No. 17-1972

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

***Appellant*,**

v.

RAYMONT WRIGHT,

***Defendant-Appellee*.**

On Appeal From the United States District Court for the Western District of Pennsylvania, Crim. No. 14-292 (Bissoon, J.)

BRIEF OF PROPOSED *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

INTEREST OF *AMICUS*[1]

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, including the Third Circuit, providing assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has appeared as *amicus curiae* in this Court in several important and carefully chosen cases, including *In re Commonwealth's*

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[1]All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(2), (a)(4)(E).

Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila., 790 F.3d 457 (3d Cir. 2015), as amended (June 16, 2015); *United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009) (en banc); *United States v. Grier*, 475 F.3d 556 (3d Cir. 2007) (en banc); *United States v. Leahy*, 438 F.3d 328 (3d Cir. 2006) (en banc); *United States v. Vazquez*, 271 F.3d 93 (3d Cir. 2001) (en banc) (*amicus* invited to argue); *United States v. Cepero*, 224 F.3d 256 (3d Cir. 2000) (en banc); *United States v. Mitchell*, 122 F.3d 185 (3d Cir. 1997), rev'd, 526 U.S. 314 (1999); *United States v. One 1973 Rolls Royce*, 43 F.3d 794 (3d Cir. 1994) (*amicus* invited to argue). *Amicus* submits this brief in support of Appellee Raymont Wright because the district court's decision below, which benefitted from the trial judge's unique familiarity with this case gained during two trials ending in hung juries, was fully consistent with the Federal Rules of Criminal Procedure and served to vindicate longstanding constitutional principles which shield defendants from the danger of unjust conviction and the trauma of repeat trials.

FACTS AND PROCEDURAL HISTORY

Amicus incorporates the statement of facts and procedural history as set forth in the Brief of Appellee Raymont Wright. Briefly, this appeal stems from the Order of the United States District Court for the Western District

of Pennsylvania (Bissoon, J.) dismissing with prejudice the indictment against Mr. Wright after two trials in which the jury was unable to agree on a verdict.

Mr. Wright was indicted on a single count of being a felon in possession of a firearm. A29-30; 18 U.S.C. § 922(g). At his first trial, beginning on May 17, 2016, testimony lasted one day: the government called five witnesses (four law enforcement officers involved in Mr. Wright's arrest, and an ATF Special Agent to establish the firearm's interstate nexus), while Mr. Wright declined to testify or call any witnesses. A32-A176. After spending approximately three hours deliberating, the jury sent a note asking the Court to identify "the point where a deliberation becomes a hung jury," and the Court instructed the jury using the Third Circuit model instruction on deadlocked jurors. A250-52, A265. Less than two hours later, the jury indicated that it was "helplessly deadlocked." A253, A266. After polling the jurors individually to confirm that further deliberations would be fruitless, the Court declared a mistrial and discharged the jury. A254-59.

The second trial began on March 7, 2017. This time, the government

called eight witnesses: four of the five witnesses from the first trial;[2] two additional officers who had been involved in Mr. Wright's arrest, neither of whom testified at the first trial; and two expert witnesses.[3] The government's expanded case lasted two days; Wright again declined to testify or call any witnesses. A267-A673. On the first day of deliberations, the jury asked several detailed factual questions about the evidence in the record. A716-22. The next day, the jury sent a note indicating that it was "hopelessly deadlocked." A725, A732-33. After polling the jurors individually to confirm that further deliberations would be fruitless, the Court excused the jury and declared a mistrial. A725-29; *see* A3 (district

[2]During the second trial, the testimony of Detective John Henson, a government witness who was involved in Mr. Wright's arrest, was adapted to account for an inconsistency that came out during the first trial. At the first trial, Henson testified that he saw a bystander motion toward the parking lot where Mr. Wright's car had stopped, contrary to his testimony at a pretrial hearing that he had not personally seen the bystander, and defense counsel cross-examined Henson about the discrepancy. A114, A132-35. At the second trial, Henson again testified that he had seen the bystander, explaining on direct examination that he had "miscommunicate[ed]" during the pretrial hearing. A564.

