No. 10-6773

In the
Supreme Court of the United States

CAROLYN URGENT,
Petitioner;

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

During its deliberations, the jury in petitioner's federal money laundering conspiracy trial submitted a note to the judge stating that it was "presently in deadlock" and requesting judicial guidance. The judge convened an off-record meeting in chambers with counsel. Clients were excluded. During the conference, petitioner's counsel expressly consented to a mistrial, without discussion of alternatives and without manifest necessity. Petitioner first learned of her lawyer's action, to her dismay, when the judge, shortly after the conference, declared a mistrial in open court, thus aborting a three-week trial.

The question presented is:

> Whether consent to a mistrial upon possible jury deadlock, entailing the waiver of the double jeopardy right to a "chosen jury," is a strategic decision within the scope of the lawyer's authority, or is instead a fundamental decision requiring the personal consent of the accused and, *a fortiori,* the presence of the accused.

PARTIES TO THE PROCEEDINGS

The appellants in the consolidated appeals to the United States Court of Appeals for the Third Circuit Court of Appeals were petitioner Carolyn Urgent (No. 08-4255), Shango Allick (No. 08-4165), Marcelino Garcia (No. 08-4254), Isaiah Fawkes (No. 08-4299), and Christopher Alfred (No. 08-4300). The appellee in all cases was the United States of America, respondent herein.

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PETITION FOR A WRIT OF CERTIORARI

Carolyn Urgent respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Court of Appeals' nonpublished opinion and judgment of which review is now sought are included in the Appendix, page 1 ("App.1") and may be found, *sub. nom., United States v. Allick*, at 2010 WL 2676361 (3rd Cir. 2010) ("*Allick II*"); the order denying rehearing is at App.15. The District Court order and unreported memorandum opinion, from which the latter appeal was taken, are at App.17. The latter arose out of an evidentiary hearing on remand directed by the Court of Appeals in its previous nonpublished opinion ("*Allick I*"), App.59, and found at *United States v. Allick*, 274 Fed. Appx. 128 (3rd Cir. 2008). The initial double jeopardy-related orders of the District Court are at App.80.

JURISDICTION

The Judgment of affirmance of the Court of Appeals was entered on July 7, 2010, and the order denying panel rehearing and rehearing *en banc* was entered on August 10, 2010. This petition is timely filed. Sup. Ct. R. 13.1, 13.3. The Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, FEDERAL RULES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[1]

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 43, Federal Rules of Criminal Procedure, provides, in pertinent part:

> Defendant's Presence
>
> (a) When Required.
>
> Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:
>
> (1) the initial appearance, the initial arraignment, and the plea;
>
> (2) every trial stage, including jury impanelment and the return of the verdict; and
>
> (3) sentencing.

[1] Section 3 of the Revised Organic Act of 1954, 48 U.S.C. § 1561, incorporates and extends "the first to ninth amendments inclusive" of the United States Constitution to the Territory of the Virgin Islands. *Id.*

(b) When Not Required. A defendant need not be present under any of the following circumstances: * * *

(3) Conference or Hearing on a Legal Question.
The proceeding involves only a conference or hearing on a question of law. * * *

(c) Waiving Continued Presence.

(1) In General.
A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect.
If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

Rule 26.3, Federal Rules of Criminal Procedure, provides:

> Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

STATEMENT

Petitioner Carolyn Urgent and a her codefendants were on trial in the District Court of the Virgin Islands for conspiracy to commit money laundering, 18 U.S.C. § 1956(a) and (h), based on a 2005 indictment.

The trial commenced January 31, 2006. The jury began its deliberations on Friday, February 17th, but was excused early to enjoy an extended holiday weekend (including Monday, February 20, 2006, which was President's Day). App.4. On Wednesday, February 22nd, the jury submitted three notes to the judge, each requesting additional evidence or a re-reading of instructions. *Id.* Two days later, on Friday, February 24th, the jury sent a fourth note to the judge stating, "[A]fter considerable deliberation we the jurors of this case are presently in a deadlock. We await further instructions." *Id.*

