No. 19-5643

IN THE SUPREME COURT OF THE UNITED STATES

RAYMONT WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court has inherent authority to dismiss a valid indictment with prejudice after two juries are unable to reach a unanimous verdict, without any showing of prosecutorial misconduct or bad faith and prejudice to the defendant.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Pa.):

United States v. Wright, No. 14-cr-292 (Mar. 30, 2017)

United States Court of Appeals (3d Cir.):

United States v. Wright, No. 17-1972 (Jan. 17, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A56) is reported at 913 F.3d 364. The order of the district court is not published in the Federal Supplement but is available at 2017 WL 1179006.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2019. A petition for rehearing was denied on April 3, 2019. Pet. App. B1-B2. On June 26, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including August 16, 2019, and the petition was filed on August

15, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the Western District of Pennsylvania on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). After the juries at petitioner's first two trials failed to reach unanimous verdicts, the district court dismissed the indictment with prejudice. Pet. App. A5-A6. The court of appeals reversed and remanded. Id. at A3, A22.

1. On the evening of July 24, 2014, five police detectives in two unmarked cars were patrolling in the Hill District of Pittsburgh, Pennsylvania. Pet. App. A3; C.A. App. 101. Detectives in the second of the two cars saw a man -- later identified as petitioner -- driving in the opposite direction well above the posted speed limit. Pet. App. A3-A4. The detectives turned around to follow the car, which sped up. Id. at A4. As the detectives continued their pursuit, petitioner fled at high speed and ran at least four stop signs. The lead car lost sight of petitioner and discontinued its pursuit. Ibid.

Shortly thereafter, detectives in the lead car noticed skid marks indicating that a car had tried but failed to make a left turn at the end of a street. Pet. App. A4. The three officers then saw petitioner's car in a parking lot below them. Ibid. The

car had gone through a fence, over a hillside, and into the parking lot, coming to rest after hitting two parked cars. Ibid.

Two of the officers exited the lead car and remained at the top of the hill where petitioner's car had broken through the fence. Pet. App. A4. From there, they saw petitioner search around the rear passenger seat of the car, back out of the vehicle holding a black handgun in his right hand, and attempt to "rack the slide" -- a motion that either chambers a round in the gun's barrel or removes a round from the barrel. Ibid. (citation omitted); Gov't C.A. Br. 6 n.2. The detectives, with weapons drawn, told petitioner to drop the gun. After initially hesitating, petitioner tossed the gun to the ground, stepped back, and lay down. Pet. App. A4. Other Pittsburgh police officers who had responded to the scene reached petitioner as he was lying on the ground with the handgun next to him. Ibid. When Detective Henson (who had been at the top of the hill) made it down to the parking lot, he heard petitioner say, "'[y]ou won this time or you won this round,'" which Henson understood to mean that he was lucky that petitioner did not shoot or that he had caught petitioner after the pursuit. Id. at A4-A5 (citation omitted). Detective Henson took custody of the gun and discovered that the gun was loaded with eight rounds, one in the chamber. Id. at A5.

2. On December 30, 2014, a federal grand jury returned an indictment charging petitioner with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e).

C.A. App. 29. Petitioner pleaded not guilty and proceeded to trial. Pet. App. A3. At the close of the government's case, the district court denied petitioner's motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29, finding "that a reasonable juror could most certainly find [petitioner] guilty of" possessing a firearm. C.A. App. 171. The jury deliberated for approximately five hours and then informed the court that it was deadlocked. Pet. App. A5. After polling the jurors to confirm that further deliberations would not lead to a unanimous verdict, the court declared a mistrial. Ibid.

Federal Rule of Civil Procedure 31(b)(3) provides that after a district court declares a mistrial based on a hung jury, the "government may retry [the] defendant." Retrial in this case was postponed by seven months after petitioner filed a series of pretrial motions and moved for postponement. Gov't C.A. Br. 9-10. At the second trial, the government called as witnesses all but one of the police officers who had testified at the first trial and two additional officers. Ibid.; Pet. App. A5. The government also presented testimony from expert witnesses that fingerprints and DNA may be difficult to recover from a firearm. Pet. App. A5. The district court again denied petitioner's motion for a judgment of acquittal at the close of evidence, stating that it "certainly believes there is sufficient evidence in the record to establish beyond a reasonable doubt that [petitioner] possessed the firearm." C.A. App. 650. After three hours of deliberations,

however, the jury reported to the court it was deadlocked. Pet. App. A6. The court polled the jurors to confirm the deadlock and then declared a mistrial. Ibid.