[3]Mr. Wright argued at the first trial that the police chose not to test the gun recovered by police for fingerprints or DNA because they knew it would not return a match to him. A223-24. After the first trial ended in a hung jury, the government revealed for the first time that it had, in fact, done fingerprint testing on the gun, which had come back negative. Gov. Br. at 10; A464-68. The district court denied Defendant's motion to dismiss the indictment based on this clear *Brady* violation. A784-85. At the second trial, the government's experts "testified about the difficulty of retrieving DNA and fingerprint evidence from firearms." Gov. Br. at 10.

court's Memorandum and Order).

After the government declared its intent to prosecute Mr. Wright for a third time, the district court ordered the parties to submit briefs addressing whether the court "should prohibit or permit a second re-trial in this case." *See* A26 (docket sheet). On March 30, 2017, the district court dismissed with prejudice the indictment against Mr. Wright. A2-A13 (Memorandum and Order). This appeal followed.

ARGUMENT

I. Rule 31(b)(3) Permits District Courts to Exercise Discretion in Declaring a Mistrial or Allowing a Retrial.

The government here urges that Rule 31(b)(3)[4] requires reversal because it "expressly permits the government to retry a case following a hung jury" and therefore "extinguishes" any discretion on the part of the district court with regard to the decision to permit a retrial. Gov. Br. at 27. *Amicus* NACDL respectfully submits that the government is wrong.

"[E]very exercise of statutory interpretation begins with an examination of the plain language of the statute," and where statutory language is "plain and unambiguous," no further inquiry is necessary.

[4]Federal Rule of Criminal Procedure 31(b)(3) states: "If the jury cannot agree on a verdict on one or more counts, the court *may* declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree." Fed. R. Crim. P. 31(b)(3) (emphasis added).

Rosenberg v. XM Ventures, 274 F.3d 137, 141 (3rd Cir. 2001); *see also Lawrence v. City of Phila., Pa.*, 527 F.3d 299, 316-17 (3d Cir. 2008) ("The plain meaning of the text should be conclusive, except in the rare instance when the court determines that the plain meaning is ambiguous."). "Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91, (2006). If the ordinary terms are clear, in other words, "Congress says in a statute what it means and means in a statute what it says there." *In re Am. Pad & Paper Co.*, 478 F.3d 546, 554 (3d Cir. 2007) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks and citation omitted)).

The government's interpretation of Rule 31(b)(3) — that it states a rigid *per se* rule that the Court *must* permit a retrial, regardless of the circumstances — cannot be squared with the text of the Rule. Instead, the Rule contains the precatory word "may," making absolutely clear that the Rule provides district courts with discretion to grant or deny a mistrial — the predicate for a retrial — rather than a mandatory command. Indeed, it is "so obvious as to be hardly worth the saying" that permissive words, including "may," "grant discretion." Antonin Scalia & Bryan A. Garner, *Reading Law* 112-15 (2012); *see, e.g.*, *Rastelli v. Warden, Metro. Corr. Ctr.*,

782 F.2d 17, 23 (2d Cir. 1986) ("The use of a permissive verb—'may review' instead of 'shall review'—suggests a discretionary rather than mandatory review process."); *Bankers Ins. Co. v. Fl. Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1298 (11th Cir. 1998) ("The legislature's selection of the modal 'may,' rather than 'shall,' 'will,' or 'must,' shows that all of the first sentence of the section . . . is permissive, not mandatory.").

