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STATE OF WASHINGTON

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BY RONALD R. CARPENTER

CLERK

NO. 76802-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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State of Washington -Petitioner,

vs.

Carrisa Marie Daniels- Respondent.

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Supplemental Brief of  
Respondent

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

State of Washington	)	
	)	
Petitioner,	)	<b>SUPPLEMENTAL BRIEF</b>
vs.	)	<b>OF RESPONDENT</b>
	)	
Carissa Marie Daniels	)	
	)	
Respondent.	)	
_____	)	

**ASSIGNMENT OF ERROR**

IT IS RESPECTFULLY SUBMITTED that this court erred in it's decision of May 3, 2007 in the following particular:

1. The Court committed err and should reconsider its decision which reversed the Court of Appeals and held that Carissa Daniels could be retried on the greater offense of homicide by abuse because the jury, utilizing an "unable to agree" jury instruction, left the verdict form for homicide by abuse, verdict form A, blank. This Court ruled that this did not violate double jeopardy. However, shortly before this Court's decision was entered, the Ninth Circuit Court of Appeals case of *Brazzel v. State of Washington*, 491 F.3d 976 (9<sup>th</sup> Cir. 2007) was entered which held that this did violate double jeopardy.

2. The Court committed err and should reconsider its decision which affirmed the Court of Appeals and held that Carissa Daniels could be retried on felony murder in the second degree with criminal mistreatment as the underlying offense. The State failed to submit an interrogatory to the jury to determine which of the two underlying predicate offenses they were finding Ms. Daniels guilty of and there was evidence sufficient for the jury to have found that she was not guilty of criminal mistreatment and may have in fact found her not guilty of that, but guilty of the assault alternative that was found to be invalid in the case of *In re Personal Restraint of Andress*, 147 Wash.2d 602, 56 P.3d 981 (2002).

#### **ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. When the case of *Brazzel v. State of Washington*, 491 F.3d 976 (9<sup>th</sup> Cir. 2007) is in direct conflict with this Court's decision, and when that case makes it clear, under facts nearly identical to those present in this case, that the "unable to agree" jury instruction alone, without any clear finding from the trial court that the jury was hopelessly deadlocked, is insufficient to establish a mistrial; is a retrial on the greater charge that the jury was unable to agree on a violation of double jeopardy?

2. Does the case of *Brazzel v. State of Washington*, 491 F.3d 976 (9<sup>th</sup> Cir. 2007) undermine the correctness of this Court's decision in *State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006) or the correctness of the decision in this case which allows Daniels retrial on the charge of homicide by abuse?

3. When a defendant is convicted of murder in the second degree based upon felony murder with two alternate means of accomplishing it, i.e., based upon an underlying offense of assault in the second degree which was subsequently determined to be invalid in *In re Personal Restraint of Andress*, 147 Wash.2d 602, 56 P.3d 981 (2002) and criminal mistreatment in the first degree, without any special interrogatories or means by which it can be determine the basis for the jury's verdict of guilty, and there is evidence sufficient from which a jury could have determined that the defendant was not guilty of criminal mistreatment in the first degree, does a retrial violate double jeopardy because the jury may have acquitted the defendant of that charge?

#### **STATEMENT OF THE CASE**

##### 1. Procedural Facts and History

Carissa Daniels was charged by information filed on November 1, 2000, with Homicide by Abuse.(CP 1-4) By Second Amended Information

that was changed to add an alternative count of murder in the second degree based upon felony murder with the underlying offense being either assault in the second degree or criminal mistreatment in the first degree.(CP 5-6)(RP 59)

Following a jury trial, the jury acquitted Ms. Daniels of the charge of homicide by abuse but convicted her of the charge of murder in the second degree.(RP 1380-1381) The jury heard closing arguments on January 23, 2002(RP 1277). The jury returned a verdict of guilty to felony murder in the second degree on January 25, 2002 (RP 1376 & 1380-1381). There was absolutely no indication from the jury that they had any difficulty whatsoever in agreeing on a decision, they simply left verdict form A blank. The jury was polled as to whether this was their verdict and the verdict of the jury, but not whether the jury was deadlocked. (RP 1381-1384) There was no differentiation between the two alternate means of committing the offense of felony murder in the second degree and no special interrogatories for the jury to distinguish whether this was based upon assault in the second degree or criminal mistreatment in the first degree.(CP 5-6, 57) She was given a mid-range sentence of 195 months.(RP 1402)(CP 68-82)

On December 21, 2004, the Court of Appeals entered an opinion remanding the case for a new trial based upon murder in the second degree

with criminal mistreatment as the predicate felony. The Court denied the State's request that she be retried on the greater offense of homicide by abuse. On May 3, 2007, this Court entered its opinion in this case wherein it reversed the Court of Appeals and remanded the case for retrial based upon the greater offense of homicide by abuse. The Court also affirmed the Court of Appeals in allowing Carissa Daniels to also be retried for the alternative offense of felony murder in the second degree with criminal mistreatment as the underlying offense.

On April 12, 2007 the Ninth Circuit Court of Appeals issued its initial decision in the case of *Brazzel v. State of Washington*, supra. This case held that the unable to agree verdict form did not rise to the level of a mistrial and therefore retrial following appeal of a greater offense for which the defendant was not found guilty was a violation of double jeopardy. Based upon this, a motion for reconsideration was filed by respondent Carissa Daniels. By order dated January 9, 2008 this Court granted the motion to reconsider its decision of May 3, 2007.

## 2. Substantive Factual History of the Case

On July 9, 2000, 17 year old Carissa Daniels gave birth to a baby boy, Damon Daniels.(RP 211, 277, 295, 341, 816, 1048) At the time she was living with her boyfriend, Clarence Weatherspoon, age 22, who was recently

discharged from the army and not the father of the child.(RP 815-819) After the baby was born, Mr. Weatherspoon watched the child alone on occasion. (RP 831-832, 1078) He recalled at least 10 times during the month of August. (RP 832) He also watched the baby several days in September. RP 834-836)

On July 18, 2000, Carissa took the baby to the St. Clare ER for blood in his mouth.(RP 272) Mr. Weatherspoon did not go.(RP 272) The baby was examined by Dr. Cowan.(RP 273) He found no bleeding. (RP 273) He further found no problem, it appeared to be a healthy baby. (RP 274 & 279-280) He saw no bleeding and based on the mother's report that it had been bleeding he noted there had been a minor nosebleed.(RP 280-281) He recommended that the baby be taken to his pediatrician, Dr. Schoenike the next day.(RP 276

