant successfully appeals his conviction on the lesser-included offense.

RELATED PROCEEDINGS

Mohave County Superior Court:

State v. Philip Martin, CR-2012-01326 (Nov. 8, 2013) (judgment and sentence)

State v. Philip Martin, CR-2012-01326 (Aug. 1, 2016) (judgment and sentence)

Arizona Court of Appeals:

State v. Philip Martin, 1 CA-CR 13-0839 (Dec. 23, 2014) (memorandum decision)

State v. Philip Martin, 1 CA-CR 16-0551 (June 19, 2018) (opinion)

Arizona Supreme Court:

State v. Philip Martin, CR-15-0034-PR (July 10, 2015) (order denying review of State's petition for review)

State v. Philip Martin, CR-15-0034-PR (Aug. 9, 2019) (opinion)

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STATEMENT OF THE CASE

The Fifth Amendment to the United States Constitution provides 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 case involves application of that prohibition on "double jeopardy" when a jury convicts a defendant of a lesser-included offense and returns no verdict on a greater offense; the jury is discharged with no declaration of mistrial or finding of manifest necessity; the conviction on the lesser offense is overturned on appeal; and the government attempts to retry the defendant on the greater offense on which he was not convicted in the first trial.

1. Resolution of the question presented requires determining which of two distinct lines of this Court's decisions applies in these circumstances.

a. i. The first line of cases began with *Green v. United States*, in which a defendant was charged with first-degree murder but was convicted of the lesser-included offense of second-degree murder. 355 U.S. 184, 185-186 (1957). In that case, the jury was instructed that it could find the defendant guilty of *either* first-degree murder or second-degree murder; in convicting on the latter offense, the jury was silent as to the former. *Ibid.* After the defendant had his conviction for second-degree murder overturned on appeal, the United States tried him again on first-degree murder, over his objection. *Id.* at 186. This Court held that the Double Jeopardy Clause prohibited the government from retrying the defendant on first-degree murder. *Id.* at 198.

The Court explained in *Green* that "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." 355 U.S. at 187. The Court noted that the prohibition on double jeopardy has deep roots in the common law, which "not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." *Ibid.* (quoting *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1874)). "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence," the Court explained, "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" because doing so subjects a defendant "to embarrassment, expense and ordeal," "compel[s] him to live in a continuing state of anxiety and insecurity," and "enhanc[es] the possibility that even though innocent he may be found guilty." *Id.* at 187-188.

Applying those principles to the case at hand, the Court held that the United States was not permitted to retry the defendant on first-degree murder. 355 U.S. at 188-198. The Court explained that "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 on the same charge." *Id.* at 188. Acknowledging that "the jury was dismissed without returning any express verdict on" first-degree murder, and noting that the Court "need not" view "the jury's verdict as an implicit acquittal on

the charge of first degree murder," the Court concluded 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 190-191. The Court emphasized that "[a]fter the original trial, but prior to his appeal, it is indisputable that [the defendant] could not have been tried again for first degree murder" and that "even after appealing the conviction of second degree murder he still could not have been tried a second time for first degree murder had his appeal been unsuccessful." *Id.* at 191. The Court held that the defendant did not waive his right to double-jeopardy protection with respect to the charge of first-degree murder by successfully appealing his conviction for second-degree murder. *Id.* at 191-192. "When a man has been convicted of second degree murder and given a long term of imprisonment," the Court explained, "it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction on the lesser offense." *Ibid.* The Court held instead that "[t]he law should not, and in our judgement does not, place the defendant in such an incredible dilemma." *Id.* at 193.

ii. The Court later reaffirmed the principles of *Green* in *Price v. Georgia*, where a jury convicted the defendant of the lesser-included offense of voluntary manslaughter but made no determination on the greater charged offense of murder. 398 U.S. 323, 324 (1970). The Court held that the defendant could not be retried for the greater offense on remand from a successful appeal of his conviction on the lesser offense. *Id.* at 327-332. Discussing *Green*, the Court

made clear that the holding of *Green* did not depend exclusively on the fiction that a jury's silence on a greater offense should be viewed as an "implicit acquittal" on that offense. *Id.* at 328. Rather, the holding of *Green* depended on the broader (and independent) proposition that a defendant's "jeopardy on the greater charge had ended when the first jury 'was given a full opportunity to return a verdict' on that charge *and instead* reached a verdict on the lesser charge." *Id.* at 329 (quoting *Green*, 355 U.S. at 191) (emphasis added).