The judge summoned counsel for an off-record meeting in chambers to discuss the note; the defendants were not invited and did not attend. App. 4, 44-45. Petitioner's former counsel was surprised by the contents of the note; he testified that he was "positive [he] would get an acquittal." App.36. But then, according to his testimony: "I recall jumping as I've done over the years, to wish to fight another day, and practically beg for a mistrial, personally." App.37-38. Petitioner's former counsel asked the judge whether the jury was hung on all counts and as to all defendants, and the judge said he would inquire. App.93. He further testified that the judge then asked him, "If they are, what do you all want to do? And I, speaking for myself, I said, of course, a mistrial." *Id.* Petitioner's trial counsel was "gung ho for a mistrial." App.41-42. No lawyer for any codefendant voiced dissent. App.39.[2]

Neither the judge nor counsel suggested any alternatives to mistrial, such as giving the jury more time or issuing an *Allen* charge. App.5. The original trial

[2] Counsel for one codefendant was completely absent. She was waiting outside for her client to arrive while the conference took place. App.33.

judge testified, in the remand hearing, that he had the clear impression that all counsel present in chambers concurred in the mistrial decision — that a mistrial was a "*fait accompli*." App.50-51. Counsel had often complained about the burdens of the trial. App.25,46-47. The trial judge testified that "pretty much all [counsel] had expressed sentiments such as, my practice is going to hell. Got to get back. I've got to make some money, and things of that type." (*Id*.) He relied "on the lawyers' words" in declaring a mistrial. App.25.

Petitioner's former counsel in the remand hearing testified, on cross-examination:

> BY MR. BARRY [present counsel]:
>
> Q. At the time all counsel were called into chambers, was the purpose announced?
>
> A. No.
>
> Q. At the time counsel were called into chambers, was it simply the understanding that the jury had another note that needed to be addressed?
>
> A. Yes, sir.
>
> Q. At the time when you said you were gung ho for a mistrial, this was in chambers while you were with counsel?
>
> A. Yes.
>
> Q. At the time you were in chambers, was any client present in chambers?
>
> A. No, sir.
>
> Q. At the time you were in chambers, was Carolyn Urgent invited to come into chambers?
>
> A. No, sir.
>
> Q. At the time you were in chambers, was any other client invited to be in chambers?
>
> A. No, sir.

> Q. At the time you were in chambers, was any client advised that they had a right to be present while this fundamental issue was decided?
>
> A. I explained to my client that I was hoping for a mistrial probably after the first note, sir.

App.42-45.

The above-quoted testimony — which refers to the first jury note of *two days before* the actual conference — is the only affirmative evidence of any communication between petitioner and her lawyer on the subject. There was no evidence that counsel discussed the fourth note with petitioner. There was no evidence that counsel ever told petitioner that a mistrial was under actual consideration by the court.

Indeed petitioner's uncontroverted testimony was that counsel never discussed the mistrial deliberations with her at all. App.55. The first she learned that a mistrial was even on the table was when the trial judge formally declared a mistrial in open court. App.53-54.

Petitioner further testified that she was in tears at the news. *Id.* Had she been given an opportunity to express her wishes, she would have told the judge she did not want a mistrial. App.56-58. Why? "Because I wanted it to be over with. Whether the jurors had came back [*sic*] with guilty or not guilty, I wouldn't have had to go through that again. It was very frustrating for me and my children. I can't do this again. There is no way." *Id.*

The material post-trial procedural chronology is as follows: Petitioner's and her codefendants' motions to dismiss the 2005 indictment with prejudice on double

jeopardy grounds (which followed the Government's voluntary motion to dismiss without prejudice, accompanied by a new indictment returned in 2007) were initially granted by the trial judge but he soon thereafter vacated his order of dismissal and recused himself from further proceedings. App.65-66. A substitute, visiting judge then denied the defendants' double jeopardy-based motions to dismiss the 2005 indictment (and separate motions to dismiss the 2007 indictment). *Id.* Defendants appealed.

The Third Circuit Court of Appeals in *Allick I*, faced with a deficient record, remanded for an evidentiary hearing to determine exactly what happened in the unrecorded proceedings in chambers, and whether the mistrial decision was sustainable on grounds of either (1) manifest necessity, or (2) consent. App.14-21.