Carissa mentioned this to Deanna Henderson, an RN from Maternity Support Services, who visited her in her home the next day. (RP 216-217) Ms. Henderson also saw Carissa and the baby in her office for a scheduled visit on August 17<sup>th</sup>.(RP 217-218) She noted that Carissa appeared to be a nurturing mother. (RP 241-242)

Dr. Sumner Schoenike was the pediatrician who preformed the discharge examination on the baby on July 11, 2000. (RP 341) He again saw the baby the next day in his office. (RP 344) He saw the baby on July 19,

2000, but he apparently did not know of the ER visit the day before.(RP 346) He examined the baby and found that he had a cold and a right ear infection. (RP 346) Dr. Schoenike next saw him on the 24<sup>th</sup> of July for a two week well child exam. (RP 347) There was nothing found to be wrong with the baby on that date. (RP 347) He next saw the baby on August 10, 2000 at which time he found a persistent ear infection and cold. (RP 348) He saw the baby on the 22<sup>nd</sup> of August for a follow up and found the ear infection had “good clearing” and some minimal nasal congestion . (RP 349) The mother had scheduled visits for September 7<sup>th</sup> and 8<sup>th</sup>, but they had to be cancelled because the state insurance the mother was on ended and she was switched by the state to Group Health.(RP 349-351)

Dr. Christopher John Schmitt was the doctor Carissa took the baby to at Group Health. He first saw the baby on August 28, 2002 at which time the baby appeared to have a fever, possibly due to a virus and he noted anemia. (RP 552-553) He further noted that there were no bruises nor any apparent injury to the baby. (RP 555) He did have Carissa take the baby to Mary Bridge Children’s Hospital for tests, which included a spinal tap. (RP 556) In addition, Mary Bridge did some blood cultures , lab work, and a chest X-ray. (RP 556) He only received the spinal tap results, which were negative for meningitis or infection. (RP 556) He again saw the baby for a follow up visit

on the 31<sup>st</sup> of August and noted that the baby was doing about the same or slightly better. (RP 556) He also commented that the baby was eating better and was improved. (RP 556-557)

On September 5, 2001, Dr. Stephen Friedrich, emergency room doctor at St. Clare Hospital saw the baby. (RP 284, 285-286) The baby was brought in by Carissa due to bleeding in the mouth.(RP 289-290) From his notes of the history given by Carissa, the bleeding had been occurring for a week, but he could not find any current bleed.(RP 291) Dr. Friedrich no problems with the baby, he appeared age appropriate in development, no signs of internal bleeding.(RP 294-295, 298-299) The one thing he found was a torn frenulum, which was not noted to be actively bleeding.(RP 299-300) There was also nothing from his exam that showed that there were any broken ribs and his examination would have triggered a response if there were broken ribs.(RP 301) At trial he acknowledged that one of the causes of a torn frenulum is abuse, such as putting a pacifier or bottle in the baby's mouth too hard, but he did not note anything to raise his suspicion so he did not call CPS.(RP 302-304) He stated that the autopsy picture of the torn frenulum was not what he saw during his examination on the 5<sup>th</sup>.(RP 304-306)

The first time Carissa noticed blood in the baby's mouth, she came into the room where Weatherspoon was watching the baby and found him

“wiggling out” with blood on his shirt. (RP 1062) Weatherspoon had been feeding him a bottle when he saw the blood. (RP 828)

The second time the baby’s mouth was bleeding, Carissa had just come home and Weatherspoon was watching the baby.(RP 1068) He apparently had put the pacifier in the baby’s mouth prior to noticing the blood. (RP 849, 869) On cross examination, at trial, Weatherspoon changed his story from direct examination and claimed that Carissa had the baby on the 5<sup>th</sup> and caused an unreported mouth bleed on the 7<sup>th</sup> and he was the one who was out and came home. (RP 907-908) But on redirect, he confirmed that he told the detectives in the first interview that it happened when the baby head butted him twice with his pacifier in his mouth.(RP 935)

Weatherspoon was watching the baby when the baby poked himself in the eye.(RP 852-853, 1078,1190) He then got some ice in a little bag and put it on the eye.(RP 854) Carissa was not home at the time.(RP 854, 1078, 1190) It still got swollen, even with the ice.(RP 854) At trial, Weatherspoon demonstrated how the baby injured himself.(RP 853) He did not recall the date of the injury, but Carissa recalled it was the same week he died.(RP 852-853, 1078) On cross examination it was presented that he told the detectives that Carissa was home and he was the one who came home and found the baby.(RP 911-912) However, on redirect it was presented that he told the

detectives on the first interview the first version of the baby poking himself in the eye. (RP 929) One witness testified that there was a bruise on the baby's eye the week he died.(RP 670)

On Monday, September 11, 2000, Carissa took the baby to Natasha Bird while she went to school and so that Weatherspoon could go to the fair. (RP 367) She watched the baby from 8:30 in the morning until 11:00 at night. (RP 374, 380) She noted that he had a scratch on his nose, but she saw no other injury to him.(RP 373, 375-376) She also commented that the baby vomited after eating. (RP 371-372, 380-381, 1263) She did not notice any blood hemorrhaging in the corner of the baby's eye on the 11<sup>th</sup>.(RP 375-376)

On Tuesday, September 12, 2000, Carissa took the baby to the school child care, while she was in class.(RP 394) This was the first time she had used the child care at school.(RP 394) The baby was very fussy, but the child care worker, Mary Waage, could not say if it was more than normal considering it was his first day as children are often fussy their first day.(RP 395-396) She did not recall seeing any injury to the baby's face or to his eye.(RP 397)

On Wednesday, September 13<sup>th</sup>, Carissa and Weatherspoon went to the fair together with the baby.(RP 736, 914-915, 1143) Sarah Schliemann saw them there with the baby around 6:00 p.m. or towards evening that

day.(RP 737)

On September 14, Carrisa got up at 7:30 and fed the baby.(RP 1080-1081) She had an appointment at Maternal Support Service, at St. Clare Hospital. (RP 1081, 1083) She had discussed this with Weatherspoon the night before that she would be leaving the baby with him.(RP 937,1081-1082) She left sometime between 10:00 and 11:00 a.m. or earlier.(RP 894-895) When she left the baby, he was sleeping with Weatherspoon.(RP 894,1081) Weatherspoon was half awake at the time.(RP 1188)

She had an appointment that morning with Maternity Support Services.(RP 1081,1098) She left the house before 11:00. (RP 894) This appointment had been set originally to bring in the baby, but she forgot it was for the baby because she usually had these appointments without the baby.(RP 251-254, 1098) After the appointment, the worker there, Ms. Utt, took her to DSHS to apply for assistance.(RP 256-257, 1083) This was after 12:00 and they got to DSHS around 1:00-1:30.(RP 257) After that Carissa then went to the mall to find the father of the baby to get information needed for the DSHS papers for child support.(RP 1083-1084)

