No. 07-

IN THE

Supreme Court of the United States

DANIEL E. CARPENTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Criminal Appeals Act of 1970, as amended by the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 3731 (2000 & Supp. IV 2004), allows the government to take an interlocutory appeal from an order of the district court granting a defense motion for a new trial, which was granted in this case due to the government's improper closing arguments. The questions presented are:

1. Whether the Double Jeopardy Clause entitles a defendant to interlocutory review of his claim that the government failed to introduce legally sufficient evidence at his first trial *before* he is retried after a motion for a new trial is granted?

2. Whether the First Circuit erred by holding, in conflict with the Fourth Circuit, that a defendant is not entitled to cross-appeal a district court's denial of his motion for judgment of acquittal based on the insufficiency of the evidence, if the *government* first takes an interlocutory appeal under 18 U.S.C. § 3731 from an order of the district court granting a new trial?

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OPINIONS BELOW

The First Circuit's opinion is reported at 494 F.3d 13 (App. 1a–46a). The district court's opinion is reported at 405 F. Supp. 2d 85 (App. 47a–88a).

JURISDICTION

The First Circuit entered judgment on July 18, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S Const. amend. V. The relevant portion of 18 U.S.C. § 3731 provides, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

STATEMENT OF THE CASE

This case presents several important and intertwined issues of Double Jeopardy law and criminal procedure. It has been clear since *Burks v. United States*, 437 U.S. 1 (1978), that retrial is barred by double jeopardy principles if a trial or appellate court grants a defendant's motion for judgment of acquittal on the ground that the prosecution's evidence was insufficient. In *Richardson v. United States*, 468 U.S. 317, 325 (1984), this Court held that a defendant can be retried unless "there has been some event, such as an acquittal, which terminates the original jeopardy," and that a declaration of a mistrial due to a hung jury does not qualify. Beyond "an acquittal," this Court did not elaborate on what "some event" might include.

In the wake of *Richardson*, courts and commentators have struggled with whether a *conviction* can be "some event, such as an acquittal, which terminates the original jeopardy." The issue usually arises when a defendant moves after conviction for a new trial because of evidentiary or other "trial error," but also moves for judgment of acquittal on sufficiency grounds. Is the trial court or court of appeals required to rule on the defendant's separate sufficiency motion if they intend to grant a new trial on "trial error" grounds? Most courts have read *Richardson* to hold that defendants have no constitutional entitlement to a ruling on their sufficiency motion—even though, if that motion is meritorious and granted, double jeopardy bars retrial. But that conclusion is so obviously inconsistent with fundamental fairness and the values underlying the Double Jeopardy Clause that most of the circuits and some state courts

have adopted a "prudential" rule requiring appellate panels to reach an alternative sufficiency argument if it is presented.

This case presents an even more obviously unfair twist on that common situation. 18 U.S.C. § 3731 now allows the government to take an interlocutory appeal from a district court's grant of a defendant's motion for a new trial. The issue in this case is whether, when the government exercises that right and asks a court of appeals to overturn the grant of a new trial made under Federal Rule of Criminal Procedure 33, a defendant may cross-appeal the denial of a motion for judgment of acquittal made under Federal Rule of Criminal Procedure 29. As the First Circuit expressly acknowledged below, the courts of appeals are divided on this important question. App. 28a.

This case presents the ideal vehicle for this Court to resolve that conflict and to give criminal defendants (who, after the grant of a new trial, are entitled to a renewed presumption of innocence) at least the same interlocutory appellate rights regarding a denial of a motion for judgment of acquittal as those recently granted to the government regarding the grant of a motion for a new trial. There are strong arguments that defendants ought to be entitled to some form of review of their sufficiency claim prior to retrial as a matter of constitutional right under the Double Jeopardy Clause. But even if this Court is not prepared to embrace that constitutional position, there is no good reason to deny a defendant interlocutory review of his sufficiency claim *at least* in those cases where the government has already taken an interlocutory appeal of the district court's grant

of a new trial motion. The First Circuit's holding that such cross-appeals are impermissible perversely puts a defendant whose motion for a new trial is granted by the district court in a worse position than if that motion had been denied by the district court, or had never been made. This Court could reverse that holding and resolve the conflict in the circuits via several different analytical routes, and as a matter of basic fairness and the wise administration of justice it should.