The second sentence of Rule 31(b)(3) likewise speaks in permissive terms — this time, to the government's decision whether to retry a defendant on any count on which a previous jury could not agree. However, it does not purport to address the scope of a district court's discretion, described in the first sentence, much less "extinguish" that discretion entirely. Indeed, the Rule does not direct district courts to do anything in particular, and the district court below was therefore correct to conclude that "there is nothing in Rule 31(b)(3) that limits a court's inherent supervisory authority to dismiss an indictment in the interests of fundamental fairness." A7. Put another way, the Rule simply does not require the district court to grant a retrial, any more than it requires the district court to grant the mistrial that is the necessary precursor to a second or in this case third bite at the apple.

Moreover, the government's interpretation should be rejected for an

additional reason: its reading "could yield an absurdity." *Artis v. District of Columbia*, No. 16-460, 2018 WL 491524, at *9 (U.S. Jan. 22, 2018); *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 330 (3d Cir. 2006) ("A basic principle of statutory construction is that we should avoid a statutory interpretation that leads to absurd results." (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982))); *see also* John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2405–06 (2003) ("The absurdity doctrine . . . rests on a judicial judgment that a particular statutory outcome . . . would sharply contradict society's 'common sense' of morality, fairness, or some other deeply held value."). Construed as the government urges, the Rule contains no limiting principle and would, as the district court recognized, permit the government to subject a defendant to trial after trial, *ad infinitum*, until it finds a jury willing to convict. *See* A7 (Memorandum & Order) ("The Court further notes that, under the government's analysis, there would be ***no bar whatsoever*** to the government retrying Mr. Wright three, four, or even 50 times, until it finds the magic composition of jurors willing to convict him." (emphasis in original)).

Nor does the government's reading of the Rule find support in the

case law.[5] Indeed, contrary to the case law, the government's reading would impose a rigid *per se* rule, where the plain language of Rule 31(b)(3) contains none, and in an arena, this Court has made clear, ill-suited to categorical rules.[6] *U.S. ex rel. Webb v. Ct. of Common Pleas of Phila. Cty.*, 516 F.2d 1034, 1043 (3d Cir. 1975) ("Questions regarding retrial after the discharge of a jury without a verdict are not to be decided by a rigid application of mechanical formulae."); *see also United States v. Jorn*, 400

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[5]*Amicus* joins in the related argument, articulated in Appellee's Brief, that Rule 31(b)(3) likewise does not (silently) alter, let alone abrogate, the district court's inherent powers. Appellee's Br. at 56-63; *see also id.* at 26-41 (discussing the broad reach of the district court's supervisory authority). Because the Court already has the benefit of briefing from the parties on this issue, *Amicus* will not address it further.

[6]*Per se* rules are disfavored in numerous areas of law where, as here, a more flexible, totality-of-the-circumstances approach is superior. *See, e.g., Budget Blinds, Inc. v. White*, 536 F.3d 244, 254 (3d Cir. 2008) (declining to "adopt a rule that categorically forbids district courts" from setting aside judgments rendered by other district courts pursuant to Rule 60(b)(6) because "it would be impossible to specify all of the scenarios in which justice might require vacatur of a judgment"); *Hritz v. Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984) (holding that, because a civil default judgment determination "require[s] trial courts to weigh the equities of the situation and the need for the efficacious resolution of controversies," the "exercise of such judgment does not lend itself to a rigid formula or to a *per se* rule"). *See also Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008) ("Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules."); Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 Ind. L.J. 299, 305 (2016) ("The strength of a balancing inquiry, removed from rigid *per se* rules, is the flexibility it offers in focusing on context rather than categorical prohibitions.").