The visiting judge presided over the remand hearing on June 16, 2008, and ruled that (1) no manifest necessity to declare a mistrial existed, but that (2) defendants validly consented to a mistrial. App. 31,33. Another interlocutory appeal, *Allick II,* ensued.

On appeal, petitioner Urgent acknowledged that her lawyer expressly and unequivocally consented to the mistrial, but contended that her lawyer had no authority to do so without her permission, particularly in a proceeding that took place in violation of her right to be present.

Petitioner stressed that a consent to mistrial upon a possibly-deadlocked jury necessarily entails the loss of a specific and well-established constitutional right, i.e., the "valued right to have [her] trial completed by a particular tribunal," *United*

States v. Dinitz, 424 U.S. 600, 608, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976), quoting *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949). Petitioner's interest in "retaining a chosen jury" to decide her guilt or innocence is "within the protection of the constitutional guarantee against double jeopardy." *Crist v. Bretz,* 437 U.S. 28, 35-36, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). It is "the reason for holding that jeopardy attaches when the jury is empaneled and sworn." *Id.* "It is an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice." *Id.*

Petitioner argued that her lawyer had no inherent authority to vicariously waive her right to a chosen jury. Consenting to a mistrial is not a purely strategic decision within the sole province of counsel — at least when the issue arises because of a possibly-deadlocked jury. The decision whether to consent to a mistrial or not is highly analogous to the "fundamental" decisions explicitly held by this Court to require the defendant's personal consent in *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983): "whether to plead guilty, waive a jury, testify in his or her own behalf, ... take an appeal" and, "with some limitations," the right of self-representation. 463 U.S. at 751.

The mistrial decision in the present case not only involved the irrevocable loss of a constitutional right, but also had a profound impact on petitioner's personal life as well as her essential "day in court." It nullified a three-week trial. It deprived her of a verdict. It was undoubtedly a "fundamental" decision in the commonly understood sense of the term.

Petitioner, a single mother, testified to her need for a definite decision by the jury, for the sake of her emotional equanimity and that of her children. Petitioner's expressed personal need for closure is indeed a cognizable legal interest, and one that suffuses double jeopardy rights generally. *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) (plurality opinion) (recognizing that a criminal trial imposes a "heavy personal strain" on the accused, and that the Double Jeopardy Clause reflects "a constitutional policy of finality for the defendant's benefit"); *Arizona v. Washington*, 434 U.S. 497, 503-504, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) (second prosecution "increases the financial and emotional burden on the accused, [and] prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing").

This same personal need for certainty and finality may legitimately lead some defendants to plead guilty, even if counsel advise that an acquittal is likely; or to waive an appeal of a conviction, even if counsel advise that the odds of reversal are great. Both types of decisions are explicitly deemed fundamental in *Barnes*. 463 U.S. at 751. Both require the personal consent of the accused. *Id.* Both reflect a judicial deference to individual autonomy when it comes to the most critical, basic legal choices. In these decisions, the accused is (in the words of the poet) the "master of [his] fate."[3]

[3] Cf., *McKaskle v. Wiggins*, 465 U.S. 168, 178, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) ("[T]he right to appear *pro se* exists to affirm ... individual dignity and autonomy."); *People v. Nauton,* 29 Cal.App.4th 976, 981, 34 Cal.Rptr.2d 861 (1994) ("Respect for the dignity and autonomy of the individual is a value universally

Petitioner argued that, by strong analogy, consent to mistrial upon a possibly-deadlocked jury is also fundamental. Indeed the decision to abort a jury trial implicates the dignity and autonomy of the individual — the interest in self-determination — in the same way as a decision to plead guilty, or to forego an appeal. In each instance the justice system presents the most basic, high-stakes choices — choices that involve the individual's willingness or unwillingness to accept uncertainty and risk at critical junctures in the proceedings, as well as the individual's subjective and varying need for closure.

The defendant accepting a plea bargain of course weighs the risks, and in all events chooses closure, i.e., certainty and finality. The convicted defendant who waives an appeal may base that decision on a risk calculation, but values closure above all. Here, petitioner accepted known risk by trusting a jury of her peers to arrive at a final and certain verdict, and thereby sought closure.