1. Background

This mail and wire fraud prosecution began with the historic stock market collapse of December 2000. From 1998 until the end of 2000, Benistar Property Exchange Trust Co., Inc. ("BPE"), of which Carpenter was chairman and Martin L. Paley ("Paley") was president, acted as a "qualified intermediary" successfully completing 119 out of 126 like-kind property exchanges under I.R.C. § 1031(a) (2005). App. 2a. Under normal circumstances, when a taxpayer sells an investment property, tax must be paid on the gain. An I.R.C. § 1031 Tax Deferred Exchange allows an exception to payment of the capital gains tax. When a taxpayer (called an "Exchangor") sells investment real estate and replaces it with different investment real estate using an exchange, the payment of capital gains tax normally required on such a sale can be deferred. As long as a property used for investment is replaced with similar property within 180 days, no gain is recognized at that time; rather, the gain is deferred until the eventual sale of the replacement property. I.R.C. § 1031(a)(3). However, upon the sale of the relinquished property, "[i]f taxpayers take possession of the cash, they are

disallowed the tax advantages of the like-kind exchange provisions." Treasury Inspector General for Tax Administration, U.S. Dep't of Treasury, Publ'n No. 2007-30-172, *Like-Kind Exchanges Require Oversight to Ensure Taxpayer Compliance* 7 n.14 (2007) ("2007 Treasury Report"). In order to avoid taking possession of the cash from the sale of the relinquished property, an Exchangor normally relies on the "safe harbor" provided by 26 C.F.R. § 1.1031(k)-1(g)(4) (2002), in which the Exchangor utilizes the services of a "qualified intermediary" (such as BPE) to invest the cash until the purchase of the replacement property. "[I]f taxpayers do not specifically follow the rules for like-kind exchanges, they could be held liable for taxes, penalties, and interest on their transactions." 2007 Treasury Report, at 1 (Memorandum from Michael R. Phillips for Comm'r, Small Bus./Self-Employed Div. (Sept. 17, 2007)).

Paley (working out of his office in Massachusetts) was responsible for BPE's marketing, had the *exclusive* interactions and communications with the Exchangors who utilized BPE's services, and "solicited the exchangors and executed the transaction documents." App. 62a. Carpenter (working out of his office in Connecticut) had no contact with the Exchangors and his role was simply to invest the Exchangors' funds *after* they were forwarded to BPE's accounts, first at Merrill Lynch and later at PaineWebber. App. 3a–4a. When the stock market collapsed in December 2000, BPE's investment accounts at PaineWebber sustained losses of approximately $9 million of the funds of seven BPE Exchangors (all of whom were professional real estate

developers or investors) out of over $100 million in total Exchangor funds invested.[1] App. 4a.

In order to generate the promised 3% or 6% return on the Exchangors' funds, App. 2a–3a, Carpenter caused BPE to invest *all* Exchangor funds in stock options of highly-rated companies and other investment-grade, publicly-traded securities offered through Merrill Lynch and later PaineWebber. App. 3a–4a. The seven Exchangors whose funds were lost blamed Carpenter's investment strategy for the losses, notwithstanding that investing in stock options is prohibited by neither I.R.C. § 1031(a), 26 C.F.R. § 1.1031(k)-1, case law, nor—most importantly—BPE's written agreements with the Exchangors. App. 5a. Carpenter attributed the losses to certain actions taken by PaineWebber, and caused BPE to file an arbitration claim against PaineWebber with the National Association of Securities Dealers, Inc. ("NASD"). In December 2005, the NASD arbitration panel unanimously awarded BPE $12.6 million against PaineWebber. App. 89a-95a. The NASD arbitration award was upheld on appeal and, in April 2007, BPE

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1. In January 2001, the seven Exchangors whose funds were lost sued BPE, Carpenter, Paley, Merrill Lynch, PaineWebber, and others in Massachusetts, even though Carpenter resides in Connecticut. The Exchangors' only viable legal claim is for breach of contract against BPE because the Exchangors had no dealings or communications with Carpenter and Carpenter had no personal obligation to them. Furthermore, because no fiduciary relationship existed as a matter of federal law, *see* 26 C.F.R. § 1.1031(k)-1(k)(2), the Exchangors' state law claims for breach of fiduciary duty against Carpenter have no basis.

obtained a final judgment against PaineWebber in New York State Supreme Court for $14.2 million. Judgment, *In re UBS PaineWebber, Inc.*, Index No. 600156/06 (N.Y. Commercial Div. April 18, 2007).