The Court in *Price* made clear that, although the defendant's successful appeal meant that he faced "continuing jeopardy" with respect to the charge on which he was convicted, the Court had "consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge." 398 U.S. at 329 (footnote omitted). More recently, this Court has stated that in *Green* and *Price*, "we held that the Double Jeopardy Clause is violated when a defendant, tried for a greater offense and convicted of a lesser included offense, is later retried for the greater offense." *Blueford v. Arkansas*, 566 U.S. 599, 608 (2012).

b. The second line of cases is best exemplified by *Richardson v. United States*, in which the Court addressed whether a defendant could be retried for an offense after a mistrial was declared in his first trial because of a jury deadlock. 468 U.S. 317 (1984). The Court explained that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such an acquittal, which terminates

the original jeopardy." *Id.* at 325. Looking to history, the Court noted that it had "been established for 160 years . . . that a failure of the jury to agree on a verdict was an instance of 'manifest necessity' which permitted a trial judge to terminate the first trial and retry the defendant because 'the ends of public justice would otherwise be defeated.'" *Id.* at 323-324 (quoting *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)). Explaining that the Court had "constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause," *id.* at 324 (citing *United States v. Logan*, 144 U.S. 263, 297-298 (1892)), the Court held that "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which [a defendant] was subjected." *Id.* at 326. "The Government, like the defendant," the Court reasoned, "is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree." *Ibid.*

In a related line of cases, this Court has made clear that the bar for declaring a mistrial before a verdict is rendered is a high one. The Court explained in *Arizona v. Washington*, for example, that a prosecutor bears a "heavy" "burden" in seeking such a mistrial, and "must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." 434 U.S. 497, 505 (1978). The Court explained that such a showing can be made when the trial court believes that a jury is unable to reach a verdict and the court exercises its discretion to declare a mistrial. *Id.* at 509-511.

2. In October 2012, respondent Philip John Martin shot and killed his neighbor on Martin's property

with a single shotgun blast. Pet. App. 2, 57. Martin admitted to the police that he shot his neighbor. *Id.* at 2, 21. Martin explained to the police and later testified that the neighbor ignored Martin's orders to leave his property and that he believed the neighbor was armed and intended to harm him. *Ibid.*

a. Petitioner State of Arizona charged Martin with premeditated first-degree murder and tried him before a jury. Pet. App. 2-3; Ariz. Rev. Stat. § 13-1105(A)(1). When charging a defendant with a greater offense and a lesser-included offense, States are generally free to choose between "reasonable efforts" instructions and "acquittal first" instructions. *See Blueford*, 566 U.S. at 612 (Sotomayor, J., dissenting); *State v. LeBlanc*, 924 P.2d 441, 442 (Ariz. 1996). In the former category, a jury is instructed that it may consider the lesser-included offense only after it either unanimously agrees to acquit on the greater offense or is unable to agree on a verdict on the greater offense after making "reasonable efforts" to do so. *LeBlanc*, 924 P.2d at 442. In the latter category, a jury is instructed that it may consider the lesser-included offense only after reaching a unanimous agreement to acquit on the greater charge. *Ibid.*

Arizona is a "reasonable efforts" State. *LeBlanc*, 924 P.2d at 442-444. The trial court therefore delivered the following standard jury instruction on the lesser-included offense of second-degree murder:

> You may find the defendant guilty of the less serious crime if all of you agree that the state has failed to prove the defendant guilty of the more serious crime beyond a reasonable doubt, or if after reasonable efforts you are

> unable to agree unanimously on the more serious crime, and you do all agree that the state has proven the defendant guilty of the less serious crime.

Pet. App. 3. The jury convicted Martin of second-degree murder. *Id.* at 3, 60. On the verdict form, the jury indicated that it was "[u]nable to agree" on the first-degree murder charge. *Id.* at 3, 59. No mistrial was declared, and no assessment of whether there was a manifest necessity for a mistrial on any count was made. Instead, the jury was discharged, and the court sentenced Martin to 16 years in prison. *Id.* at 3, 10, 69-70.

b. Martin appealed, and the court of appeals reversed. Pet. App. 42-52. The court held that the trial court erred by failing to instruct the jury on the crime-prevention defense provided under state law. *Id.* at 43, 45-48; Ariz. Rev. Stat. § 13-411. The court thus remanded for a new trial. Pet. App. 52. The Arizona Supreme Court denied the State's petition for review. *Id.* at 53-54.