U.S. 470, 486 (1971) (explaining that the Supreme Court has "conscious[ly] refus[ed]" to "channel the exercise of [the district court's discretion to declare a mistrial] according to rules based on categories of circumstances" because "bright-line rules based on either the source of the problem or the intended beneficiary of the ruling would only disserve the vital competing interests of the Government and the defendant"); *Downum v. United States*, 372 U.S. 734, 737 (1963) ("Each case must turn on its facts."). Indeed, because the decision whether to grant or deny a mistrial is a fact-sensitive one, district judges enjoy broad discretion. *See, e.g.*, *Illinois v. Somerville*, 410 U.S. 458, 462 (1973) ("The broad discretion reserved to the trial judge [to declare a mistrial] has been consistently reiterated in decisions of this Court."); *United States v. Wecht*, 541 F.3d 493, 507 (3d Cir. 2008) ("[W]e generally give the highest degree of deference to a district court's judgment that a deadlocked jury manifestly necessitates a mistrial."); *United States v. Goldstein*, 479 F.2d 1061, 1069 (2d Cir. 1973) (noting "how rarely the informed judgment of a trial court is disturbed in these or similar circumstances").

And, the cases demonstrate, the discretion to declare a mistrial and to permit a retrial are inextricably linked: "A trial judge has broad discretion to determine what factual situations merit a mistrial and allow a defendant

to be reprosecuted." *U.S. ex rel. Russo v. Super. Ct. of N.J., Law Div., Passaic Cty.*, 483 F.2d 7, 13 (3d Cir. 1973); *see also Arizona v. Washington*, 434 U.S. 497, 509 (1978) (holding that district judges "*may* discharge a genuinely deadlocked jury and require the defendant to submit to a second trial" (emphasis added)). The trial judge's discretion to grant or deny a mistrial accordingly cannot be severed from the inevitable question of a retrial because "trial judges may declare a mistrial without barring reprosecution only in extraordinary circumstances." *Russo*, 483 F.2d at 13.

In sum, the deference that is accorded the fact-sensitive decision to grant or deny a mistrial applies in equal measure to the determination whether to permit a retrial, as these actions are so inextricably intertwined.[7] Both are equally affected by the fundamental principles at issue, explained by Justice Frankfurter:

> Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment—cases in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his

[7]Because the permissive terms of Rule 31(b)(3) expressly contemplate the district court's discretion, which includes the discretion not only to declare a mistrial but also to determine whether retrial would violate precepts of fundamental fairness enshrined in the Double Jeopardy Clause, *see infra* Part II, it follows that the government's argument that the "the district court's decision infringed on the government's prerogative to prosecute" and thereby violated "the separation of powers doctrine" is without merit. Gov. Br. at 24.

> authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused. . . . It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Scylla and Charybdis. We would not thus make them unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused.

Gori v. United States, 367 U.S. 364, 369–70 (1961). As this passage suggests, district courts are to "resolve any doubt 'in favor of the liberty of the citizen.'" *Downum*, 372 U.S. at 738 (quoting *United States ex rel. Rush v. Watson*, 28 F. Cas. 499, 501 (S.D.N.Y. 1868)); *see also Webb*, 516 F.2d at 1043 ("In a close case, any doubts are to be resolved in favor of barring retrial."). Indeed, at least two district courts have done just that, finding that "the court, in its discretion, may dismiss the indictment with prejudice if it determines that a retrial is against the concept of fundamental fairness." *United States v. Rossoff*, 806 F. Supp. 200, 202 (C.D. Ill. 1992); *United States v. Ingram*, 412 F. Supp. 384 (D.D.C. 1976).

Because Rule 31(b)(3) does not contradict this longstanding line of authority, much less evince a clear intent to alter it, it should not be presumed that Congress intended to displace the discretionary authority that district courts have long held in matters pertaining to mistrial and retrial. *See Carlisle v. United States*, 517 U.S. 416, 426 (1996) ("[S]ince a

district court's authority to dismiss *sua sponte* for lack of prosecution was a 'sanction of wide usage,' we would not assume, in the absence of a clear expression, that Federal Rule of Civil Procedure 41(b), which allowed a party to move for dismissal for lack of prosecution, abrogated this 'long . . . unquestioned' power."); *Midlantic Nat. Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501, (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."). Indeed, if Congress intended for Rule 31(b)(3) to require district courts to yield their discretion to that of the executive branch, it certainly knows how to do so with greater clarity. *See, e.g.*, Fed. R. Crim. P. 9 ("If a defendant fails to appear in response to a summons, the court may, and upon request of an attorney for the government must, issue a warrant.").