These personal considerations — which can be emotional, financial, reputational, or even, conceivably, moral or spiritual — may legitimately transcend purely strategic calculations. In a criminal proceeding, authority to make the most

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celebrated in free societies and uniformly repressed in totalitarian and authoritarian societies.")

basic, life-altering decisions must remain personal and individual, and cannot be arrogated by the lawyer.[4]

Petitioner, on appeal, acknowledged that certain cases cited for the general proposition that "mistrial decisions" are for counsel to make are sound *in the factual circumstances presented*. Notable among such decisions is the Third Circuit's own *Government of Virgin Islands v. Weatherwax*, 77 F.3d 1425 (3rd Cir. 1996), an "ineffective assistance" case holding that the decision *not to move* for mistrial based on juror misconduct was a strategic one properly made by counsel, even over the protest of his client. Others are in accord. E.g., *United States v. Chapman*, 593 F.3d 365, 369 (4th Cir. 2010); *United States v. Burke*, 257 F.3d 1321,1324 (11th Cir. 2001).

But there is, petitioner argued, a distinction of constitutional significance between a lawyer's *refusal* to follow his client's wishes to move for a mistrial, and the lawyer's affirmative *consent* to (or motion for) a mistrial against the client's wishes. That distinction is simple: The latter involves a waiver of the client's "valued right to have his trial completed by a particular tribunal." *Dinitz,* 424 U.S. at 608. The former does not. This point serves to contrast the present case

[4] Clear parallels exist in medicine. It has long been established at common law that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body...." *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129, 105 N.E. 92 (CANY 1914) (Cardozo, J). More modernly: "Health care choices involve profound questions that are not finally referable to professional expertise. ... [P]atient autonomy has become a central principle of both popular and philosophical analysis of medical decisionmaking." Shultz, "From Informed Consent to Patient Choice: A New Protected Interest," 95 Yale L.J. 219, 222 (1985).

markedly from *Weatherwax*, *supra*; from *Chapman*, *supra* (attorney declined judge's offer of mistrial without prejudice); and from *Burke*, *supra* (lawyer declined to join government motion for mistrial upon a possibly-hung jury, requesting *Allen* charge instead).

Petitioner argued that any rule that "mistrial decisions" are solely within the province of counsel is too general and encompasses too broad a class of decisions. A more nuanced analysis of the procedural circumstances surrounding the mistrial issue, as well as the substantive legal basis for the potential mistrial, should be required.

Petitioner acknowledged the compelling general need to allow a defense lawyer to function as trial counsel, effectively and without client interference, in truly tactical matters, e.g., "whether and how to conduct cross-examinations, what jurors to accept or strike, [and] what trial motions should be made," *Weatherwax,* 77 F. 3d at 1434, citing 1 American Bar Association Standards for Criminal Justice § 4-5.2(b). Indeed, and as petitioner acknowledged, the lawyer who allows a client to micromanage the defense, subordinating his professional judgment to a layperson's demands on these matters, cannot render effective assistance.

But petitioner maintained that the decision to consent to a mistrial *upon a possibly-hung jury* is not merely a matter of legal tactics and is not uniquely within the competence of counsel. It is, in large measure, a commonsense question that, as stated, not only entails the loss of an established constitutional right of the accused,

but also deeply impacts his or her personal fate as well as the very mechanism the Constitution creates to determine that fate — a jury trial.

Petitioner also acknowledged the pragmatic reality that a lawyer must make many kinds of decisions at trial without even consulting with his or her client simply because there is no opportunity to consult without disrupting the trial. The Eighth Circuit's reasoning in *United States v. Washington*, 198 F.3d 721 (8th Cir.1999) is illustrative: "[T]he decision to move for a mistrial often must be made in a split-second and it involves numerous alternative strategies such as remaining silent, interposing an objection, requesting a curative instruction, or requesting an end to the proceeding." *Id.*, 198 F.3d at 724.