3. Following the second mistrial, the government informed the district court that it intended to retry petitioner. D. Ct. Doc. 122 (Mar. 15, 2017). The court entered an order requiring the parties to brief "whether the [c]ourt, through an exercise of its inherent authority, should prohibit or permit a second re-trial in this case." D. Ct. Doc. 124 (Mar. 16, 2017). After receiving those briefs, the court "dismiss[ed] the Indictment with prejudice, pursuant to its inherent authority." C.A. App. 3.

The district court reiterated its determination that the government had presented sufficient evidence to convict petitioner at both trials, describing the "evidence that [petitioner] committed the crime with which he has been charged" as "compelling." C.A. App. 11. The court also recognized that retrying petitioner did not violate the Double Jeopardy Clause of the Constitution, id. at 4, and that Rule 31(b)(3) provides that "the government may retry any defendant on any count on which the jury could not agree," C.A. App. 7 (quoting Fed. R. Crim. P. 31(b)(3)). The court concluded, however, that it had "inherent authority to dismiss an indictment with prejudice after determining that reprosecution would violate the precepts of fundamental fairness," id. at 5; that Rule 31(b)(3) did not limit that authority, id. at 7; and that, "although [it was] a close

case," id. at 13, a series of factors considered by some state courts in analogous circumstances supported dismissing the indictment with prejudice. Id. at 8-14.

4. On the government's appeal, a divided panel of the court of appeals reversed and remanded. Pet. App. A1-A56.

a. The court of appeals' lead opinion observed that under this Court's precedents, "[t]he exercise of inherent authority must satisfy two requirements": "(1) it 'must be a reasonable response to the problems and needs confronting the court's fair administration of justice,' and (2) it 'cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute.'" Pet. App. A12-A13 (quoting Dietz v. Bouldin, 136 S. Ct. 1885, 1892 (2016)). It determined that the district court's dismissal here did not satisfy those requirements. See id. at A13-22.

The lead opinion explained that under the first of these requirements, "a court may dismiss an indictment based upon its inherent authority only if the [g]overnment engaged in misconduct, the defendant was prejudiced, and no less severe remedy was available to address the prejudice." Pet. App. A13. It then determined that the facts of this case did not meet that standard. Citing the district court's findings "that the [g]overnment performed diligently and professionally in both trials" and "that the evidence was sufficient to prove * * * that [petitioner] possessed the gun," the lead opinion found "no misconduct." Id.

at A15. It also rejected petitioner's suggestion that he had been prejudiced, explaining that prejudice that justifies dismissal of an indictment consists not of "the anxiety and the normal stress of undergoing a trial," but government "actions that place a defendant at a disadvantage in addressing the charges." Ibid.

The lead opinion further determined that the district court's dismissal of the indictment ran afoul of the requirement that the exercise of inherent "powers must be in accordance with the Constitution, statutes, and rules." Pet. App. A17 (citing Dietz, 136 S. Ct. at 1892). It reasoned that constitutional separation-of-powers principles leave "the decision to try or retry a case [to] the discretion of the prosecutor," and that such "principles preclude a court from terminating a prosecution absent misconduct and prejudice to the defendant." Id. at A18-A19. The lead opinion also observed that courts cannot exercise inherent powers in a way that "circumvent[s]" the Federal Rules of Criminal Procedure. Id. at A20 (quoting Carlisle v. United States, 517 U.S. 416, 426 (1996)). And it explained that "[b]arring a retrial through the exercise of inherent authority" would "circumvent[] the absence of power of the district court to dismiss an indictment in Rule 31(b)." Ibid.

b. Judge McKee concurred in the judgment. Pet. App. A23-A30. He expressed "sympath[y]" for the district court's efforts to "assure a measure of justice for [petitioner]," but did "not believe that the current state of the law supports the [court's]

action in the absence of prosecutorial misconduct, bad faith, or more than two unsuccessful trials." Id. at A23. Judge McKee explained that he did not understand the lead opinion to hold "that a trial court lacks the power to, at some point, call a halt to successive prosecutions following deadlocked juries." Ibid. But he observed that the state court decisions on which the district court had based its decision rest "on the inherent authority of state courts under" state constitutions and that the principal authority cited by the district court -- State v. Abatti, 493 A.2d 513 (N.J. 1985) -- "has no real corollary in federal case law." Pet. App. A28-A29.

c. Judge Nygaard dissented. Pet. App. A31-A56. In his view, the district court had inherent authority to dismiss the case after identifying a circumstance that the court believed "harmful to the institution and to the defendant." Id. at A34.