c. On remand, the trial court granted the State's motion to retry Martin on first-degree murder, rejecting Martin's argument that doing so would violate the Constitution's prohibition on double jeopardy. Pet. App. 30-41. The court acknowledged that Martin "was already put on trial for First Degree Murder and should not be required to continue to 'run the gauntlet'"; wondered why the State should "be allowed another opportunity to convict [Martin] for First Degree Murder when [it] already had the opportunity to do so, and failed"; and noted that if Martin had not successfully appealed his conviction, "he could not have be[en] retried for First Degree Murder." *Id.* at 40. The court

nevertheless granted the State's motion because in its view the first jury's notation that it could not reach a verdict on first-degree murder foreclosed the possibility that it had expressly or impliedly acquitted Martin of that charge. *Id.* at 33-41.

After a retrial, the jury found Martin guilty of first-degree murder, and Martin was sentenced to life in prison. Pet. App. 4, 55-57.

d. Martin appealed, and the court of appeals affirmed. Pet. App. 19-29. The court relied on reasoning similar to the trial court's, explaining that "[t]he first jury clearly and formally stated it was unable to agree on the greater charge of first-degree murder after it was instructed that it could proceed to consider the lesser charge if after reasonable efforts it was unable to unanimously agree on first-degree murder." *Id.* at 20.

e. The Arizona Supreme Court granted Martin's petition for review and reversed. Pet. App. 1-18.

Relying on this Court's decision in *Green* and in subsequent cases, the Arizona Supreme Court held that the Double Jeopardy Clause prevented the State from retrying Martin on the charge of first-degree murder. Pet. App. 6-13. The court explained that, as in *Green*, "the jury [in this case] considered both the greater and lesser offense and 'refused to find [the defendant] guilty' of the greater charge." *Id.* at 6 (quoting *Green*, 355 U.S. at 190) (second brackets in original). "[I]n such circumstances," the court concluded, "jeopardy ended when the jury 'was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so.'" *Id.* at 6-7 (quoting *Green*, 355 U.S. at 191). "The

rule of *Green*," the court explained, is that "where the state had a full and fair opportunity to try the defendant on a charge and the jury refused to convict, jeopardy terminates when the jury is dismissed following its verdict, and therefore the state may not place the defendant in jeopardy again for that same charge." *Id.* at 7.

The Arizona Supreme Court rejected the State's argument that "it did not have a full and complete opportunity to convict Martin of first-degree murder in the first trial because the jury indicated it was unable to agree to a verdict on that charge." Pet. App. 9. The court explained that "the State fully prosecuted the first-degree murder charge but was unable to persuade the jury to convict." *Ibid.* "Such a situation, where the jury is unable to agree on one charge and convicts on the lesser offense," the court explained, "cannot alone justify a finding of 'extraordinary circumstances' or 'genuine deadlock' required to meet the state's heavy burden to continue jeopardy." *Ibid.* The court concluded that the State had not "demonstrated a 'manifest necessity' to support the trial court declaring a mistrial and discharging the jury because it was deadlocked." *Id.* at 9-10 (quoting *Washington*, 434 U.S. at 509). "The absence of that situation here," the court held, "distinguishes this case from *Richardson*." *Id.* at 10. "Here," the court reasoned, "the jury was not discharged because of a mistrial based on jury deadlock, but only after it had returned a complete verdict on the original indictment." *Ibid.*

Finally, the Arizona Supreme Court explained that the State's practice of using "a unitary process for jury consideration of greater and lesser-included of-

fenses," Pet. App. 10, "is calculated to avoid the deadlock jury that is a necessary predicate for a mistrial and for a second trial on the greater offense," *id.* at 11. Under that practice, "following a full and complete presentation of the evidence, the jury will first consider the greater offense, and if it is not convinced the evidence supports a guilty verdict, it will consider the lesser-included offense." *Ibid.* That system, the court explained, "'adequately protect[s]'" the State's "'interest in a full and fair adjudication of the charged offense.'" *Ibid.* (quoting *LeBlanc*, 924 P.2d at 443). The court thus concluded that, "as a necessary corollary in applying *Green* and *Washington*, when a verdict is reached on a lesser-included offense in accord with" the instructions set out in *LeBlanc*, "jeopardy terminates for the greater offense and the defendant may not be retried on the greater offense." *Ibid.*

The Arizona Supreme Court also rejected the State's argument that "it was Martin who extended jeopardy by deciding to appeal his second-degree murder conviction." Pet. App. 12. The court explained that the State had conceded "that if Martin had not appealed his conviction for second-degree murder, double jeopardy would have prohibited a new trial on the first-degree murder charge." *Ibid.* And the court rejected the State's argument that, "[b]y appealing a conviction on a lesser-included offense," Martin had "restart[ed] the jeopardy clock on a greater charge," noting that this Court had expressly rejected such an argument in *Green*. *Id.* at 13.

