No. 19-5643

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

RAYMONT WRIGHT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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I. Courts have inherent power to dismiss an indictment following serial mistrials for jury deadlock to preserve the integrity of judicial proceedings by preventing "jury shopping," to protect the independence of the judiciary from executive intrusion, and to ensure fundamental fairness. Neither the Executive nor Congress may abrogate or render inoperative that inherent power.

The government does not deny that this case presents an important question of federal law that has not been settled by this Court involving the authority of the judiciary *vis a vis* the executive: whether federal district courts possess inherent power to dismiss an indictment after serial hung juries or whether the executive has unchecked power to endlessly retry a defendant so long as the prosecutor has not engaged in misconduct. *See* Petition for Writ of Certiorari (Pet.) at 4 & 15 (identifying this as question of first impression), 18 (explaining that while this Court recognizes that a court's inherent power includes the power to dismiss an indictment under various circumstances, it has not yet considered whether courts have inherent power to dismiss following multiple mistrials for deadlocked jury); S. Ct. Rule 10(c) (included among considerations governing review on *certiorari* is "whether a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."). Nor does it dispute that this case presents an ideal vehicle for deciding the question presented. *See* Pet. at 29-31.

Instead, the government offers two reasons why *certiorari* should be denied. Neither is persuasive.

First, the government opposes *certiorari* primarily because it claims the question "arises infrequently." Brief for the United States in Opposition (BIO) at 8, 18, 21. Notably, the government was not deterred by the infrequency of lower court exercises of inherent power when it elected to appeal the district court's order. *See generally United States v. Ingram*, 412 F. Supp. 384, 385 (D.D.C. 1976) ("the Government, always a hard loser, simply wishes to keep pressing so long as juries disagree in the hope that a conviction eventually will result.").

The government bases its assessment of how frequently this question arises on the number of federal appellate court decisions addressing whether district courts may exercise inherent authority to dismiss following multiple mistrials. The number of published court of appeals decisions reviewing such dismissals is not an appropriate measure of what one district court judge characterized as an "ever recurring problem"—"whether any discretion exists in a United States District Judge to terminate a useless prosecution." *United States v. Ingram*, 412 F. Supp. 384, 385 (D.D.C. 1976).

The scarcity of federal appellate court decisions more likely reflects that federal criminal trials are rare and that district court judges, like the district court judge here, are circumspect.[1] *See* Waters, Nicole L. and Hans, Valerie P., "A Jury of

[1] Before ordering that the indictment be dismissed, the district court here methodically weighed factors—including the character of the prior trials (which were "simple," entirely dependent on officer credibility, and virtually identical), the probability that a third trial, if allowed, would not result in any different outcome given that the government had no new evidence to present, the diligence of the attorneys, the gravity of the offense and the public interest, and the impact of another retrial on the accused. App'x.2-13. Importantly, the district court stressed

One: Opinion Formation, Conformity, and Dissent on Juries" (2009). *Cornell Law Faculty Publications,* 114 (reporting that only 2.5% of federal criminal trials result in a hung jury), *available at* https://scholarship.law.cornell.edu/lsrp_papers/114; Gramlich, John, "Only 2% of federal criminal defendants go to trial, and most who do are found guilty," Pew Research Center (June 11, 2019). Moreover, when an indictment is dismissed, a defendant would never appeal, and the government may decline to appeal as in *Ingram*, *supra*, and *United States v. Rossoff*, 806 F. Supp. 200 (C.D. Ill. 1992).

Second, the government opposes *certiorari* based on its flawed assessment of the conflict.

In the petition, Mr. Wright identifies various state courts, federal district courts, and Courts of Appeals holding or recognizing that courts possess inherent power to dismiss an indictment with prejudice following serial mistrials. Pet. at 18-20 (citing cases). The government challenges that statement, but in doing so, it conflates two distinct questions. *See* BIO 18-19.

The question presented is whether courts have inherent power to dismiss an indictment following multiple mistrials for jury deadlock. If so, the secondary question becomes what test should govern a court's exercise of that power. That the federal cases discussed by the government, *see* BIO at 18-19, ultimately may have not approved the *exercise* of inherent power does not mean those cases disapproved

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that serial retrials increase the burden on defendants and increase the risk that an innocent defendant may be convicted. App'x.7, 13-14.

the *existence* of such power. They did not.[2] *See United States v. Rossoff*, 806 F. Supp. 200, 202-03 (C.D. Ill. 1992) (exercising inherent authority to dismiss indictment with prejudice where two trials ended in mistrial through no fault of either party and cautioning, "the Government should not be given continued bites at the apple in the hopes that a conviction will eventually result."); *United States v.*

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[2] In that regard, the government's reliance on *United States v. Miller*, 4 F.3d 792 (9th Cir. 1993) and *United States v. Wqas Khan*, 2014 WL 1330681 (E.D. Cal. 2014) is misplaced.

In *Miller,* the Ninth Circuit formerly restricted inherent powers to remedying violations of statutory or constitutional rights, preserving judicial integrity, or deterring future illegal conduct. *Id*., 4 F.3d at 795. Preliminarily, the district court in *Miller* "nowhere said" its dismissal of certain counts following mistrial was based on its inherent supervisory power to preserve judicial integrity. And "[s]ince the district court did not purport to rely on this ground, [the appellate court did] not consider this argument." *Id.*, 4 F.3d at 795-96. Thus, *Miller*, whatever its vitality, does not stand for the proposition that courts lack supervisory authority to dismiss to preserve judicial integrity.