To summarize, *amicus* NACDL respectfully submits that, contrary to the government's argument, Rule 31(b)(3) does not purport to address the circumstances in which "the state's interest in enforcing its laws must yield to the right of its citizen not to be reprosecuted." *Russo*, 483 F.2d at 17. The district court, accordingly, correctly concluded that the Rule did not bar its exercise of discretion in dismissing the indictment below.

II. The District Court Carefully Weighed the Critically Important Interests Underlying the Double Jeopardy Clause.

Were Rule 31(b)(3) to impose a rigid *per se* rule on federal courts – that any request by the government to retry a defendant after a hung jury must be granted, thereby eliminating the district court's discretion – it would also be in derogation of the fundamental principle that emerges from the caselaw that "[a] power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial." *Jorn*, 400 U.S. at 479; *see also Gori*, 367 U.S. at 373 (1961) (Douglas, J., dissenting) ("The policy of the Bill of Rights is to make rare indeed the occasions when the citizen can for the same offense be required to run the gantlet twice."). Thus, although the Double Jeopardy Clause does not preclude retrial after a hung jury, its very purpose is to protect the accused from being "harassed by successive, oppressive prosecutions." *Gori*, 367 U.S. at 369; *see also United States v. Rivera*, 384 F.3d 49, 58 (3d Cir. 2004) (barring reprosecution and dismissing indictment where district judge failed to exercise "sound discretion" in declaring a mistrial "without considering the constitutional import of his decision"). The Supreme Court in *Green v. United States* articulated the

reasons for these protections:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

355 U.S. 184, 187-88 (1957). The Court further articulated this fundamental principle in *Arizona v. Washington*:

> Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

434 U.S. at 503-05 (footnotes omitted).

Thus, the "general rule[that] the prosecutor is entitled to one, and only one, opportunity" to try a defendant for a given offense serves at least two distinct purposes. *See* Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. Pa. L. Rev. 449, 497–507 (1977). First, it protects defendants from the enormous personal consequences of repeated trials: anxiety, public embarrassment, and expense. *See, e.g.*, *Oregon v. Kennedy*, 456 U.S. 667, 676-77 (1982) (double jeopardy frees defendants from "extended anxiety"

caused by trials); *Abney v. United States*, 431 U.S. 651, 661 (1977) (double jeopardy prevents defendants from "endur[ing] the personal strain, public embarrassment, and expense of a criminal trial more than once"); *United States v. Dinitz*, 424 U.S. 600, 608 (1976) (noting that the Double Jeopardy Clause protects a defendant against the "anxiety, expense, and delay occasioned by multiple prosecutions"); *Jorn*, 400 U.S. at 479 ("[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws."). Indeed, while any criminal prosecution is stressful for the accused, the delay and extended uncertainty occasioned by a retrial only exacerbates the profound trauma that is thus visited upon defendants and their families. *See* Schulhofer, *supra*, at 498.

The Double Jeopardy Clause also speaks to the increased risk of an erroneous conviction that a second trial poses. Indeed, as the district court noted here, double jeopardy was "intended to preclude the defendant from being subjected to multiple prosecutions and the consequent increased risk of conviction." A4 (quoting *Webb*, 516 F.2d at 1040). Whatever the ground for a mistrial, retrial "entail[s] not only a delay for the defendant, but also operate[s] as a post-jeopardy continuance to allow the prosecution an