Holding that "trying Martin a second time for first-degree murder under the circumstances here violated his constitutional right to be free from double jeopardy," Pet. App. 13, the Arizona Supreme Court

vacated the court of appeals' decision and remanded the case to the trial court "to consider in the first instance whether to reduce Martin's conviction to the lesser-included offense, or, if Martin can show prejudice, to order a new trial," *id.* at 14.

THE PETITION SHOULD BE DENIED

The Supreme Court of Arizona correctly held that the Double Jeopardy Clause bars retrial of Martin on first-degree murder because his first jury was afforded a full opportunity to convict him of that offense but chose to convict him of the lesser-included offense of second-degree murder instead, and because no mistrial was declared on the greater offense. That decision conflicts with only one decision of another state court of last resort. This Court's review of that narrowest-possible conflict on a question that does not appear to arise with any frequency is unwarranted.

I. The Decision Below Does Not Implicate A Conflict Warranting This Court's Review.

Arizona errs in arguing (Pet. 18-30) that there is a widespread conflict among state courts of last resort and federal courts of appeals about how double-jeopardy principles apply in the circumstances presented here. Most of the decisions Arizona contends are in conflict with the decision below involved a different set of circumstances that are not present here. Even a superficial review of the cases reveals that the decision below implicates only the narrowest-possible conflict with only one other state court of last resort. This Court's immediate intervention to resolve that nascent and narrow conflict is unwarranted.

A. Arizona contends that the Arizona Supreme Court's decision conflicts with decisions of at least one

federal court of appeals and five other state courts of last resort. In all but one of those jurisdictions, however, there is no reason to believe that the outcome of this case would be any different than it was in the Arizona Supreme Court. The decision below does not conflict with any of those decisions.

1. Arizona errs in contending (Pet. 22-25) that decisions of the supreme courts of New Mexico and California, as well as the court of appeals of the District of Columbia conflict with the decision below. None of those decisions conflict because, unlike in this case, the trial court in each of those cases declared a mistrial on the greater offense, bringing the case within the exception to double jeopardy under *Richardson v. United States*, 468 U.S. 317 (1984)—and distinguishing those cases from this one, in which no mistrial was declared on any charge.

First, in *State v. Martinez*, the jury convicted the defendant of the lesser charge of aggravated battery but was unable to reach a verdict on the greater charge of attempted murder. 905 P.2d 715, 716 (N.M. 1995). At the request of the *defendant*, the trial court declared a *mistrial* on the greater offense. *Id.* at 717; *see State v. O'Kelley*, 822 P.2d 122, 123 (N.M. Ct. App. 1991), *cited in Martinez*, 905 P.2d at 717) (retrial on greater charge allowed when mistrial had been declared on that charge). That decision has no bearing on the question presented here, where no mistrial was declared and the Arizona court's decision depended on that fact. Pet. App. 9-10. In any case, the so-called greater and lesser charges in *Martinez* were charged as *separate* offenses, not as a greater and lesser-included offense—and the court declined to decide whether they could have been charged as such. 905

P.2d at 717-718. There is no question that a defendant can be retried in those circumstances—*i.e.*, when he has been convicted of one offense and a mistrial declared on a *separate* offense. The decision below therefore does not conflict with any decision of the Supreme Court of New Mexico.

Second, the same is true of *People v. Fields*, in which a jury convicted the defendant of lesser-included offenses but could not reach agreement on a greater offense. 914 P.2d 832, 834-835 (Cal. 1996). After inquiring with the jury about its deliberations, the trial court determined that the jury was hopelessly deadlocked on the greater charges and, with no objection from either party, declared a mistrial on those charges. *Id.* at 835. The defendant was then retried and convicted on the greater charges—and the California Supreme Court held that the retrial did not violate double jeopardy, *id.* at 835-838, although it did violate a state statute, *id.* at 840-843. That court therefore had no occasion to consider the situation presented here, where the court neither declared a mistrial nor made a finding of deadlock—and, in the words of the Arizona court, the state did not "demonstrate[] a 'manifest necessity' to support the trial court declaring a mistrial and discharging the jury." Pet. App. 9-10 (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)).