While she was at the mall, Weatherspoon paged her.(RP 860-862, 1084) This was sometime after 3:00 p.m..(RP 861-862) She immediately returned his call from a courtesy phone.(RP 860, 896, 1084-1085) He told her

that the baby was not moving and that everything he did to wake him was not working.(RP 860, 896, 1151) She asked if the baby was blue and when he told her no, she then told him to take his temperature and call her back.(RP 1151) He then paged her and she called him right back.(RP 861, 897) He then told her that the temperature was normal, that the baby was breathing, and that he had a pulse.(RP 861) After this conversation, Carissa came home.(RP 862) It took her about 45 minutes by bus to get home.(RP 1085-1086) When she got home, she tried to call 911, but could not get through.(RP 711, 1086) She then called Joanna Ruzanka-Stuen, at Maternity Support Services at St. Clare Hospital.(RP 711) She told her to call 911 again.(RP 711) This call occurred at approximately 4:30 p.m..(RP 712) Carissa finally got through to 911 at approximately 4:40 p.m..(RP 85) By the time the paramedics came, at 4:47 p.m., the baby had no pulse and was dead.(RP 102,105)

Before trial, the state dismissed the charges against Mr. Weatherspoon without prejudice in return for his agreement to testify against Carissa.(RP 883-885) He was also released from jail as a result of his agreement.(RP 885)

At trial, Dr. Yolanda Duralde, an expert on child abuse at Mary Bridge Children's Hospital, testified about shaken baby syndrome.(RP 157, 162-164) She testify as to the mechanics of the injury and that there were

generally no external signs.(RP 162-164, 167) In regard to what might be noticed she stated:

What you see is neurologic changes and particularly in babies that is often nonspecific. So the neurologic changes you see is the baby is fussy, irritable, vomits. Won't eat. Cries more frequently, Or is real quiet. So all these are sort of nonspecific changes that the baby might go through but babies kind of do that anyways.

So sometimes it's really hard to tell, you know, is this because of an event that happened to the child or does the kid have the flu. And it is often difficult to distinguish.(RP 180-181)

In elaborating on whether the signs of shaken baby syndrome would be apparent to a lay person in cross examination she stated:

Well, like I said, it can be quite confusing. Because there's often no external injuries and the baby can basically be more fussy, irritable, not eat as well, but those are things that babies might do anyways. So it can be a confusing picture.(RP 191)

She testified that only 25% of the babies that are shaken die.(RP 179)

A shaken baby can linger for days before it finally dies.(RP 189) Also, it does not take much shaking to cause the injuries of shaken baby syndrome, it can be all of 10 seconds of shaking.(RP 200)

Weatherspoon testified that Carissa never shook the baby, she only rattled him.(RP 920-922) Carissa testified that Weatherspoon did shake the baby a little, but not hard.(RP 1180)

## ARGUMENT

### I.

THE CASE OF *BRAZZEL V. STATE OF WASHINGTON*, 491 F.3D 976 (9<sup>TH</sup> CIR. 2007) IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION, AND THAT CASE MAKES IT CLEAR, UNDER FACTS NEARLY IDENTICAL TO THOSE PRESENT IN THIS CASE, THAT THE "UNABLE TO AGREE" JURY INSTRUCTION ALONE, WITHOUT ANY CLEAR FINDING FROM THE TRIAL COURT THAT THE JURY WAS HOPELESSLY DEADLOCKED, IS INSUFFICIENT TO ESTABLISH A MISTRIAL; THEREFORE A RETRIAL ON THE GREATER CHARGE THAT THE JURY WAS UNABLE TO AGREE ON IS A VIOLATION OF DOUBLE JEOPARDY.

In the case of *Brazzel v. State of Washington*, 491 F.3d 976 (9<sup>th</sup> Cir. 2007) the defendant, Brazzel, was charged with a three count information. The first count charged attempted murder in the first degree and in the alternative assault in the first degree. The verdict form was the same unable to agree form used in Carissa Daniels case. The Court in describing the facts stated:

The jury convicted Brazzel of first degree assault on Count I, second degree assault on Count II, and second degree assault on Count III. On Count I, the jury remained silent on the first degree attempted murder charge, leaving the verdict form blank. During the jury poll, at the conclusion of their deliberations, the jurors did not claim to be hung or announce any splits or divisions. The state did not request that the jury be declared hung as to the attempted murder count; nor did the state take any other post-verdict action on the attempted

murder charge. The trial judge discharged the jury, taking as final the convictions on the assault counts, and sentenced Brazzel to 456 months in prison. (at 979)

Brazzel sought appeal based upon a jury instruction error and the case was remanded for a new trial. On retrial, the prosecutor refiled all of the original charges, including first-degree attempted murder. Although Brazzel objected to the refileing of the attempted first-degree murder charge, the State argued that based upon the prior verdict form, the jury had hung on the issue of attempted first-degree murder and therefore the retrial on that charge was appropriate. The trial court allowed the charge and retrial on both attempted first-degree murder and first-degree assault. On retrial the defendant was again convicted of first-degree assault with the same verdict forms.

The Ninth Circuit Court of Appeals reversed the trial court. In so doing the court stated:

The Fifth Amendment's Double Jeopardy Clause prohibits retrial after an acquittal, whether express or implied by jury silence. *See Green*, 355 U.S. at 191, 78 S.Ct. 221. An implied acquittal occurs when a jury returns a guilty verdict as to a lesser included or lesser alternate charge, but remains silent as to other charges, without announcing any signs of hopeless deadlock. *See id.* at 191, 194, 78 S.Ct. 221.(at 981)

.....

In contrast to an implied acquittal, retrial is permitted where there is a mistrial declared due to the "manifest necessity" presented by a hung jury. *See United States v. Perez*, 9 Wheat. 579, 22 U.S. 579, 580, 6 L.Ed. 165 (1824). A hung jury

occurs when there is an irreconcilable disagreement among the jury members. A “high degree” of necessity is required to establish a mistrial due to the hopeless deadlock of jury members. *See Arizona v. Washington*, 434 U.S. 497, 506, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). The record should reflect that the jury is “genuinely deadlocked.” *Richardson v. United States*, 468 U.S. 317, 324-25, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984) (explaining that when a jury is genuinely deadlocked, the trial judge may declare a mistrial and require the defendant to submit to a second trial); *see also Selvester*, 170 U.S. at 270, 18 S.Ct. 580 (“But if, on the other hand, after the case had been submitted to the jury they reported their inability to agree, and the court made record of it and discharged them, such discharge would not be equivalent to an acquittal, since it would not bar the further prosecution.”).