The government elected to pursue this matter criminally. As the government's own auditor and forensic accountant acknowledged at trial, however, Carpenter did not take, steal, misappropriate, divert, or embezzle any Exchangor funds. App. 96a. To the contrary, Carpenter invested and lost $2 million of his *own* money in BPE to help keep the business afloat. App. 96a. Moreover, it is undisputed that Carpenter voluntarily provided thousands of pages of documents to the government; did not "cover up" conduct by himself or others; and did not tell anyone to lie, engage in misconduct, or otherwise break the law.[2]

2. District Court Proceedings

In February 2004, Carpenter was indicted in the District of Massachusetts on 14 counts of wire fraud and five counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 1343 (2002). App. 4a. In September 2004, shortly after the district court heard argument on Carpenter's motion to dismiss the indictment for failure to allege the necessary elements of a crime (including materiality),

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2. By contrast, the record suggests that Paley may have made false statements to federal agents and committed perjury during his trial testimony. App. 70a, 77a. The district court noted "[t]he confusing and contradictory nature of Paley's testimony." App. 76a. *See also* App. 84a–88a. Paley was not charged with any crime. App. 71a–72a.

lack of fair notice, and lack of venue, the government returned a superseding indictment.[3]

Read with the benefit of post-trial hindsight and in a light most favorable to the government, the superseding indictment essentially alleged that Carpenter caused the seven Exchangors whose funds were lost (out of 126 total Exchangors) to mail and/or wire their funds to BPE based on written and/or oral affirmative misrepresentations that the funds would be "safe." App. 5a. During pretrial proceedings, the government expressly conceded that whether BPE's investments resulted in gains or losses was irrelevant to whether a scheme to defraud existed. Moreover, "[t]here was no evidence at trial that Carpenter personally made any *oral* misrepresentations, so the focus was on the *written* statements that the indictment alleged were materially false." App. 58a (emphasis added). Consequently, the government abandoned its reliance on any *oral* misrepresentations as charged in the superseding indictment because Carpenter did not speak to or deal with any of the Exchangors—that was Paley's job. App. 57–58a. Instead, the government

3. The government's ostensible purpose in seeking the superseding indictment was to add factors for the jury's determination in light of *Blakely* v. *Washington*, 542 U.S. 296 (2004), but the government also added the word "material" several times throughout the document. The superseding indictment, however, failed to remedy the original indictment's primary defect—placing Carpenter on fair notice as to precisely what conduct of his was alleged to be "criminal" as required by *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). The district court nevertheless denied Carpenter's motion to dismiss as well as his motion to transfer venue to the District of Connecticut pursuant to Federal Rule of Criminal Procedure 21(b).

was forced to rely exclusively on alleged *written* misrepresentations (although not a single document introduced into evidence stated that the funds would be "safe") and, more importantly, on Carpenter's omitting to disclose to the Exchangors that their funds would be invested in stock options (without proving that Carpenter had a *duty* to disclose and while admitting that, since Paley alone dealt with the Exchangors, Carpenter did not have the *opportunity* to disclose). App. 58a, 62a.

There was no conspiracy charge or claim of agency between Carpenter and Paley although there was an aiding and abetting allegation against Carpenter pursuant to 18 U.S.C. § 2, "during trial the government disavowed a theory of Carpenter's culpability based on his having aided or abetted Paley." App. 65a. Consequently, the government's case focused on Carpenter's *own* acts (which amounted simply to investing the funds), rather than on Paley's acts (communicating with the Exchangors and drafting the marketing materials) that the Government might have tried to attribute to Carpenter. App. 65a. And even though the government had conceded that the investment losses were irrelevant to its theory of prosecution, "considerable evidence about the trading losses was introduced by the government. The figures and charts demonstrating the extent and persistence of the trading losses were dramatic."[4] App. 81a.

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4. Carpenter moved for a mistrial on this issue, arguing that the admission of such concededly irrelevant evidence was unduly prejudicial to the defense. The district court denied the motion. App. 11a.

After a three-week trial in July 2005, Carpenter moved for a judgment of acquittal at the close of the government's case and again at the close of all the evidence pursuant to Federal Rule of Criminal Procedure 29(a). Those motions were denied. During its closing and rebuttal arguments, the government repeatedly employed "gambling" metaphors to characterize Carpenter's investment strategy. App. 78a–79a. The "thus-incited jury," App. 79a, found Carpenter guilty on all counts.[5]