Third, the D.C. Court of Appeals also considered a case in which a trial court declared a mistrial—at the defendant's request—on a greater offense after a jury convicted the defendant of a lesser offense but was deadlocked on the greater. *United States v. Allen*, 755 A.2d 402, 403 (D.C. 2000). By its own terms, that court's holding is limited to circumstances in which a

"jury expressly states that it is unable to reach agreement on [a] greater offense . . . and the trial court has declared a mistrial as to the greater offense after the jury finds the defendant guilty of the lesser offense." *Id.* at 404. The court distinguished cases like *Green*, explaining that "this is not a case where, as in *Green*, *supra*, 'the jury was dismissed without returning any express verdict on the charge at issue without [the defendant's] consent.'" *Id.* at 409 (quoting *Green v. United States*, 355 U.S. 184, 191 (1957)) (brackets omitted). "By requesting a mistrial," the court explained, the defendant "consented to the jury's dismissal," bringing the case squarely within the rule of *Richardson*. *Ibid.*; *see ibid.* ("Double jeopardy principles generally have not prevented retrial of a defendant in state courts where the defendant was retried on a greater offense after the jury was unable to reach a verdict and the trial court declared a mistrial at the defendant's request."). Because those circumstances are not present here, that decision does not conflict with the decision below.[1]

2. Arizona also relies on the Supreme Court of Indiana's decision in *Cleary v. State*, 23 N.E.3d 664 (Ind. 2015). The court in that case considered whether a defendant could be retried on a greater offense after a jury convicted him of a lesser offense but deadlocked on the greater offense, and the trial court declined to enter a verdict on any offense, instead ordering a new trial. *Id.* at 667. The state supreme court held that

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[1] Arizona's citation (Pet. 25 n.4) of the Colorado Court of Appeals' decision in *People v. Aguilar*, is similarly misguided because there, too, the trial court declared a mistrial on the greater charge after the jury could not reach a verdict on that charge. 317 P.3d 1255, 1257 (Colo. App. 2012).

the new trial on all counts did not violate the state constitution's prohibition on double jeopardy or state statutory provisions because the retrial was simply a continuation of the original jeopardy from the first trial. *Id.* at 673. Whether that decision was correct or not, it plainly decided a *different* question than is presented here—because, as the Supreme Court of Indiana emphasized, no judgment of conviction was entered on *any* charge in *Cleary*. *Id.* at 668-669. Here, in contrast, a judgment of conviction on the lesser charge was entered against Martin and he was sentenced accordingly. Although the Supreme Court of Indiana's decision does not reflect that a mistrial was formally declared in *Cleary*, the trial judge's decision to grant a new trial on all counts as a result of the jury's deadlock on the greater offense, rather than entering judgment on the jury's verdict on the lesser offense, is the functional equivalent of a mistrial. Arizona purports to rely (Pet. 24) on the state court's characterization of this Court's decision in *Green*. But the court's discussion of *Green* was relevant only to that court's holding that a *state statute* did not bar the retrial—and is obviously irrelevant to the federal constitutional question presented here.

3. The Eighth Circuit's decision in *United States v. Bordeaux*, 121 F.3d 1187 (8th Cir. 1997), similarly relies on the fact that a mistrial was declared. In that case, the defendant was charged with the greater offense of attempted aggravated sexual abuse and with the lesser-included offense of attempted abusive sexual contact by force. *Id.* at 1188. The jury returned a verdict of guilty on the lesser offense, indicating that, after expending "all reasonable efforts," it was "unable to reach a verdict" on the greater charge. *Ibid.* Before

sentencing the defendant on the lesser charge, however, the district court declared a mistrial on the greater offense, vacated the conviction on the lesser offense after the government admitted that the jury instructions omitted an element of that crime, and ordered a new trial. *United States v. Bordeaux*, 92 F.3d 606 (8th Cir. 1996) (first appeal); *Bordeaux*, 121 F.3d at 1189 (second appeal). After the Eighth Circuit held on appeal that the district court lacked authority to order a new trial on the lesser offense, the district court sentenced the defendant on remand. 121 F.3d at 1189. In a second appeal, the defendant succeeded in having his conviction on the lesser offense overturned based on the conceded instructional error. *Id.* at 1189-1190. But the Eighth Circuit refused in that appeal to hold that he could not be retried on the greater offense on remand. *Id.* at 1190-1193. In so holding, the Eighth Circuit held that "the fact that the district court declared a mistrial based on a hung jury as to the greater offense ma[de]" *Green* and *Price v. Georgia*, 398 U.S. 323 (1970), "inapplicable." 121 F.3d at 1192. The court explained that it viewed as "certain" that "jeopardy did not terminate on the greater offense because the jury could not agree as to that offense and the district court therefore declared a mistrial." *Ibid.* Applying the rule of *Richardson*, the court therefore held that the defendant could be retried on both offenses on remand. *Id.* at 1193.[2]