“The trial judge's decision to declare a mistrial when he considers the jury deadlocked is ... accorded great deference by a reviewing court.” *Arizona v. Washington*, 434 U.S. at 510, 98 S.Ct. 824; *United States v. Salvador*, 740 F.2d 752, 755 (9th Cir.1984) (citations omitted). When a judge does not find a mistrial to be of manifest necessity in his or her own judgment, “the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate ‘manifest necessity’ for any mistrial declared over the objection of the defendant.” *Arizona v. Washington*, 434 U.S. at 505, 98 S.Ct. 824.(at 982)

In the case of Carissa Daniels, there was no mistrial declared, there was no finding that the jury was “genuinely deadlocked”. After less than two days of deliberation, without any indication whatsoever that they were deadlocked in the least, the jury just left Verdict Form A blank and found her

guilty of felony murder in the second degree. Her case is directly on point with Brazzel's.

The *Brazzel* Court went on to state:

No Supreme Court case addresses precisely such an “unable to agree” jury instruction, so the state court's treatment of the jury's silence cannot be characterized as “contrary to” federal law. Under federal law, the Washington Court of Appeals' determination was also not unreasonable. Consistent with Supreme Court precedent, the state court could reasonably conclude that the inability of Brazzel's first jury, as instructed, “to reach [a] unanimous decision after full and careful deliberation on the charge of attempted murder in the first degree” did not by itself result in a hung jury and “mistrial” by “manifest necessity” on the attempted murder charge, but rather was an implied acquittal. Assuming, as we must, that the jury followed the instructions, we know the jury did not *actually* acquit Brazzel on the attempted murder charge because it did not fill in the box with a “not guilty” notation. Instead, the jury “[could] not agree” on that charge, remained “silent,” and convicted of a lesser alternative offense. Under *Green* and *Price*, “petitioner'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.” *Price*, 398 U.S. at 329, 90 S.Ct. 1757 (quoting *Green*, 355 U.S. at 191, 78 S.Ct. 221).(at 984)

Here it appears clear that the Ninth Circuit has taken the position that without a mistrial created by a manifest necessity, we are left with an implied acquittal. Basically the State was given a full opportunity to to have a verdict returned on the greater charge and a failed to do so. As a result of that they do not get a second opportunity to try the case.

In further clarification of this the court continued by stating:

Following Brazzel's first trial, the judge polled the jury asking two questions: "Is this your verdict, is this the way you individually, personally voted" and "Is this the verdict of the jury, meaning is this the verdict of all twelve of you?" Each juror responded in turn, "Yes" or "Yes, it is."

No inquiry was made to determine whether the jury had "genuinely deadlocked" or simply moved to the lesser alternative assault charge as a compromise. Notably as well, after Brazzel's first trial, the government did not construe the jury's silence as "hanging" or seek a retrial as to that count, even though the state now argues the blank form should be construed as a hopeless deadlock.

Under 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. *See, e.g., Arizona v. Washington*, 434 U.S. at 509, 98 S.Ct. 824. The Supreme Court has characterized disagreement sufficient to warrant a mistrial as "hopeless" or "genuine" "deadlock." *Id.* ("[T]he trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial."). Genuine deadlock is fundamentally different from a situation in which jurors are instructed that if they "cannot agree," they may compromise by convicting of a lesser alternative crime, and they then elect to do so without reporting any splits or divisions when asked about their unanimity. (at 984)

As stated above, this is exactly the situation that we have with Carissa Daniels. The jury spent less than two days deliberating; never indicated that they were hung, were deadlocked, or in any way incapable of reaching a

decision. The prosecutor never inquired as to whether or not they were deadlocked and never sought a finding by the court to that affect. The only question asked of the jury was whether or not the verdict rendered was their verdict and the verdict of the jury. Absolutely no indication of any deadlock. Hence the very same reasons presented above in *Brazzel* apply equally to Carissa Daniels and she should not be retried on the greater offense of homicide by abuse.

It should be noted that the court in *Brazzel* found that this decision was not in conflict with the case of *State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006). The reason was because in the *Ervin* case there was clear evidence that the jury was deadlocked. In *Ervin* the jury deliberated for five weeks and announced that they were unable to reach a unanimous verdict.(at 750) This is a clear factual distinction from Carissa Daniels' case where the jury returned a unanimous verdict in less than two days of deliberation without any indication whatsoever of any deadlock. Hence this Court does not have to reversed itself on the ultimate outcome or results of the *Ervin* case in order to rule that there is an implied acquittal in the case of Carissa Daniels.

Finally in the *Brazzel* case the court concluded by stating:

The purpose of the rule permitting retrial if a jury hangs is to accord "recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Id.* at 509, 98 S.Ct. 824. Here, the prosecution was given one complete opportunity to convict Brazzel of attempted first degree murder. The jury declined to do so. In *Green*, the Supreme Court rejected the proposition that "in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal." 355 U.S. at 193, 78 S.Ct. 221. The state court's treatment of the jury's "silence" following Brazzel's first trial as an implied acquittal is a permissible application of governing law. (at 985)

On pages 262-263 of this Court's opinion in the case of Carissa Daniels the court stated:

Daniels argues her conviction for second degree murder terminates jeopardy for all charges because the State already had an opportunity to convict her for homicide by abuse and was unsuccessful. Therefore, she claims it is unfair to allow the State to raise the specter of a retrial on this charge if a defendant is successful in reversing the conviction on other included charges. This argument has appeal on purely fairness grounds, and if we were deciding this as a matter of first impression, perhaps we would agree. (at 262-263 )

From the concluding statement in *Brazzel* listed above, it is clear that not only is Carissa Daniels argument appealing on the grounds of pure fairness, but it is also consistent with federal law. The State had one full opportunity to obtain a conviction and the jury compromised, as they were

allowed to do under the jury instruction, and returned a verdict of guilty on the lesser offense. The state had their opportunity to obtain a conviction on the greater offense and lost. Under double jeopardy, they do not get a second bite at that apple.

On pages 262-263 of this Court's decision in Carissa Daniels' case, this Court also stated:

Jury silence can be construed as an acquittal and can therefore act to terminate jeopardy. *Green v. United States*, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) (stating jury's silence acted as implied acquittal). But such is not the case when a jury fails to agree and such disagreement is evident from the record. *Ervin*, 158 Wash.2d at 753-54, 147 P.3d 567. (at 262)

This is in direct conflict with *Brazzel* and with *Arizona v. Washington*, *ibid*, that requires a hopeless or genuine deadlock before a mistrial can be declared. In this case, we have nothing but the jury lack of agreement and probable compromise on the greater offense. This record is not sufficient for a true hung jury and hence the record is insufficient to allow for a retrial.