ARGUMENT

Petitioner contends (Pet. 15-31) that federal district courts have inherent authority to dismiss an indictment after two juries are unable to reach a unanimous verdict, even in the absence of prosecutorial misconduct, bad faith, or prejudice to the defendant's ability to put on a defense at a second retrial. The court of appeals correctly rejected that contention, and its resolution of the question presented -- which arises infrequently in federal criminal cases -- does not conflict with the decision

of any other court of appeals or a state court of last resort applying principles of federal law. Further review is unwarranted.

1. The court of appeals correctly recognized that the district court lacked the authority to bar a second retrial through an exercise of its inherent powers. Pet. App. A1-A30.

a. Both the Constitution and the Federal Rules of Criminal Procedure permit retrying a criminal defendant following a jury's failure to return a unanimous verdict at trial. For almost 200 years, this Court has "adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." Richardson v. United States, 468 U.S. 317, 324 (1984) (citation omitted); see United States v. Perez, 22 (9 Wheat.) U.S. 579, 580 (1824). Similarly, the Federal Rules of Criminal Procedure have long provided that a district "court may declare a mistrial on those counts" as to which the jury cannot agree on a unanimous verdict, and that the government then "may retry any defendant on any count on which the jury could not agree." Fed. R. Crim. P. 31(b)(3).

Notwithstanding that the Constitution and the Federal Rules allow retrial following a second mistrial, the district court in this case asserted "inherent authority" to dismiss the indictment. C.A. App. 3. This Court has "recognized that a district court possesses inherent powers that are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious

disposition of cases.'" Dietz v. Bouldin, 136 S. Ct. 1885, 1891 (2016) (quoting Link v. Wabash R.R., 370 U.S. 626, 630-631 (1962)). In criminal cases, "[t]he purposes underlying use of th[ese] powers are threefold: to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct." United States v. Hasting, 461 U.S. 499, 505 (1983) (citations omitted). But recognizing the potential "danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority," Degen v. United States, 517 U.S. 820, 823 (1996), this Court has imposed "certain limits" on the exercise of a court's inherent powers, see Dietz, 136 S. Ct. at 1891.

As relevant here, the Court has repeatedly held that district courts may not invoke their inherent powers in ways that would "circumvent or conflict with the Federal Rules of Criminal Procedure" or with constitutional principles. Carlisle v. United States, 517 U.S. 416, 426 (1996). For example, in Carlisle, the Court held that a district court cannot use its inherent powers to circumvent the time limits prescribed in Federal Rule of Criminal Procedure 29 for seeking a judgment of acquittal. 517 U.S. at 425-428. The Court has also concluded that a court may not remedy prosecutorial misconduct before the grand jury or at trial in a way that circumvents the harmless-error inquiry prescribed by Rule

52(a). See Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988) (grand jury); Hasting, 461 U.S. at 506 (alleged prosecutorial misconduct at trial). And in United States v. Payner, 447 U.S. 727 (1980), the Court held that a court cannot use its supervisory power to suppress evidence that is otherwise admissible under the Fourth Amendment and the exclusionary rule. Id. at 736-737.

b. The court of appeals correctly applied the foregoing precedents in recognizing that, absent any showing of government misconduct or bad faith and resulting prejudice to petitioner, the district court could not exercise its inherent power to dismiss the indictment and bar a second retrial. As an initial matter, those criteria are necessary to ensure that a court's decision to terminate a criminal case through the "drastic" sanction of dismissing the indictment, United States v. Morrison, 449 U.S. 361, 365 n.2 (1981), does not violate the separation of powers by infringing on prosecutorial discretion. See United States v. Isgro, 974 F.2d 1091, 1097 (9th Cir. 1992) ("Dismissal of an indictment with prejudice necessarily implicates separation-of-powers principles."), cert. denied, 507 U.S. 985 (1993). Such discretion extends not only to decisions on whether to initiate a prosecution, see Wayte v. United States, 470 U.S. 598, 607 (1985), but also decisions about whether to terminate an existing prosecution -- including whether to "retry a case" that has resulted in juror deadlock on one or more occasions. Pet. App.