Carpenter timely filed a post-verdict motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). App. 7a. "In his sufficiency challenge, Carpenter raise[d] arguments of causation, intent, constructive amendment of the indictment, reliance upon a theory of liability based on omission, good faith as an absolute defense, and venue." App. 32a. The district court denied that motion, concluding that, while "the jury would certainly have been warranted in concluding beyond a reasonable doubt that Carpenter acted with intent to defraud, . . . *a contrary conclusion also would have been rationally possible on the evidence*." App. 82a (emphasis added). Carpenter also timely moved for a new trial pursuant to Federal Rule of Criminal Procedure 33(b)(2). App. 7a. In December 2005, the district court granted Carpenter's motion for a new trial due to the government's improper and excessive use of "gambling" metaphors in its closing and

5. The jury returned its verdict in July 2005, but the NASD arbitration award against PaineWebber was not issued until December 2005. App. 89a. Thus, the jury was unable to consider the significance of that award when deliberating whether Carpenter was criminally responsible for the Exchangors' losses.

rebuttal arguments. App. 78a–83a. The district court explained that, "though sufficient to withstand a motion for judgment of acquittal, *the case was not so strong* that it can confidently be said that the repeated 'gambling' references had no illegitimate effect on the jury's assessment of the evidence." App. 82a (emphasis added).

In January 2006, the government timely appealed pursuant to 18 U.S.C. § 3731 the district court's order granting a new trial. Carpenter then timely cross-appealed pursuant to Federal Rule of Appellate Procedure 4(b)(1)(A)(ii) the denial of his motion for judgment of acquittal.

3. Court of Appeals Proceedings

The First Circuit ordered both parties to address in their merits briefs whether the court properly had jurisdiction over Carpenter's cross-appeal. It then affirmed the grant of a new trial based on the government's improper closing arguments (without addressing Carpenter's other arguments in support of a new trial). App. 23a. The First Circuit afforded "substantial deference" (App. 23a) to the district court's conclusion that those "improper arguments affected the outcome of the trial." App. 21a. Accordingly, the First Circuit found "no basis for concluding that the district court abused its discretion in ordering a new trial." App. 23a.

However, the First Circuit dismissed Carpenter's cross-appeal of the denial of his motion for judgment of acquittal for lack of appellate jurisdiction. App. 33a. The court held that Carpenter was not appealing from any

"final decision" of the district court within the meaning of 28 U.S.C. § 1291. It acknowledged this Court's holding in *Abney v. United States*, 431 U.S. 651, 659 (1977), that double jeopardy claims satisfy the requirements of the collateral order doctrine, and the "practical appeal" of Carpenter's point that refusing to hear the sufficiency claim "would burden defendants with a 'Hobson's choice' between: (1) waiving the right to move for a new trial in order to ensure appellate review of a sufficiency claim; and (2) moving for a new trial and losing the right to appeal a sufficiency claim arising from the first trial." App. 25a.

The court nonetheless held that Carpenter had no viable double jeopardy claim because of *United States v. Porter*, 807 F.2d 21, 24 n.2 (1st Cir. 1986), which extended this Court's decision in *Richardson* (concerning mistrials) to hold that a conviction and subsequent reversal for trial error does not terminate the former "continuing jeopardy." App. 26a–27a. And it held that Carpenter's sufficiency of the evidence claim did not satisfy the requirements of the collateral order doctrine because it is "deeply entwined with the merits." App. 32a. It acknowledged that the Fourth Circuit had expressly upheld the exercise of interlocutory appellate jurisdiction under these same circumstances in *United States v. Greene*, 834 F.2d 86 (4th Cir. 1987), but expressly "decline[d] to follow" that decision. App. 28a–29a.

REASONS FOR GRANTING THE PETITION

This case involves an important constitutional issue that has bedeviled courts and commentators since this Court's decision in *Richardson*, and a question of jurisdiction and procedure of profound importance that has divided the courts of appeals.

The district court in this case acknowledged that "Carpenter stands farther back, both in time and proximity, from the critical events that are the gist of the charged offenses," App. 62a, and stated that although the jury found intent to defraud, "a contrary conclusion also would have been rationally possible on the evidence." App. 82a. At a minimum that is an acknowledgment that Carpenter has a serious claim that the evidence was insufficient for conviction.[6] If the court of appeals had reversed the district court's denial of Carpenter's sufficiency motion, a retrial would violate double jeopardy principles under *Burks*. But Carpenter

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6. Arguably that conclusion *compels* a judgment of acquittal because:

> [I]f the evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, this court must reverse the conviction. This is so because ... where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, a reasonable jury *must necessarily entertain* a reasonable doubt.

United States v. *Flores-Rivera*, 56 F.3d 319, 323 (1st Cir. 1995) (internal citations and quotation marks omitted).

never got a chance to present that issue to the First Circuit because the district court granted his alternative motion for a new trial—and the appeal was taken by the government rather than the defendant.