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[2] In the first appeal, the court "vacate[d] the district court's order granting a mistrial on the greater offense." 92 F.3d at 608. But in the second appeal, the court treated the mistrial as dispositive. 121 F.3d at 1192-1193.

To be sure, the Eighth Circuit articulated its holding broadly at times, stating "we hold that where 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." 121 F.3d at 1193. But elsewhere the court made clear that its holding depended on the fact that the district court had declared a mistrial on the greater offense in the first trial. *Id.* at 1192. Because no mistrial was declared in this case, the holding of *Bordeaux* would not have applied had the case arisen in the Eighth Circuit.[3]

4. The only decision Arizona identifies that does conflict with the decision below is the Washington Supreme Court's decision in *State v. Glasmann*, 349 P.3d 829 (Wash. 2015). In that case, the jury returned guilty verdicts on two lesser-included offenses, leaving the verdict forms blank as to the greater offenses after being instructed to leave the forms blank if they could not agree on a verdict. *Id.* at 830. The trial judge did not declare a mistrial. After the defendant had his convictions overturned on appeal, the State refiled the original charges, including the greater offenses. *Ibid.* The Washington Supreme Court held that the State could proceed with a retrial on the greater charges. *Id.* at 831. In a poorly reasoned decision, that court noted this Court's holdings in *Green* and *Price* that "a defendant's jeopardy on a greater charge ends 'when the

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[3] Arizona's reliance (Pet. 20 n.2) on *dicta* in the Fifth Circuit's decision in *United States v. Williams* is misplaced because that court held that the jury had not rendered a verdict on *any* counts, including the lesser-included offenses. 449 F.3d 635, 646-649 (5th Cir. 2006).

first jury is given a full opportunity to return a verdict on that charge and instead reaches a verdict on the lesser charge.'" *Ibid.* (quoting *Price*, 398 U.S. at 329) (internal quotation marks and brackets omitted). The court then ignored that holding, concluding that the jury's silence on the greater offenses was the equivalent of a mistrial—and that retrial on the greater offenses was therefore allowed under the Double Jeopardy Clause. *Id.* at 833-834.

As the dissenting justice pointed out, the outcome in that case should have been governed by "*Green*'s second rationale," which prohibits retrial on a greater offense "when a jury *fails to reach a verdict*, either expressly or impliedly" "after the jury has had 'a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so.'" 349 P.2d at 835 (Stephens, J., dissenting) (quoting *Green*, 355 U.S. at 191). The dissenting justice explained that the majority's position effectively held that a jury that convicts on a lesser offense while indicating disagreement on the greater offense "hang[s] itself, *id.* at 834, a holding that flies in the face of this Court's cases holding that *only* a trial judge can declare a mistrial after making a finding of manifest necessity, *id.* at 838-840.

5. Arizona's further contention (Pet. 25-27) that the decision below is not "[c]onsistent" with decisions of the Second, Fourth, Seventh, and Tenth Circuits, as well as decisions of two additional state supreme courts, is also mistaken.

The Second Circuit's decision in *United States ex rel. Jackson v. Follette*, presented sufficiently unusual circumstances that the court itself declared the case to be "sui generis." 462 F.2d 1041, 1049 (2d Cir. 1972).

In that case, the defendant was tried in both of his consecutive trials with two different versions of first-degree murder—and the jury returned a verdict of guilty on a different version in each trial, after being instructed to choose only one. *Id.* at 1043-1044. After explaining that the two charged offenses were functionally equivalent—and, significantly, emphasizing that there had been "*no conviction of a lesser-included offense*"—the court found no double jeopardy violation. *Id.* at 1049-1050. That set of circumstances casts no light on how the Second Circuit would decide the question presented in this case. And in a case with facts nearly identical to this one, the Second Circuit reached a conclusion in accord with the decision below, holding that a defendant could not be retried on first-degree murder after a jury was instructed that it could choose among, *inter alia*, first- and second-degree murder and convicted him of second-degree murder. *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, 847-848, 863 (2d Cir. 1965) (Marshall, J.).