A18; see United States v. Fokker Servs. B.V., 818 F.3d 733, 742 (D.C. Cir. 2016) ("[D]ecisions to dismiss pending criminal charges -- no less than decisions to initiate charges and to identify which charges to bring -- lie squarely within the ken of prosecutorial discretion.").

In addition, empowering district courts to bar retrials without proof of government misconduct and prejudice would "circumvent[] the absence of power of the district court to dismiss an indictment in [Federal] Rule [of Criminal Procedure] 31(b)." Pet. App. A20. As the lead opinion below explained, Rule 31(b) confirms the government's authority to "retry any defendant on any count on which the jury could not agree," Fed. R. Crim. P. 31(b)(3), and neither establishes "a limit on the number of retrials it may conduct" nor confers on district courts authority to bar such retrials. Pet. App. A9-A12. The Rule's language and structure stand in sharp contrast to other provisions that expressly authorize courts to dismiss an indictment. See id. at A12 n.8 (citing Fed. R. Crim. P. 48(b)). Those rules generally have been construed to allow for dismissal with prejudice only in narrowly defined circumstances, where a defendant has suffered harm to "his ability to present his defense." United States v. Goodson, 204 F.3d 508, 515 (4th Cir. 2000) (applying Rule 48(b)). Yet on petitioner's view, a district court could invoke its inherent authority to bar retrial without any showing that the defendant would suffer prejudice of that nature, or that the

defendant suffered a violation of any right at all. The court of appeals correctly rejected an understanding of inherent authority that would lead to that anomalous result.

The district court here accordingly erred in dismissing petitioner's indictment with prejudice. Petitioner does not challenge the determination of the courts below that the government engaged in "no misconduct." Pet. App. A15; see ibid. (accepting the district court's findings "that the [g]overnment performed diligently and professionally in both trials"); id. at A23 (McKee, J., concurring in the judgment). And petitioner likewise makes no claim that a third trial would result in the type of prejudice that this Court and lower courts have found necessary to justify dismissal of an indictment with prejudice -- namely, interference with a defendant's ability to defend himself at trial. See Goodson, 204 F.3d at 515; cf. United States v. Marion, 404 U.S. 307, 325-326 (1971) (a showing of "actual prejudice to the conduct of the defense" is required to establish that pre-indictment delay violates due process). The court of appeals therefore correctly reversed the dismissal of petitioner's indictment with prejudice.

c. Petitioner's arguments do not support a contrary result. Petitioner principally contends (Pet. 18-21) that this Court has acknowledged district courts' inherent authority to dismiss indictments in at least some circumstances, and that by recognizing limits on the dismissal authority, the court of appeals ran afoul of this Court's direction that inherent powers can "neither be

abrogated nor rendered practically inoperative." Pet. 16, 21 (quoting Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 266 U.S. 42, 66 (1924)). Neither aspect of that argument is sound.

In support of his contention (Pet. 18) that "[t]his Court has recognized that a court's inherent power includes the power to dismiss an indictment under various circumstances," petitioner points to this Court's decisions in Link, supra, and Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). Those cases do not support the existence of the inherent dismissal authority that petitioner urges. Both Link and Gulf Oil involved the dismissal of civil suits brought by private litigants, one pursuant to courts' "long * * * unquestioned" power to dismiss civil cases for want of prosecution, Link, 370 U.S. at 631, and the other "pursuant to the doctrine of forum non conveniens," Gulf Oil, 330 U.S. at 502, which contemplates that a litigant's suit will proceed in a different judicial forum, id. at 512. Petitioner identifies no analogous tradition permitting courts to terminate criminal prosecutions without finding that the government engaged in misconduct and that the defendant suffered prejudice to his ability to put on a defense, much less a "long unquestioned power" to do so in the context of mistrials following jury deadlock. Carlisle, 517 U.S. at 426-427 (internal quotation marks omitted). See ibid. (declining to recognize an inherent power where there were "only two cases prior to the enactment of the Federal Rules of Criminal

Procedure that could be read as asserting in dictum the existence of such a power").