Regardless, later decided Ninth Circuit decisions rejected the limits on inherent power articulated in *Miller*. A court may also act under its inherent authority, "to effectuate, as far as possible, the speedy and orderly administration of justice" and "supervise the administration of criminal justice in order to ensure fundamental fairness." *United States v. W.R. Grace*, 526 F.3d 499, 511 n.9 (9th Cir. 2008) (rejecting *Miller's* narrow reading of *United States v. Hasting*, 461 U.S. 499 (1983) and reaffirming the holding of *United States v. Richter*, 488 F.2d 170, 173-74 (9th Cir. 1973)). *Accord Wqas Khan*, 2014 WL 1330681 at *2 (agreeing courts have "supervisory powers to dismiss on 'fundamental fairness' grounds" when the government was unable to secure a conviction following multiple trials and describing the Ninth Circuit as contemplating dismissal with prejudice following mistrial).

Although the government broadly, and somewhat ambiguously, asserts that the district court in *Wqas Khan* declined to order dismissal with prejudice, it overlooks that the defendant expressed his willingness to stipulate to a dismissal *without* prejudice. Further, the government in that case, unlike here, proffered critical new evidence it intended to present at the second retrial. *Wqas Khan*, 2014 WL 1330681 at *1, *4.

Ingram, 412 F. Supp. 384 (D.D.C. 1976) (affirming dismissal of indictment with prejudice after consecutive juror deadlocks; courts have inherent power to dismiss in the interests of justice). *See also United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008) (holding that a district court may dismiss an indictment with prejudice under its supervisory powers even where government's conduct does not amount to a due process violation; affirming order dismissing indictment).

Tellingly, the government devotes the bulk of its brief to arguing that the decision below was correct on the merits. BIO at 9-18. Even if that were so, and it is not, that is no reason to deny *certiorari* to review an important question of federal law that has not been but should be settled by this Court, particularly where the Third Circuit's fractured decision is in conflict with state and federal authority.

In so arguing, the government simply regurgitates the lead opinion's assertion that the district court's exercise of inherent power to dismiss the indictment "circumvent[ed] the absence of power of the district court to dismiss an indictment in Rule 31(b)." BIO at 12 (quoting Appendix A at 20 (alterations omitted) (Shwartz)). And the government, like the lead opinion, fails to grapple with authority from this Court that is clearly to the contrary: the mere absence of language in a permissive rule specifically authorizing a court to take a particular action does not give rise to a negative implication of a prohibition. *See Link v. Wabash R. Co.,* 370 U.S. 626 (1962). The inherent power of a court can be invoked even if procedural rules exist which touch on the same conduct. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991). A rule cannot supplant a trial court's inherent

power unless it contains an "express grant of or limitation," *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891-93 (2016), or "clear[] expression" of Congressional purpose to abrogate inherent authority, *Chambers*, 501 U.S. at 49, 51.

Additionally, the government attempts to minimize the breadth of the Third Circuit's opinion as highlighted by the dissent: "The majority . . . concludes that prosecutors have the unimpeded right to try persons for violating federal law based on an indictment as many times as they wish and that the separation of powers doctrine prohibits a federal court from interfering." Appendix A at 48 (Nygaard, dissenting). The government views a single sentence from Judge McKee's opinion concurring in the judgment as articulating limits that it quite simply does not. BIO at 17.

Judge McKee concludes "I do not read Judge Shwartz's opinion as standing for [the] principle" "that a trial court lacks the power to, at some point, call a halt to successive prosecutions following deadlocked juries…." Appendix A at 25 (McKee, concurring in the judgment).[3] But Judge Shwartz's opinion must be read for that principle: it expressly concludes courts do ***not*** have authority to "dismiss an indictment after successive hung juries" "unless" it identifies a constitutional basis,

[3] Judge McKee suggests that dismissal may be appropriate where there are "more than two unsuccessful trial." Appendix A at 25. It cannot be that inherent power exists after three mistrials for deadlocked juries but not after two. The legal question—do district courts have inherent power to dismiss following serial mistrials for hung juries—cannot depend on the facts of any particular case. It is the *exercise* of that power that requires an assessment of the underlying circumstances (as for example the number of mistrials).

like double jeopardy or due process (which encompasses prejudicial prosecutorial misconduct), or evidentiary deficiency. Appendix A at 18 & n.9 (Shwartz).

In sum, this case presents an important question of federal law on which this Court has not spoken and about which state and federal courts disagree. And it presents an ideal vehicle for deciding whether federal district courts possess inherent power to dismiss an indictment after serial hung juries given the palpable risk that Mr. Wright, though innocent, may be convicted through sheer governmental perseverance. *See* Appendix A at 27 (McKee, concurring in the judgment) (urging government to exercise its discretion to decide ***not*** to retry Mr. Wright). The petition for *certiorari* should be granted.

CONCLUSION

As set forth in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case.

Dated: November 7, 2019

Respectfully submitted,

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