opportunity to strengthen its case." *Somerville*, 410 U.S. at 469; *see also United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) ("[I]f the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own."); *Gori*, 367 U.S. at 369 (double jeopardy safeguard prevents prosecution from obtaining a "more favorable opportunity to convict the accused"). A retrial therefore poses more risk not only of conviction, but of an erroneous conviction. Janet E. Findlater, *Retrial After A Hung Jury: The Double Jeopardy Problem*, 129 U. Pa. L. Rev. 701, 714 (1981) (retrial "increase[s] the risk that although innocent the defendant may be convicted"); *Washington*, 434 U.S. at 504 n.14 (describing how "subtle changes in the State's testimony, initially favorable to the defendant, may occur during the course of successive prosecutions" (citing *Carsey v. United States*, 392 F.2d 810, 813-14 (D.C. Cir. 1967))). Indeed, the risk of an erroneous conviction during a retrial is especially acute when the second trial follows a hung jury (as opposed, for example, to a mistrial declared midway through the government's case) because the prosecution has, by that time, gained the experience and knowledge that comes with presenting its case in full, has seen how the defendant sought to cross-examine its witnesses at the first trial and even, as here, has had the opportunity to

interview jurors in the first trial as to why they were unable to reach a verdict. *See* Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 286 n.115, 288 & n.125 (1965) ("Reprosecution burdens and disadvantages the defendant more after he has completed a full first trial than if it ends prematurely."); Schulhofer, *supra*, at 523 ("[T]he problem of jury deadlock arises not merely after the close of the prosecutor's case-in-chief, but after complete presentation of all defense and rebuttal evidence. Mistrial at this late stage of the case involves acute possibilities for prejudice to the defendant.").[8]

Though it did not and could not preclude a retrial on double jeopardy grounds, the district court quite properly rested its decision on principles such as these, which have long underlay the Supreme Court's double

[8]Here, for example, the government unquestionably exploited the insights into the defense case that the first trial supplied, and adjusted its presentation to meet them. Detective Henson, who was surprised when he was cross-examined about an inconsistent statement during the first trial, preemptively corrected himself on direct during the second trial. *Supra* note 1. Similarly, retrial provided the government an opportunity to call two different law enforcement officers as witnesses, perhaps in the hope that they would be more credible to a jury. And most significantly, the government called two expert witnesses at Mr. Wright's retrial to explain how difficult it is to obtain fingerprints or DNA from a firearm, clearly a reaction to – and an attempt to neutralize – a central theme of Mr. Wright's defense during the first trial. The increased risk of erroneous conviction at a retrial, which as discussed *supra* grows out of the strategic advantage it provides, is a central concern of the Double Jeopardy Clause and here weighs strongly in favor of the district court's decision.

jeopardy jurisprudence.[9] The district court used a series of factors, drawn from *State v. Abbati*, 493 A.2d 513, 521–22 (N.J. 1985), to inform its exercise of discretion.[10] Among the factors the district court considered

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[9]As the district court acknowledged, neither the Supreme Court nor the Third Circuit has squarely addressed whether district courts may dismiss an indictment with prejudice after multiple hung juries. However, as noted above, at least two district courts have concluded that it was within their power to do so. *United States v. Rossoff*, 806 F. Supp. 200 (C.D. Ill. 1992); *United States v. Ingram*, 412 F. Supp. 384 (D.D.C. 1976). Still other courts have suggested that dismissal may be appropriate in the right case. *See, e.g.*, *United States v. Gunter*, 546 F.2d 861, 866 (10th Cir. 1976) ("There indeed may be a breaking point, but we do not believe it was reached in the instant case.").