In any event, even if petitioner could identify a tradition in which courts exercised inherent powers to bar retrial without any finding of prosecutorial misconduct or prejudice to the defendant's defense, the exercise of such a power in this circumstance would conflict with Rule 31(b)(3). No principle bars Congress or this Court from circumscribing the exercise of inherent powers through rulemaking. Petitioner's attempt (Pet. 16, 21) to draw such a principle out of this Court's decision in Michaelson v. United States, supra, is misplaced. The quoted statement from Michaelson addressed possible limitations on the authority of courts to punish contempt, 266 U.S. at 65-66, a power that predates the Founding and that the Court has described "as essential" to the performance of judicial duties. Young v. United States ex rel. Vuitton, 481 U.S. 787, 795-796 & n.7 (1987). Michaelson itself accepted that even an inherent power of such longstanding application "may be regulated within limits," 266 U.S. at 66. And the Court has since recognized that "[i]n many instances the inherent powers of the courts may be controlled or overridden by statute or rule." Degen, 517 U.S. at 823; see Bank of Nova Scotia, 487 U.S. at 255.

Petitioner also contends that Rule 31(b)(3) cannot "supplant a trial court's inherent power" because it does not provide the government with an "'express grant'" of authority to retry a

defendant following a mistrial based on a jury's inability to agree on a verdict. Pet. 28-29 (citation omitted). That contention cannot be squared with the language of Rule 31(b)(3), which states without any qualification that the "[t]he government may retry any defendant on any count on which the jury could not agree." Fed. R. Crim. P. 31(b)(3); see also p. 12-13, supra. It is true that the Rule does "not require" the government to retry the defendant, Pet. 28 (emphasis added), but it plainly (and expressly) grants the government authority to do so if the government so chooses. And even if Rule 31(b)(3) were more equivocal, the decision in Carlisle makes clear that in the absence of any 'long unquestioned' power of federal district courts," a court's assertion of inherent authority may be precluded by implication. 517 U.S. at 426.

Petitioner further faults (Pet. 22-26) the court of appeals' separation-of-powers analysis, contending that the district court performed a judicial rather than an executive act in dismissing the indictment and that the dismissal "did not prevent the Executive from accomplishing its constitutionally assigned functions." Pet. 25. Even if the dismissal here were a judicial act, however, that would not in itself support the district court's authority to undertake it in light of Rule 31(b)(3) and other concerns. In any event, petitioner's contention rests on the mistaken premise that the "prosecutorial discretion" exercised by the Executive applies only "in choosing whether to prosecute and what charge to bring." Pet. 25. As explained above, prosecutorial

discretion also extends to decisions "to dismiss charges once brought," Fokker Servs. B.V., 818 F.3d at 741, including whether to "retry a case" following a mistrial resulting from a hung jury, Pet. App. A18. And petitioner does not explain how a district court dismissal order -- if based not on government misconduct and prejudice to the defendant, but on a multi-factor balancing test, see C.A. App. 7-13 -- can be anything other than judicial second-guessing of the prosecutor's decision to retry the case.[1]

Finally, petitioner repeatedly invokes the concern that, by requiring a showing of government misconduct and prejudice, the court of appeals has conferred on prosecutors "unchecked power to endlessly retry a defendant." Pet. 15; see Pet. 20, 22, 26. That concern is overstated. Judge McKee, whose vote was necessary to the judgment below, stated in his concurrence that he did not read the court's decision to hold that trial courts necessarily "lack[] the power to, at some point, call a halt to successive prosecutions following deadlocked juries." Pet. App. A23. And this case, which

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[1] The district court's balancing test looked to factors that other courts had considered "in determining whether fundamental fairness compel[led] dismissal following several mistrials." C.A. App. 8. This Court has generally addressed the concept of "fundamental fairness" under the Due Process Clause, rather than a court's inherent powers. Dowling v. United States, 493 U.S. 342, 352-353 (1990). In so doing, the Court has "decline[d] to use the Due Process Clause as a device for extending the double jeopardy protection to cases where it otherwise would not extend." Id. at 354; see Sattazahn v. Pennsylvania, 537 U.S. 101, 116 (2003) (same). That reasoning counsels strongly against allowing courts to employ their inherent powers to preclude retrial in circumstances -- such as a mistrial resulting from a hung jury -- where the Double Jeopardy Clause would allow it.

involves just two mistrials, does not present any occasion to determine whether and where such potential limits might exist.