But this rationale has no force at all the present case. The mistrial decision in the present case was made in a completely unpressured, deliberative setting. That will always be true when a mistrial question arises because of potential jury deadlock. There is no risk of disrupting the trial by requiring the personal consent of the accused in this circumstance. Indeed it is not clear that *any* mistrial decision — involving the ultimate disruption of a trial — needs to be made or even *can* be made "on the fly," given the requirements of Fed.R.Crim.P. 26.3: "Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives." *Id.*

Petitioner finally, on the subject of allocation of decision-making authority, posited a hypothetical scenario to the Court of Appeals in which a defendant is

present when the mistrial decision upon a possibly-hung jury is discussed, and protests when his or her lawyer proposes to consent to a mistrial. Petitioner submitted that it is unimaginable that any conscientious trial judge would disregard the client's personal wishes and order a mistrial in this situation — i.e., in the absence of manifest necessity.

Petitioner argued that this should have been the actual, not hypothetical, state of affairs. The actual mistrial decision should not have been made in petitioner's absence. From petitioner's perspective, the singlemost important event in the entire proceedings — the decision to abort her jury trial — occurred in Kafkaesque secrecy.

Under the Federal Rules of Criminal Procedure, petitioner's presence was required at "every trial stage, including jury impanelment and the return of the verdict," Fed.R.Civ.P. 43(a)(2), but not in a "proceeding [that] involve[d] only a conference or hearing on a question of law." Fed.R.Crim.P., 43(b)(3). Rule 43 of the Federal Rules of Criminal Procedure is said to codify the defendant's right to be present existing under the Sixth Amendment and Due Process Clause of the Fifth Amendment, as well as those existing under the common law, and is therefore at least coextensive with those constitutional rights. *United States v. Alessandrello*, 637 F.2d 131, 138 (3rd Cir. 1980); accord, e.g., *United States v. Gordon*, 829 F.2d 119, 124 (D.C. Cir. 1987).

Petitioner contended that the meeting in chambers in the present case was not a "proceeding [that] involve[d] only a conference or hearing on a question of

law." The mistrial question did not involve a mere technical legal issue or administrative matter, where petitioner's presence would be pointless. A mistrial decision on a possibly-deadlocked jury is well within the ken of any competent layperson, and affects the accused in clearly understandable ways. See, e.g., *United States v. Wecht*, 541 F.3d 493 (3rd Cir. 2008) (mistrial decision for manifest necessity a mixed question of law and fact; citing multiple "fact-intensive" considerations such as the length and complexity of the trial, length of deliberations, jury exhaustion, etc.). Petitioner's right to be present at the conference became even more compelling when the question became the simple one of whether to *agree* to a mistrial or not.

Excluding petitioner from the conference facilitated a significant breach of professional standards by her former counsel in the present case. A lawyer is required to "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland v. Washington*, *supra,* 466 U.S. at 688; ABA Standard § 4-5.2(b). In case of irreconcilable differences between a lawyer and client on such questions, counsel is to make a record on the disagreement (while preserving confidentiality). ABA Standard § 4-5.2(c). Had that protocol been followed — and had the trial court observed petitioner's basic right to be present — petitioner would have had the opportunity to timely express her personal choice on the mistrial question. The trial court would presumably have honored her choice.

As petitioner also pointed out, a client has a qualified right to discharge counsel and opt for self-representation in case of a significant lawyer-client impasse. *Weatherwax,* 77 F.3d at 1437. Terminating counsel in this instance would have been a very rational option, if petitioner's counsel had refused to accede to her wishes. At that stage of the proceedings, during jury deliberations, petitioner's need for counsel was much diminished. By that juncture, petitioner's fate was where it belonged: in the hands of her "chosen jury." Not her lawyer.

The Third Circuit rejected all of petitioner's arguments.

The Court held that whether to consent to a mistrial or not was a non-fundamental, strategic decision properly made by counsel without the personal consent of the accused. App.10-11 (*Allick II*), citing *Barnes*, 463 U.S. at 751, and *Weatherwax*, 77 F.3d at 1433. "Although we have not addressed this specific issue, other courts of appeals have consistently held that the decision to request or consent to a mistrial is a strategic decision that ultimately rests with counsel." *Id.*, citing *Chapman, supra,* 593 F.3d at 369; *Burke, supra,* 257 F.3d at 1324; *United States v. Washington*, *supra,* 198 F.3d at 723-24; *Watkins v. Kassulke*, 90 F.3d 138, 143 (6th Cir. 1996); *Galowski v. Murphy*, 891 F.2d 629, 639 (7th Cir. 1989).