In the first quote above from this Court dealing with the State having one full opportunity to convict an accused, this Court concluded with the following statement:

But for over a century the United States Supreme Court has held that when a jury is unable to agree, jeopardy has not terminated. *Selvester v. United States*, 170 U.S. 262, 269, 18 S. Ct. 580, 42 L. Ed. 1029 (1898).

This Court then provided the following quote from the *Selvester* case in support of that.

Doubtless, where a jury, although convicting as to some, are silent as to other counts in an indictment, and are discharged without the consent of the accused, as was the fact in the *Dealy case*, the effect of such discharge is "equivalent to acquittal," because, as the record affords no adequate legal cause for the discharge of the jury, any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent. But such obviously is not the case, where a jury have not been silent as to a particular count, but where, on the contrary, a disagreement is formally entered on the record. The effect of such entry justifies the discharge of the jury, and therefore a subsequent prosecution for the offence as to which the jury has disagreed and on account of which it has been regularly discharged, would not constitute second jeopardy. (at 269)

In the *Selvester* case, the jury was able to return a verdict on three counts of a four count indictment, but they were unable to agree on the fourth count. The jury expressly advised the court that they were unable to agree on the fourth count. The question on appeal was whether or not the conviction was valid when the jury was unable to expressly agree as to all four counts. The Supreme Court determined that the conviction upon the first three counts

was valid and that the court could proceed to sentence the defendant on those three counts. In doing so the court stated the above.

However, the concurring opinion pointed out the above quote was unnecessary dicta. In the concurring opinion they stated:

But in so much of the opinion of the court, as suggests that the plaintiff in error may be hereafter tried, convicted and sentenced anew upon the fourth count, we are unable to concur. No attempt has been made to try him anew, and the question whether he may be so tried is not presented by this record. (at 271)

The problem with attempting to use the *Selvester* case as precedence here is because the portion of the case being used as precedence was clearly dicta. The court was not there presented with any attempt to retry *Selvester* and hence that was not the issue before the court for a decision.

The next thing to bear in mind is that factually speaking the *Selvester* case involved a clearly hung jury. The jury indicated to the court in no uncertain terms that they were deadlocked and would not be able to reach an agreement as to the fourth count. That was the reason for the appeal in the first place, the question was, when the jury deadlocks on one of four counts was a verdict valid on the other three. Clearly this is consistent with the holding in *Brazzel* above. In the case of Carissa

Daniels there was no evidence on the record that the jury ever deadlocked or was unable to reach a unanimous verdict, other than that which was implied from the failure to fill in the blank on Verdict Form A.

The Court also cited *Richardson v. United States*, 468 U.S. 317, 325, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984) for the proposition that “jeopardy does not terminate when the jury is discharged because it is unable to agree.” (at 325-326) However, in the case of Ms. Daniels, the jury was not “discharged because it is [was] unable to agree”, it actually reached a verdict.

In footnote 3, the Court cites to *State v. Linton*, 156 Wn.2d 777, 132 P.3d 127 (2006) for the proposition that following a hung jury the defendant could be retried after appeal if the lesser included conviction was overturned, however, in that case there was a clear finding of a hung jury as to the greater offense. As the Court in *Linton* stated:

The State argues that because the trial court found that the jury was *hopelessly deadlocked* on first degree assault, there was no implied acquittal and *Linton* can be retried on that charge under the hung jury rule. (at 783) (emphasis added)

Once again this is consistent with the decision in *Brazzel* requiring that the jury be hopelessly deadlocked. This is also a fact that does not exist in the case of Carissa Daniels.

The last thing that the court should consider is what was the intent of the "unable to agree" jury instruction. In the case of *State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1991) this court looked at the question of whether it was error to refuse to give the "unable to agree" jury instruction. The court concluded that it was not error to refuse to give the jury instruction, but it was equally not error to give the instruction. In fact the court implied that it was preferable to give the "unable to agree" jury instruction. In discussing the intent of the "unable to agree" instruction the court stated:

The rationale underlying the "unable to agree" instruction rule is twofold. First, this rule allows the jury to correlate more closely the criminal acts with the particular criminal conviction. Second, it promotes the efficient use of judicial resources; where unanimity is required, the refusal of just one juror to acquit or convict on the greater charge prevents the rendering of a verdict on the lesser charge and causes a mistrial even in cases where the jury would have been unanimous on a lesser offense. Retrials, necessitated by hung juries, are burdensome to defendants, victims, witnesses and the court system itself. Successive trials can burden a defendant while allowing the state to benefit from "dress rehearsals". Additionally, structuring the jury's deliberations to unnecessarily increase the likelihood of hung juries places

an enormous financial strain on an already heavily burdened criminal justice system. A second trial exacts a heavy toll on both society and defendants by helping to drain state treasuries, crowding court dockets, and delaying other cases while also jeopardizing the interests of defendants due to the emotional and financial strain of successive defenses. (at 420)

From the above it is clear that the Court intended the “unable to agree” instruction to avoid hung juries, not to create them. Hence, when a jury does what the Court expected them to do, it promotes judicial economy and avoids unnecessary hung juries. However, this Court’s current position in Carissa Daniels’ case now makes every case where the “unable to agree” instruction is given, an automatic hung jury subject to retrial following an appeal.

The *Labanowski* court further clarified this in rejecting the defense request for an election rule that would have allowed the defendant, at his choice, to have either an “unable to agree” instruction or an “acquittal first” the court commented:

An "acquittal first" instruction is also likely to result in unnecessarily hung juries and consequent mistrials which burden both defendants and the criminal justice system.(at 423)

Hence the traditional “acquittal first” instruction was recognized by the Court as more likely to create hung juries. That was one of the reasons given by the

court in favor of the “unable to agree” instruction, that it would avoid hung juries. However, that advantage is lost if the instruction is construed to create an automatic hung jury.

For all of the above reasons, this Court must reconsider its decision and rule that without evidence of an actual hopeless deadlock, the mere act by the jury of leaving the jury form of an “unable to agree” instruction blank and returning a verdict to a lesser offense, is an implied acquittal and does not allow for a retrial following appeal.