The other circuit court decisions also do not support Arizona's assertion of inconsistency. In *United States v. Ham*, the Fourth Circuit expressly distinguished cases (like this one) in which a defendant was convicted of second-degree murder and acquitted of first-degree murder, explaining that the former conviction "established the existence of a fact (the state of mind required for that offense) that was inconsistent with his being guilty of first-degree murder." 58 F.3d 78, 85 (4th Cir. 1995) (citation omitted). The Seventh Circuit's decision in *Kennedy v. Washington* is not relevant at all because it involves retrial of a defendant only on an offense of which he was *convicted* in his first trial. 986 F.2d 1129, 1131-1133 (7th Cir. 1993). And

the Tenth Circuit's decision in *United States v. Wood* involved retrial of a defendant on the only count of the indictment on which he was tried and convicted—a situation that sheds no light on the question presented here. 958 F.2d 963, 965, 967-968 (10th Cir. 1992).

The additional state supreme court decisions Arizona relies on are similarly inapposite. In *State v. Kent*, the Supreme Court of Appeals of West Virginia upheld retrial of a defendant on two different versions of first-degree murder and specifically distinguished the situation at issue here, *i.e.*, retrial of a defendant on a greater offense after he has been convicted on a lesser-included offense. 678 S.E.2d 26, 28, 31-32 (W. Va. 2009). And the same was true in *Commonwealth v. Carlino*, 865 N.E.2d 767, 769, 774-775 (Mass. 2007).

B. Arizona contends (Pet. 28-29) that the decision below "align[s]" with the Sixth Circuit's decision in *Terry v. Potter*, 111 F.3d 454 (6th Cir. 1997). But that decision also does not involve a jury that convicted a defendant on a lesser-included offense while delivering no express verdict on a greater offense. *Id.* at 455-456. As that court acknowledged, it involved a situation like the one faced by the Second Circuit in *Jackson*, *supra*, where the defendant was convicted in successive trials of two different versions of the same crime. *Id.* at 458. Unlike the Second Circuit, the Sixth Circuit held that the second prosecution was prohibited by double jeopardy. *Ibid.* (noting disagreement with Second Circuit). But the disagreement between the Sixth and Second Circuits on a question not presented here is no reason to grant the petition in this case.

C. The decision below does align with the Ninth Circuit's decision in *Brazzel v. Washington*, which held in habeas proceedings that a defendant could not be retried on a greater offense after the jury convicted him of a lesser-included offense and returned no verdict on the greater offense. 491 F.3d 976, 978-980 (9th Cir. 2007). The Ninth Circuit 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 (citing *Washington*, 434 U.S. at 509). Relying on *Green* and *Price*, the court thus held that the defendant's "jeopardy on the greater charge had ended when the first jury was given a full opportunity to return a verdict on that charge and instead reached a verdict on the lesser charge." *Ibid.* (quoting *Price*, 398 U.S. at 329). There, like here, the jury was given an "unable to agree" instruction and opted for the lesser charge. As Arizona points out, the court applied a deferential habeas standard in that case, asking whether "[t]he state court's treatment of the jury's 'silence' following [the defendant's] first trial as an implied acquittal [wa]s a permissible application of governing law." *Id.* at 985.

* * * * *

In sum, Arizona has identified only two decisions—the decision below and the Illinois Supreme Court's decision in *Glasmann*—that squarely address the double-jeopardy rules that are applicable when a jury convicts a defendant of a lesser-included offense, the jury returns no verdict on the greater offense, the district court does not declare a mistrial, and the conviction on the lesser-included offense is overturned on

appeal. Although the decision below does conflict with *Glasmann*, that narrowest-possible conflict does not warrant this Court's intervention at this time.

II. The Decision Below Does Not Warrant Review.

As explained, further review of the decision below is not warranted because the conflict with other courts is as shallow as possible. Review by this Court is unwarranted for the additional reasons that the question presented does not arise with any frequency and the decision below is correct.