The Third Circuit further held that petitioner's presence was not required at the meeting in chambers because it was a "conference or hearing on a question of law." App. 11, citing Fed. R. Crim. P. 43(b)(3) and *Faretta v. California*, 422 U.S. 806, 819 n.15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (holding that Rule 43 did not require defendant's presence at in-camera interview of jurors).

The Court of Appeals denied panel rehearing and rehearing *en banc.* App.12-14.

This Petition followed.

* * *

The District Court of the Virgin Islands had jurisdiction of this case under Section 22, Revised Organic Act of 1954, 48 U.S.C.A. § 1612(a) (Virgin Islands District Court possesses jurisdiction of a district court of the United States), and 18 U.S.C. § 3231. The Court of Appeals had appellate jurisdiction under 28 U.S.C. § 1291; *Abney v. United States*, 432 U.S. 651, 659 (1977) (interlocutory appellate jurisdiction proper under the collateral order doctrine in double jeopardy challenges).

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE SPLIT.

The Third Circuit in the present case held that consenting to a mistrial upon a possible jury deadlock was a non-fundamental, strategic decision solely within the province of counsel. App. 10-11.

Contra: *United States v. Rich*, 589 F.2d 1025 (10th Cir.1978).

> We ... hold that [defendant's] attorney was not empowered or authorized, expressly or impliedly, to waive [defendant's] right to be tried by the chosen jury. [The defendant] was constitutionally entitled to have his cause tried to the jury empaneled in that he had a "valued right to have his trial completed by that particular tribunal."

589 F.2d at 1032.

II. THE CONSTITUTIONAL QUESTIONS PRESENTED ARE OF GREAT IMPORTANCE TO THE ADMINISTRATION OF CRIMINAL JUSTICE.

"[N[either the Constitution nor the Supreme Court provides many definitive answers to the allocation of decisionmaking questions that lawyers, clients, and courts regularly confront." Uphoff, "The Allocation of Decisionmaking Between Defense Counsel And Criminal Defendant: An Empirical Study [etc.]," 47 U. Kan. L. Rev. 1, 20 (1998).

The present case not only presents an important opportunity for the Court to add clarity and substance to two constitutional rights of the accused, *viz.,* the double jeopardy right to a "chosen jury" and the right to be present, but also brings into sharp focus the issue of the proper allocation of ultimate decision-making authority between the accused and counsel, all within a clear matrix of important competing interests — individual, systemic and societal.

The following vital interests are implicated in the present case, just as they are typically implicated in this general type of recurring problem: The dignity and autonomy of the accused; the efficient and effective functioning of a criminal trial in its essential truth-finding process; and the critical role in that process of defense counsel as advocate,[5] but with appropriate limitations on his or her ability to act as surrogate.

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[5] "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence...." *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986). The "very premise of our adversarial system ... is that partisan advocacy on both sides of a case will best promote the

A. Existing Supreme Court jurisprudence on the allocation of the ultimate decision-making authority between lawyer and client in questions implicating constitutional rights is context-specific and lacking in a unifying rationale.

"[C]ertain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate." *Florida v. Nixon,* 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), citing *Barnes,* 463 U.S. at 751. "Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action." *Nixon,* 543 U.S. at 187. At the same time, "[f]rom the standpoint of effective administration of justice, the need to confer decisive authority on the attorney is paramount with regard to the hundreds of decisions that must be made quickly in the course of a trial." *Barnes,* 463 U.S. at 760 (Brennan, J., *dissenting*).

Barnes differentiates between decisions belonging to the accused and those entrusted to his counsel on the following basis: "Fundamental" decisions require the personal consent of the defendant, and strategic or tactical decisions are for counsel to make. 463 U.S. at 751. *Barnes,* as stated, identified the following decisions as fundamental: "whether to plead guilty, waive a jury, testify in his or her own behalf,

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ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975).