## II.

THE CASE OF *BRAZZEL V. STATE OF WASHINGTON*, 491 F.3D 976 (9<sup>TH</sup> CIR. 2007) DOES UNDERMINE THE CORRECTNESS OF THIS COURT’S DECISION IN *STATE V. ERVIN*, 158 WN.2D 746, 147 P.3D 567 (2006) AND THE CORRECTNESS OF THE DECISION IN THIS CASE WHICH ALLOWS DANIELS RETRIAL ON THE CHARGE OF HOMICIDE BY ABUSE

The State filed a response to the motion for reconsideration in which it is alleged that the *Brazzel* case did not undermine the correctness of the *Ervin* case nor of this Court’s original decision on Daniels. The State does so by first alleging that it was improper for the Ninth Circuit Court of Appeals to have accepted habeas review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). First of all, it should be

noted that in that case the Ninth Circuit was of the opinion that the did have jurisdiction under the AEDPA and that did not appear to be challenged by the State, nor was that issue, nor any other issue, taken up on appeal to the US Supreme Court. Therefore, the short answer to their first proposition is that it is a non-issue because since it was never appealed or challenged, it is the law of the case regardless and therefore the case is valid. However, even when the issue is fully analyzed, the decision is still valid and the court did have the authority to grant the relief.

The AEDPA, 28 U.S.C.A. § 2254 (d) (1) reads as follows:

**(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

**(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

The State takes the position the Ninth Circuit in Brazzel was precluded from finding that a defendant could not be retried on a greater offense following appeal if the jury left the unable to agree jury instruction blank because the court acknowledged that “No [United States] Supreme Court case addresses precisely such an ‘unable to agree’ jury instruction.” (at 984) The State

reasons that since there is no United States Supreme Court case directly on point in the law and fact, that a federal court cannot consider the case. The State also implies that the court must also defer to a State court determination of law, not if it is incorrect, but if it believes it to be unreasonable.

In interpreting the AEDPA, the case cited by the State, and the leading US Supreme Court case dealing with this is *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L. Ed.2d 389 (2000). That case involved an inadequate representation of counsel question out of the Fourth Circuit Court of Appeals. The Court in *Williams* rejected a similar interpretation by the Fourth Circuit to that taken by the State here by saying:

In this case, the Court of Appeals applied the construction of the amendment that it had adopted in its earlier opinion in *Green v. French*, 143 F.3d 865 (C.A.4 1998). It read the amendment as prohibiting federal courts from issuing the writ unless:

“(a) the state court decision is in ‘square conflict’ with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, ‘the state court’s resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts,’ ” 163 F.3d, at 865 (quoting *Green*, 143 F.3d, at 870).

Accordingly, it held that a federal court may issue habeas relief only if “ ‘the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable,’ ” 163 F.3d, at 865.

We are convinced that that interpretation of the amendment is incorrect. It would impose a test for determining when a legal rule is clearly established that simply cannot be squared with the real practice of decisional law. It would apply a standard for determining the “reasonableness” of state-court decisions that is not contained in the statute itself, and that Congress surely did not intend. And it would wrongly require the federal courts, including this Court, to defer to state judges' interpretations of federal law. (at 375-377)

The Court when on to make an analysis of the statute. They began by defining the term “clearly established Federal law”. In this regard the Court stated:

In *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), we held that the petitioner was not entitled to federal habeas relief because he was relying on a rule of federal law that had not been announced until after his state conviction became final. The antiretroactivity rule recognized in *Teague*, which prohibits reliance on “new rules,” is the functional equivalent of a statutory provision commanding exclusive reliance on “clearly established law.” (at 379)

In short, clearly established Federal law is law established at the time the defendant’s conviction becomes final as opposed to something established by the court thereafter. The only qualifier on that is that it must be federal law that is established by the US Supreme Court. In this case, the case law

dealing with double jeopardy from the US Supreme Court is clear and once the state has had a full opportunity to try the defendant, they do not get another opportunity to do so unless the jury is “hopelessly deadlocked”. Therefore, the Ninth Circuit Court of Appeals was dealing with clearly established Federal law as determined by the United States Supreme Court.

As the Court in *Brazzel* clearly said at the end of their opening paragraph:

The framework for our analysis of this double jeopardy challenge is found in two Supreme Court cases- *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), and *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970). (at 978)

It is evident, that the Court was relying on “clearly established Federal law, as determined by the Supreme Court of the United States”.

The court next considered the question of the meaning of the phrase “contrary to, or involved an unreasonable application” and determined that these are not two separate and distinct requirements, but rather that they refer to the same thing. Basically if a decision is contrary to federal law is also an unreasonable application. This is contrary to the state’s implication on page 3 where they state that the question “is not whether a federal court believes the State court determination was incorrect but whether that determination was unreasonable— a substantially higher threshold.” In fact, the court took

the position that any time a state court is incorrect or in error that would qualify. The Court stated:

Our disagreement with the Court about the precise meaning of the phrase “contrary to,” and the word “unreasonable,” is, of course, important, but should affect only a narrow category of cases. The simplest and first definition of “contrary to” as a phrase is “in conflict with.” Webster's Ninth New Collegiate Dictionary 285 (1983). *In this sense, we think the phrase surely capacious enough to include a finding that the state-court “decision” is simply “erroneous” or wrong.* (We hasten to add that even “diametrically different” from, or “opposite” to, an established federal law would seem to include “decisions” that are wrong in light of that law.) And there is nothing in the phrase “contrary to”-as the Court appears to agree-that implies anything less than independent review by the federal courts. Moreover, state-court decisions that do not “conflict” with federal law will rarely be “unreasonable” under either the Court's reading of the statute or ours. We all agree that state-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated. Our difference is as to the cases in which, at first blush, a state-court judgment seems entirely reasonable, but thorough analysis by a federal court produces a firm conviction that that judgment is infected by constitutional error. In our view, such an erroneous judgment is “unreasonable” within the meaning of the Act even though that conclusion was not immediately apparent.(emphasis added)(at 388-389)

Clearly the court in *Brazzel* was not reduced to merely rubber stamping what the state court had done unless there was a US Supreme Court decision directly on point, but they were free to reverse the decision if they believed

it was simply incorrect or wrong in light of US Supreme Court decisions that were in existence at the time of Brazzel's trial. Hence, the *Brazzel* court was fully within the law when they reached their decision and as such it should be considered by this Court.

That being said, the question still remains whether that case undermines the correctness of this Court's decision in *State v. Ervin*. As was discussed in the former section, the *Brazzel* court felt that when the jury leaves the verdict form blank for an offense, following the unable to agree jury instruction, it is a violation of double jeopardy for the defendant to be retried for the greater offense following appeal. The court felt that the only time a defendant may be retried is when there is a hung jury based upon a finding that the jury is hopelessly deadlocked. *State v. Ervin* ruled differently and there is clearly a conflict here. Based upon this, its correctness has been undermined and this Court should reverse those portions of the decision that are inconsistent. As pointed out above, the ultimate result in *State v. Ervin* was not undermined by the decision in *Brazzel* because there was a factual distinction in the *Ervin* case with the jury actually having been hung and hopelessly deadlocked. However, those portions of the decision ruling that in every case where the jury leaves the jury verdict blank, without any further finding that the jury was hopelessly deadlocked and therefore hung, allow a

defendant to be retried on the greater offense following appeal must be reversed by this Court.