A. As Arizona notes (Pet. 11), this Court has had frequent occasion to address various aspects of the Double Jeopardy Clause. And Arizona's efforts to collect double-jeopardy decisions in attempting to establish a conflict warranting review illustrates that double-jeopardy questions in general do arise with some regularity in state and federal courts. But the dearth of cases addressing the precise question presented here demonstrates that *that* question does not arise with any frequency. Even the amicus brief on behalf of other States does not contend that the question presented here arises with any frequency—indeed, *not one* of the 11 amici States identifies even one decision from one of its own courts raising this issue. This Court "does not have time to give full consideration to all cases that present interesting issues." Stephen M. Shapiro et al., *Supreme Court Practice* 4-33 (11th ed. 2019). If the issue does begin to arise with greater frequency going forward, that will result in additional decisions from federal courts of appeals and state courts of last resort—and, inevitably, deeper analysis of the issue. This Court should defer consideration of the

question presented until a deeper conflict arises, if ever.

B. This Court's review is unnecessary because the decision below is correct.

The decision below represents a straightforward application of this Court's double-jeopardy precedents. As the Court has explained, in *Green* and *Price*, the Court "held that the Double Jeopardy Clause is violated when a defendant, tried for a greater offense and convicted of a lesser included offense, is later retried for the greater offense." *Blueford v. Arkansas*, 566 U.S. 599, 608 (2012). That is exactly what happened here. Arizona misstates the holdings of *Green* and *Price* in contending (Pet. 2) that those holdings apply only when the jury "implicitly" acquits a defendant on a greater charge while convicting on the lesser charge. To the contrary, the Court expressly declared that double jeopardy barred retrial on the greater offense upon conviction of the lesser offense *even if* the silent verdict meant the jury was unable to agree as to the greater offense—because the government had a full and fair opportunity to present its case on the greater charge and no mistrial was declared. *Green*, 355 U.S. at 190-191.

The Court in *Green* relied heavily on the fact that, "[a]fter the original trial, but prior to his appeal, it is indisputable that [the defendant] could not have been tried again for first degree murder" after the jury convicted him of second-degree murder and returned no verdict on first-degree murder—and that the same would have been true if the defendant's appeal of his conviction on second-degree murder had been unsuccessful. 355 U.S. at 191; *Price*, 398 U.S. at 329. Arizona conceded below, *see* Pet. App. 12, that the same

is true here, *i.e.*, that the fact that the jury indicated it could not reach a verdict on first-degree murder rather than indicating nothing on that count had *no effect* on whether Martin faced continuing jeopardy on first-degree murder absent a successful appeal. Arizona instead argues that Martin subjected himself to renewed jeopardy on the charge of first-degree murder—that he somehow waived his right to assert a double-jeopardy defense to that charge—by successfully appealing his flawed conviction on second-degree murder. This Court rejected *exactly* that reasoning in *Green*, explaining that, "[w]hen a man has been convicted of second degree murder and given a long term of imprisonment"—as Martin was here—"it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense." 355 U.S. at 191-192. "In short," the Court held, "he has no meaningful choice" and "it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." *Id.* at 192.

Arizona offers no basis for finding a valid waiver here but not in *Green*, based on a slight difference in jury forms. Arizona stresses (Pet. 32) that it is entitled to a full and fair opportunity to secure a verdict on the charge of first-degree murder. The United States argued the same in *Green*—and this Court held that the government had that opportunity when the jury "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." 355 U.S. at 191. It is therefore

"clear, under established principles of former jeopardy, that [Martin'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.*

Arizona relies on this Court's decisions in cases like *Richardson*, which hold that a defendant may be retried on a charge when a jury cannot reach a verdict based on an actual deadlock and the trial court declares a mistrial based on manifest necessity. But those decisions do not apply here where the trial court did not determine that the jury had reached an actual deadlock, did not declare a mistrial, and made no inquiry into whether the manifest-necessity standard was satisfied. *See* Pet. App. 9-10. Unlike in *Richardson* and cases like it, here the jury *did* reach a verdict and the trial court did *not* declare a mistrial, make a finding of deadlock, or discharge the jury without entering a verdict. In these circumstances, the rule of *Green*, not *Richardson*, applies. This Court held as much in *Green* itself, relying on the absence of a finding of "extraordinary circumstances" that "prevented" the jury from returning a verdict. 355 U.S. at 191.

The Arizona Supreme Court correctly held that here, as in *Green* and *Price*, Martin's jeopardy on the charge of first-degree murder was terminated when the jury convicted him of the lesser-included offense of second-degree murder. No further review of that decision is warranted.

CONCLUSION

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

Respectfully submitted,

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April 6, 2020