... take an appeal" and, "with some limitations," the right of self-representation. 463 U.S. at 751.[6]

However, the fundamental-strategic dichotomy of *Barnes*, except as applied to those types of decisions addressed in a specific holding of this Court, is unclear if not altogether illusory. According to a leading treatise:

> The Supreme Court's explanations of why particular decisions are for counsel or client have been brief and conclusionary. Decisions within the client's control are simply described as involving "fundamental rights," while those within the lawyer's control are said to involve matters requiring the "superior ability of trained counsel" in assessing "strategy." While the rights subject to defendant's "personal choice" clearly are "fundamental," the Court has not explained why various rights subject to counsel's authority are not equally

[6] Some courts appear to simply interpret the *Barnes* list as exclusive. E.g., *Burke, supra,* 257 F.3d at 1323, citing *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3rd Cir.1996) (stating that "[a]fter consultation with the client, all ... decisions [not identified in *Barnes*] fall within the professional responsibility of counsel") and *United States v. Boyd*, 86 F.3d 719, 723 (7th Cir.1996) (decisions not identified in *Barnes* "are in the hands of counsel"). *Barnes* did not hold that its list was exclusive, although in a footnote it *did* cite a shorter list of *three* decisions identified as belonging to the client in Rule 1.2(a) of the ABA Model Rules of Professional Responsibility ("plea to be entered, whether to waive jury trial and whether the client will testify"), suggesting that in all other areas, at least under the Model Rules, it is the "attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." *Barnes,* 463 U.S. at 763, n.6. The ABA Standard for Criminal Justice 4-5.2, entitled "Control and Direction of the Case," provides that the decisions ultimately belonging to the accused "include" those identified in *Barnes*, thereby suggesting by obvious implication that the *Barnes* list is *not* necessarily exhaustive. Indeed, this Court in *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), identified the right to be present at trial — not mentioned in *Barnes* — as one of the "basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client." 484 U.S. at 418, n.24 (*dictum*). By way of further example, lower federal courts have held, with considerable persuasive force, that a competent defendant has the ultimate personal authority to refuse to raise an insanity defense. E.g., *United States v. Marble*, 940 F.2d 1543 (D.C. Cir. 1991).

> fundamental. ... If the fundamental nature of a right is measured by its importance, its historic tradition, or its current status in constitutional or state law, those rights would appear to be on the same plane.
>
> The Court's emphasis upon the strategic element in those decisions subject to counsel's control also fails to distinguish the different types of decisions.

2 W. LaFave & J. Israel, *Criminal Procedure* § 11.6(a) (3d ed.) (hereinafter, LaFave); *footnotes omitted*.[7]

Justice Scalia has voiced the same criticism:

> What makes a right tactical? Depending on the circumstances, waiving any right can be a tactical decision. Even pleading guilty, which waives the right to trial, is highly tactical, since it usually requires balancing the prosecutor's plea bargain against the prospect of better and worse outcomes at trial.
>
> Whether a right is "fundamental" is equally mysterious.

United States v. Gonzalez, 553 U.S. 242, 256, 128 S.Ct. 1765, 170 L.Ed.2d 616 (2008) (Scalia, J., dissenting).

Yet despite these conceptual difficulties, *Barnes* and related cases of this Court reflect the sound, basic notion that the client should not "play lawyer," and the lawyer should not "play God."

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[7] See generally, *id.* at n.20-39, citing Supreme Court cases upholding authority of counsel to decide: E.g., *Barnes, supra* (selecting issues to appeal); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (raising Miranda violation); *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965) (challenging illegal search); *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (moving to dismiss indictment based on alleged racial discrimination in grand jury composition); *Taylor v. Illinois*, *supra* (foregoing cross-examination on particular issue); and *Gonzales, supra* (consenting to magistrate for *voir dire* and jury selection); *New York v. Hill,* 528 U.S. 110, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000) (waiving 180-day trial deadline of Interstate Agreement on Detainers).

B. This case presents an ideal vehicle to advance and refine the standards for delineating the respective spheres of authority of lawyer and client.

The present case is an excellent opportunity for the Court to develop better standards for the rational and principled allocation of authority between counsel and the accused in the exercise or waiver of constitutional rights — at least in the circumstances presented.