Also, it should be noted that the *Ervin* case did not hold that the unable to agree jury verdict was equivalent to a mistrial. In footnote 10, the court stated:

FN10. This is not to decide, however, that the jury's inability to agree on the greater charges is the equivalent of a mistrial on those charges. Unable to agree instructions instruct the jury to end deliberations on a greater charge and move to a lesser charge once disagreement on the greater has been established. Comparatively, state and federal jurisprudence establishes that a jury must be "genuinely deadlocked" before a mistrial can be declared. *See Arizona v. Washington*, 434 U.S. 497, 509, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); *see also Jones*, 97 Wash.2d at 164, 641 P.2d 708 (finding that "hopeless deadlock is an 'extraordinary and striking' circumstance"). Therefore, an "unable to agree" verdict (or nonverdict) is not the equivalent of a "mistrial" on the charges upon which the jury was unable to agree. (at 757)

Therefore, the Court in *Ervin* did not find that the unable to agree jury verdict did amount to a mistrial, however, it is clear from the *Brazzel* court and the Supreme Court case law that in order to have a retrial there must be a determination that there is a mistrial. This as an inconsistency in the *Ervin* case that further makes it clear that the unable to agree jury instruction does not justify a retrial on a greater offense following appeal.

The cases cited by the state in apparent support of an unable to agree type of instruction that would justify a retrial after appeal are factually distinct from that of Carissa Daniels and Brazzel. All of them involve an actual hung jury that was hopelessly deadlocked. That was not the case with either Ms. Daniels nor with Mr. Brazzel.

In *U.S. v. Bordeaux*, 121 F.3d 1187 (1997), in upholding a retrial following appeal, the court stated:

However, after further analysis, we think that neither of the bases for invoking the double jeopardy bar in *Green* and *Price* can be applied here. The jury's express statement that it could not agree on a verdict as to the greater offense obviously precludes the inference that there was an implied acquittal. The second basis for those rulings comes from the general rule that if a trial court discharges a jury, over defendant's objection, before a verdict is reached, then the defendant cannot be retried. *See Green*, 355 U.S. at 188, 78 S.Ct. at 223-24. However, there are exceptions to this rule, and the paradigmatic exception, consistently recognized by the Supreme Court, allows dismissal of the jury and retrial of the defendant when there is a hung jury. *See Richardson*, 468 U.S. at 324-25, 104 S.Ct. at 3085-86; *Green*, 355 U.S. at 188, 78 S.Ct. at 223-24; *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949). Therefore, the fact that the district court declared a mistrial based on a hung jury as to the greater offense makes the second basis for the holding in *Green* and *Price* likewise inapplicable. (at 1192)

Clearly, there was a hung jury and a mistrial in this case. In the case of *U.S. v. Williams*, 449 F.3d 635 (2006) there was an “express statement of deadlock” (at 645).

The cases decided by the state for the proposition that where the defendant requests a mistrial there is no error in retrying him are not applicable because this Court stated in *Ervin* that the unable to agree jury instruction does not raised to the level of a mistrial. Therefore, they do not apply to an unable to agree instruction.

For all the above reasons it is respectfully requested that the court reverse the decision in *Ervin* and in *Daniels* inasmuch as the retrial following appeal is based solely upon a blank jury instruction following an unable to agree jury instruction and not based upon an express statement of hopeless deadlock by the jury.

### III.

WHEN A DEFENDANT IS CONVICTED OF MURDER IN THE SECOND DEGREE BASED UPON FELONY MURDER WITH TWO ALTERNATE MEANS OF ACCOMPLISHING IT, I.E., BASED UPON AN UNDERLYING OFFENSE OF ASSAULT IN THE SECOND DEGREE WHICH WAS SUBSEQUENTLY DETERMINED TO BE INVALID IN *IN RE PERSONAL RESTRAINT OF ANDRESS*, 147 WASH.2D 602, 56 P.3D 981 (2002) AND CRIMINAL MISTREATMENT IN THE FIRST DEGREE, WITHOUT ANY SPECIAL

INTERROGATORIES OR MEANS BY WHICH IT CAN BE DETERMINE THE BASIS FOR THE JURY'S VERDICT OF GUILTY, AND THERE IS EVIDENCE SUFFICIENT FROM WHICH A JURY COULD HAVE DETERMINED THAT THE DEFENDANT WAS NOT GUILTY OF CRIMINAL MISTREATMENT IN THE FIRST DEGREE, A RETRIAL VIOLATES DOUBLE JEOPARDY BECAUSE THE JURY MAY HAVE ACQUITTED THE DEFENDANT OF THAT CHARGE.

The statute, RCW 9A.42.020(1), Criminal mistreatment in the first degree reads as follows:

(1) A parent of a child, the person entrusted with the physical custody of a child or dependent person, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

RCW 9A.42.010(2)(c) defines the term great bodily harm as follows:

"Great bodily harm" means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ.

RCW 9A.42.010 (1) defines basic necessities of life as follows:

"Basic necessities of life" means food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication.

RCW 9A.08.010(c) defines recklessness as follows:

RECKLESSNESS. A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

Therefore, in order for Carrisa to be guilty and of the crime of criminal mistreatment in the first-degree, she must be found to have recklessly, i.e. to know of and disregard a substantial risk that a wrongful act may occur and that this was a gross deviation from conduct that a reasonable man would exercise in the same situation; caused a bodily injury which had a high probability of causing death or caused serious permanent disfigurement, or caused a permanent or protracted loss or impairment of the function of any bodily part or organ; by withholding the basic necessities of life, i.e., necessary medical treatment.

In the case of Carissa Daniels the jury heard evidence that her child was born on July 9, 2000 and died on September 14, 2000. During the month of July, following discharge from the hospital on July 11, 2000, Ms. Daniels took the baby to the doctor or emergency room on July 12<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, and the 24<sup>th</sup>. During the month of August she took the child to the doctor on the 10<sup>th</sup>, 17<sup>th</sup>, 22<sup>nd</sup>, 28<sup>th</sup>, and 31<sup>st</sup>. During the month of September she took the

child to the doctor on the 5<sup>th</sup> and two appointments on the 7<sup>th</sup> and the 8<sup>th</sup> were canceled because the state changed her medical insurance. The baby was seen by a babysitter who watched the baby on September 11<sup>th</sup> and the school child care or watched the baby on the 12<sup>th</sup> while Ms. Daniels was at school. On the 13<sup>th</sup> of September the child was seen by others with the mother at the Puyallup fair.