2. Petitioner argues (Pet. 15) that the Court's review is warranted because the decision below conflicts with decisions in which "[s]everal state courts, federal district courts and [c]ourts of [a]ppeals have held or recognized that courts have inherent authority to dismiss following multiple mistrials." That contention lacks merit. No conflict exists on any issue of federal law, and the question presented would not warrant review in any event, given the infrequency with which it arises.

a. Petitioner identifies no decision of a federal court of appeals that has approved the use of a district court's inherent authority to dismiss an indictment with prejudice following multiple hung juries. The only court of appeals to consider the exercise of inherent authority in analogous circumstances -- the Ninth Circuit in United States v. Miller, 4 F.3d 792 (9th Cir. 1993) -- reversed an order in which the district court had dismissed all hung counts "except those in which a majority of the jurors voted to convict," concluding "that the fact that the jury was hung by a six to six vote, or by one even more favorable to the defendant, is not an adequate basis for dismissal under the court's supervisory power." Id. at 793, 796. And both the decision below and Miller, moreover, are consistent with the results reached in decisions rejecting constitutional challenges to retrial following multiple deadlocked juries or appellate

reversals. See, e.g., United States v. Jones, No. 96-1667, 1997 WL 416957, at *1 (2d Cir. July 25, 1997) (rejecting due process challenge to conviction that followed two hung juries and an appellate reversal); United States v. Castellanos, 478 F.2d 749, 752 (2d Cir. 1973) (double jeopardy challenge to retrial after two hung juries); see also Gov't C.A. Br. 19-20 & n.6 (collecting cases).

Petitioner cites two court of appeals decisions for the proposition that courts have the authority "to do justice" by dismissing an indictment. Pet. 19 (citation omitted). One of those decisions did not involve a retrial following a hung jury at all. United States v. De Diego, 511 F.2d 818, 824-825 & n.8 (D.C. Cir. 1975) (reversing order that had dismissed indictment based on determination that it was tainted by use of immunized statements). The other decision merely assumed that courts have such power, and did so in the course of reversing an order dismissing an indictment following several previous mistrials and appellate reversals. United States v. Dooling, 406 F.2d 192, 196-197 (2d Cir.), cert. denied, 395 U.S. 911 (1969). And to the extent that petitioner relies on three federal district court decisions, such nonprecedential decisions cannot create a conflict that warrants this Court's review. See Sup. Ct. R. 10; Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011); see also Pet. A10-A11 & n.7 (explaining why two of the cited decisions are inapposite); United States v.

Waqas Khan, No. 10-cr-0175, 2014 WL 1330681, at *3-*4 (E.D. Cal. Apr. 1, 2014) (declining to order dismissal with prejudice).

Petitioner also contends that the court of appeals' decision conflicts with decisions of courts of last resort in three States (and an intermediate appellate court in a fourth State) that have recognized inherent authority "to dismiss an indictment with prejudice following general mistrials." Pet. 18-19 (citation omitted). The cited decisions, however, do not establish a conflict over "an important question of federal law," Sup. Ct. R. 10(a) and (c) (emphasis added), because none of them purported to rely on federal law as the source of the inherent power they recognized. As Judge McKee explained, the New Jersey Supreme Court's decision in State v. Abbati, 493 A.2d 513 (1985) -- on which the district court relied, C.A. App. 6, 8 -- was "based * * * on the inherent authority of state courts under the New Jersey Constitution." Pet. App. A28; see Abbati, 493 A.2d at 517-518. The Hawaii Supreme Court's decision in State v. Moriwake, 647 P.2d 705 (1982), is similarly grounded in the state constitution, id. at 711-713 & n.13. And the decisions from New York and Tennessee that petitioner cites also did not explicitly trace "the inherent authority" they described to federal law, State v. Witt, 572 S.W.2d 913, 917 (Tenn. 1978); see People v. Kirby, 92 A.D.2d 848, 849-850 (N.Y. App. Div. 1983) (expressing agreement with trial court's adoption of Witt's inherent-authority principle, but reversing the court's dismissal order in the

circumstances of that case). Those decisions, in short, do not present a conflict on a question of federal law that justifies this Court's intervention.

b. This Court's review is also unwarranted because the question presented arises infrequently in federal criminal prosecutions. As explained above, pp. 18-19, supra, in the last 25 years, only two federal courts of appeals have considered whether district courts may exercise inherent authority to dismiss an indictment with prejudice following a mistrial (or multiple mistrials). Similarly, with the exception of one decision from 2014, all of the district court decisions that petitioner cites predate 1993. And in the absence of reported decisions, petitioner provides no other evidence that federal criminal prosecutions regularly result in multiple hung juries in circumstances where district courts must determine whether they have the inherent authority to preclude further retrial by dismissing a valid indictment with prejudice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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