[10]The district court surveyed a series of state high court decisions that, "[a]lthough not binding," provided persuasive authority in the absence of a controlling Third Circuit or Supreme Court precedent. A5-7 (citing *Sivels v. State*, 741 N.E.2d 1197 (Ind. 2001); *State v. Abbati*, 493 A.2d 513 (N.J. 1985); *State v. Moriwake*, 647 P.2d 705 (Haw. 1982); *State v. Witt*, 572 S.W.2d 913 (Tenn. 1978)). As the district court found, those decisions are "compelling, especially in light of the Supreme Court's stated concerns regarding the costs of subjecting criminal defendants to multiple trials." A7. Those decisions are addressed extensively in the parties' briefs, and *Amicus* accordingly does not belabor them here. The district court, however, sensibly applied the factors used by the Supreme Court of New Jersey, in *Abbati*:

> (1) the number of prior mistrials and the outcome of the juries' deliberations, so far as is known; (2) the character of prior trials in terms of length, complexity, and similarity of evidence presented; (3) the likelihood of any substantial difference in a subsequent trial, if allowed; (4) the trial court's own evaluation of the relative strength of each party's case; and (5) the professional conduct and diligence of respective counsel, particularly of the prosecuting attorney. The court must also give due weight to the prosecutor's decision to reprosecute, assessing the reasons for that decision, such as the gravity of the

significant were the lack of complexity in Mr. Wright's two previous trials, which were "virtual duplicates" of one another, and the fact that no new evidence was anticipated at a potential third trial, A10; and the personal impact of another retrial on Mr. Wright, in particular the enormous stress and anxiety involved in multiple trials, including the fact that his mother was ill at the time and he and his partner were expecting a child. A10, A12-13. At the same time, the district court acknowledged the points that the government now emphasizes: the strength of the government's evidence (tempered, of course, by its failure to persuade two juries) and the fact that the personal trauma to Mr. Wright would be even greater in other circumstances (*e.g.*, were he incarcerated). A11-12.

The district court, in other words, properly considered the full range of factors in exercising its discretion as to whether the government should have been permitted to try Mr. Wright for a third time: "the financial and emotional burden on the accused, . . . the period in which he is stigmatized

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> criminal charges and the public's concern in the effective and definitive conclusion of criminal prosecutions. Conversely, the court should accord careful consideration to the status of the individual defendant and the impact of a retrial upon the defendant in terms of untoward hardship and unfairness.

A10 (quoting *Abbati*, 493 F.2d at 521-22). *Amicus* agrees with the district court that these factors provide "an appropriate basis for determining" whether and how to exercise the court's discretion.

by an unresolved accusation of wrongdoing, and . . . the [enhanced] risk that an innocent defendant may be convicted." *See Washington*, 434 U.S. at 503-04 (footnotes omitted). The government disagrees with the district court's conclusion, but that is no reason to substitute the prosecution's judgment for the court's. Because the district court's analysis was sound, because the Rule confirms rather than supplants its discretion and because it was in the best position to make this nuanced determination, the lower court's decision deserves deference, and, *amicus* NACDL respectfully submits, should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's order dismissing the indictment with prejudice.

Respectfully submitted,

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Dated: February 12, 2018

CERTIFICATIONS

1. Certification of Bar Membership

I hereby certify that I, Lawrence S. Lustberg, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Certification of Font, Word Count, Identical Text, and Virus Check

I hereby certify that this Brief complies with the type and volume limitations set forth in Fed. R. App. P. 32(a). This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared using a proportionally spaced typeface, namely Georgia, using Microsoft Word with 14-point font. This brief complies with the word count requirement of Fed. R. App. P. 32(a)(7) because, according to the word count feature of Microsoft Word, this Brief contains 5,283 words, excluding those parts exempted by Fed. R. App. P. 32(f). The text of the electronic version of this Brief is identical to the text in the paper copies. The electronic PDF of the brief has been prepared on a computer that is automatically protected with a virus detection program, namely a continuously updated version of Sophos Endpoint Advanced, version 10.8.1.1, and no virus was detected.

3. Certification of Service

I hereby certify that on February 12, 2018, I caused the foregoing Brief to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, and to have seven (7) paper copies of the Brief delivered to:

Marcia Waldron
The Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

I hereby certify that on February 12, 2018, I caused the foregoing Brief to be served upon the counsel of record for both parties through the Notice of Docketing Activity issued by this Court's CM/ECF system.

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.

Dated: February 12, 2018