In this case, evidence was admitted showing that the baby died from blunt force trauma to the head, shaking baby syndrome. Whereas there was some evidence from which a jury could include that either Carrisa or Witherspoon or both may have shaken the baby at some point in time, there was little or no evidence from which a jury could conclude that Carrisa recklessly withheld medical attention. As defined above, one acts recklessly if they know of and disregard a substantial risk that a wrongful act would occur and that this disregard was a gross deviation from conduct that a reasonable man would exercise in the same situation.

The evidence introduced at trial was that there were no external injuries to the baby that were apparent from shaken baby syndrome. (RP 167, 448-449) The testimony from Yolanda Duralde was that there are no external injuries, and the signs of shaken baby syndrome are very confusing to a

layperson because they are not often distinguishable from a fussy baby or one with the flu. (RP 180-181, 191) The testimony from Dr. Ramoso was that there was evidence of two injuries from shaken baby syndrome, one was about two weeks old and the other was several days old.(RP 474-475, 482-483) The baby died on the 14<sup>th</sup> of September and the last doctor appointment occurred on the 5<sup>th</sup> of September, nine days before the baby's death. This would have been five days after the first incident of shaken baby occurred.

It should also be noted that the baby was seen almost weekly by doctors up until the 5<sup>th</sup> of September. There was nothing noted on the September 5<sup>th</sup> visit to indicate that this baby had suffered a head trauma such as shaken baby syndrome. Dr. Duralde also testified that shaken baby syndrome can occur with as little as 10 seconds of shaking.(RP 200) There was no evidence that Carrisa would have or should have known that in as little as 10 seconds of shaking the baby she could have caused a life-threatening injury to the child. Especially in light of her having taken the child to a hospital emergency room to see a doctor on the 5<sup>th</sup> of September, apparently five days after the first shaking would have occurred, and the emergency medical doctor failed to notice any signs of shaken baby syndrome. There was simply insufficient evidence to establish that she recklessly withheld medical treatment for her baby.

Based upon this, it is very probable that the jury did not find her guilty based upon criminal mistreatment, but more likely that it was based upon the 2<sup>nd</sup> degree assault for which there was evidence presented that the baby was injured. Hence without any interrogatories to the jury or any means of determining what the jury's basis for finding Ms. Daniels guilty was, it is our position that a retrial violates her rights against double jeopardy as there is a high probability in this case that she was actually found not guilty by the jury on this very charge and was only convicted of the assault. That is why in our Answer to Petition for Review we requested review of the Court of Appeals refusal to find that it was double jeopardy to retire Ms. Daniels

The argument and authorities cited in the Answer to Petition for Review is incorporated herein by reference.

The Court in this case, in denying the request to reverse the Court of Appeals, has essentially posed the question of whether there was a final conviction terminating jeopardy in regard to second degree felony murder. That is not the right question. The question that should be asked is whether or not there was an acquittal terminating jeopardy in regard to second degree felony murder.

First of all, although the quote given by the Court from *State v. Corrado*, 81 Wash.App. 640, 645, 915 P.2d 1121 (1996), review denied, 138 Wash.2d 1011, 989 P.2d 1138 (1999) indicates that jeopardy terminates with a final conviction that is not overturned on appeal, it is equally true that jeopardy terminates with an acquittal. Therefore, the question must be asked in this case whether or not there was an acquittal. The mere fact that the jury found Carissa Daniels guilty of second degree felony murder, without any information from the jury regarding which of two alternative means presented to them was used as the predicate offense for conviction, is insufficient to determine that the jury did not acquit her of second degree felony murder based upon the underlying predicate offense of criminal mistreatment. If even the slightest possibility exists that she was acquitted of second degree felony murder with the underlying predicate offense of criminal mistreatment, it is unquestionable that jeopardy terminated as to that offense. As a result it is clearly repugnant to principles of double jeopardy for her to be retried on that offense. Quite clearly under these circumstances the acquittal in this case is and should be final.

The fact that the court cannot retry a defendant following a conviction for which the evidence was found insufficient does little to further the argument, because if the defendant was acquitted he equally cannot be

retried. The mere fact that one conviction is set aside, when the charge contains two alternatives, does not automatically mean that the other alternative remains viable for retrial. This is not the case where a defendant's case is reversed on appeal due to an evidentiary issue or something that leaves the underlying criminal charge available for prosecution in the future. This is a case where the crime reversed on appeal was reversed because the very criminal charge itself was determined to be invalid. Hence it is absolutely impossible for that same criminal charge to ever be refiled. Therefore it is impossible for that criminal charge to be brought again after appeal.

What the court is in essence doing is saying that the defendant, following a reversal of one criminal charge on appeal, can then have a different criminal charge filed against him. However, the criminal charge that this court is saying can be brought against him is one for which there is a real possibility that he was actually acquitted of by the same jury that convicted him below. Clearly this violates double jeopardy as jeopardy ended when he was acquitted below.

The State is the one who filed the charges. If a charge they file is wrong they are the ones who should bear the burden of that. If they failed to

file jury instructions or jury interrogatories that made it clear whether the jury was convicting Carissa Daniels of felony murder in the second degree based upon the underlying predicate offense of assault or criminal mistreatment, they should live with the consequences of their failure. The defendant should not be put in a position where she must shoulder the burden of the state's sloppy jury instructions and charging practices. Therefore, because it is impossible at this point in time to know whether or not the jury acquitted Carissa Daniels of felony murder in the second degree based upon the underlying predicate offense of criminal mistreatment, it must be presumed that she was acquitted of that offense. Since she was acquitted of that offense she cannot now be retried for that same offense.

For the above-stated reasons it is respectfully requested that the court reconsider its opinion in regard to Carissa Daniels being retried for felony murder in the second degree based upon the underlying predicate offense of criminal mistreatment. The Court must rule that she was implicitly acquitted of that offense and that retrial is barred by double jeopardy.

### CONCLUSION

This case must be reconsidered and the prior decision reversed and the Ervin case reversed inasmuch as it held that a retrial following appeal of

an offense for which the jury returned a blank verdict based upon an inability to agree jury instruction did not violate double jeopardy. Retrial is not available unless the jury was hopelessly deadlocked for which there was no evidence in this case.

Also, this Court must reverse its earlier ruling in order that Ms. Daniels is not subject to retrial on the felony murder charge because it is unknown whether the jury actually acquitted her of the charge of felony murder based upon criminal mistreatment and there was evidence sufficient from which a jury could have acquitted her of that charge.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of February, 2008.



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WSBA #13723

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