Petitioner submits that, for the sake of analytical clarity, it should be recognized (as commentators and at least one member of this Court have recognized, *supra*) that "strategic" decisions and "fundamental" decisions are not mutually exclusive — that indeed *all* legal decisions are likely strategic on some level (thus at least calling for the *advice* of counsel). Within the universe of strategic decisions, there is a set that involves constitutional decisions, and within that set a subset of constitutional decisions that are "fundamental." As to these, and only these, the defendant should have the last word.

Petitioner submits that fundamental decisions, requiring the personal consent of the client, are those that have a clear, direct and substantial impact upon (1) a specific constitutional right, *and* either (2) the personal fate of the accused *or* (3) the essential character or function of the trial.

Pleading guilty, waiving an appeal, and (petitioner submits) consenting to a mistrial upon possible jury deadlock are fate-determinative decisions, requiring deference to individual autonomy. Waiving a jury trial, the right to counsel, the privilege against self-incrimination at trial, the right to be present at the trial (*semble*) — and (petitioner submits), waiving the right to a chosen jury by

voluntarily aborting a jury trial in progress — are all decisions affecting the character and function of the trial on the most basic level. Deference to individual autonomy is also required on these essential "day in court" questions.

Petitioner's proposed formulation, attempting to identify a unifying principle for the various types of decisions listed in *Barnes* as belonging personally to the accused, would be consistent with this Court's prior decisions specifically allocating certain decisions to counsel. See n. 7, *supra* herein. For example, a decision not to move to suppress evidence may clearly implicate a constitutional right, e.g., *Wainwright v. Sykes*, *supra* (Miranda violation; Fifth Amendment); *Henry*, *supra* (unlawful search; Fourth Amendment), but is not a decision inherently determinative of the fate of the accused, nor does it clearly, directly and substantially alter the basic character or function of the trial. In such areas, strategic considerations and the need for the expertise of counsel predominate over concerns of individual autonomy and self-determination. Counsel remains the ultimate arbiter.

LaFave suggests a balancing test that examines both the particular constitutional right at stake and the procedural setting in which the issue arises. *Id*., § 11.6(c). Such an analysis could be used in conjunction with the standard proposed above (or some variation of it that the Court believes better expresses a cohesive rationale for *Barnes*). The analysis would give due weight to procedural

constraints and other compelling pragmatic considerations, as well as the need for independent professional judgment of defense counsel as advocate for the accused.[8]

These issues are all front and center in the present case. The Court has a chance to examine them on a clear record involving simple facts, and to further develop principled standards in this important area.

C. The Court should clarify the accused's right to be present, and the "question of law" exception to that right.

Petitioner was excluded from the conference in chambers. The Third Circuit held that this was appropriate because the conference involved a "question of law," for which her presence was not required. App.11, citing Fed.R.Crim.P., 43(b)(3).

In *United States v. Gagnon*, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985), the Court approved of conducting a particular proceeding in the defendant's absence because the defendant "could have done nothing had he been at the

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[8] According to LaFave:

> As various lower courts have noted, the determination that particular decisions do or do not require defendant's personal choice has obviously rested on a balancing of several factors including, but not limited to, the fundamental nature of the right involved and the significance of strategic considerations. Those other factors include the objective of avoiding disruption of the litigation process, the distinction between objectives and means, the "inherently personal character" of the particular decision, and the need to foster a strong defense bar.

Id., § 11.6(c); *footnote omitted*. In mistrial decisions, the "disruption of the litigation process" factor must be viewed in the light of the requirements of Fed.R.Crim.P. 26.3 (court to consider alternatives, ascertain whether parties consent or object, before ordering mistrial).

conference, nor would he have gained anything by attending." 470 U.S. at 527. In the present case, by contrast, petitioner, if she were present, could have informed her lawyer and the judge that she did not want a mistrial.

This Court has yet to address the appropriate standard for determining what constitutes a "question of law" for purposes of Rule 43(b)(3). This case presents an opportunity to do so.

CONCLUSION

For the foregoing reasons, this Court should issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

RESPECTFULLY SUBMITTED this __ day of September, 2010.

-Original signed September 28, 2010-

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Note: Although the Supreme Court declined to hear this case, the Government voluntarily dismissed all charges against the Defendant shortly prior to the retrial.

-Ed Barry