First, Carpenter is undeniably entitled to an interlocutory appeal under the collateral order doctrine if double jeopardy principles bar retrial in these circumstances. The "continuing jeopardy" analysis of *Richardson* should not be extended to situations like this one. A mistrial after a hung jury does not terminate the original jeopardy but a completed trial resulting in a conviction has reached a far greater state of finality. And permitting the government to retry a defendant after a fully completed trial in which the evidence was insufficient for conviction offends the core values the Double Jeopardy Clause was meant to protect.

Second, when a defendant moves for a new trial because of "trial error," and for a judgment of acquittal on sufficiency grounds, the trial court and court of appeals should reach and decide both issues as a matter of fairness, prudence, and the wise administration of justice even if doing so is not required by the Double Jeopardy Clause. Indeed, many of the circuits and state supreme courts have explicitly adopted a "prudential" rule requiring appellate panels to address a defendant's alternative sufficiency claim on the merits if it is presented—even if the court is inclined to reverse in any event on the ground that a new trial should have been awarded.

This case differs from that common pattern only because the district court granted Carpenter's motion for a new trial, the appeal here was thus taken *by the government*, and the defendant needs to raise the sufficiency issue by cross-appeal. That posture raises a

finality issue not present in the more common scenario, but the collateral order doctrine is rooted in a "practical rather than a technical construction" of finality, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), and the defendant's equities are even more powerful in this setting. If the government is permitted to interrupt the ordinary criminal process with an interlocutory appeal, defendants should be permitted to present their own sufficiency claims that, if accepted, would establish a constitutional right not to be retried and terminate the litigation rather than prolong it. The First Circuit in this case acknowledged a conflict with the Fourth Circuit, which has recognized that denying defendants a right to cross-appeal in this setting would be "unfair," and would "encourage piecemeal review and unduly delay the final resolution of a criminal case." *Greene*, 834 F.2d at 89. This Court should grant review to resolve that conflict.

1. The Double Jeopardy Clause Substantively Bars Retrial After A Complete Trial Ending In Conviction, If The Evidence Was Insufficient

The prohibition of the Double Jeopardy Clause "is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." *United States* v. *Ball*, 163 U.S. 662, 669 (1896). "The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1873).

"That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

> Moreover it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again.

Green v. United States, 355 U.S. 184, 188 (1957).

> 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.

Id. at 187-88.

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding . . . where the Double Jeopardy Clause is applicable, its sweep is absolute." *Burks*, 437 U.S. at 11 & n.6.

> This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance.

Tibbs v. Florida, 457 U.S. 31, 41–42 (1982); *see* 12 Charles Viner, *A General Abridgement of Law & Equity* 479 (2d ed. 1794) ("[T]he mischief might be very great if the party should be put to a new trial, for then his adversary would see where he failed, and might use ill means to prove what he failed in before.").

Accordingly this Court has held that a holding by a trial court or court of appeals that the evidence was insufficient bars retrial. In *Richardson*, however, this Court noted that

> [without] exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the

> prosecution one complete opportunity to convict those who have violated its laws.

468 U.S. at 324 (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)). This Court held that "unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict" did not implicate the "type of oppressive practices at which the double-jeopardy prohibition is aimed." *Richardson*, 468 U.S. at 324–25. It then held that *Burks* could be "readily reconciled" with the availability of retrial after mistrial, on the ground that "the *Double Jeopardy Clause* by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Id.* at 325.

After *Richardson*, courts and commentators have struggled with whether retrial is barred after a complete trial ending in conviction, at which the evidence was constitutionally insufficient. There are good reasons to think so. *See, e.g.*, Sarah O. Wang, Note, *Insufficient Attention to Insufficient Evidence: Some Double Jeopardy Implications*, 79 Va. L. Rev. 1381, 1397–1409 (1993) (arguing that *Richardson* should be confined to the mistrial context or overruled). A trial ending in conviction does not implicate "unforeseeable circumstances that arise during trial making its completion impossible," or the historic principle that the prosecution should have at least one complete opportunity to prove its case. *Richardson*, 468 U.S. at 324–25. And there is certainly support for the idea that after conviction the defendant has been exposed to a full "jeopardy." *See, e.g.*, *Crist v. Bretz*, 437 U.S. 28, 33 (1978)

(referring to the English common-law rule that "a defendant has been put in jeopardy only when there has been a conviction or an acquittal—after a complete trial"); *United States v. Scott*, 437 U.S. 82, 92 (1978) (equating the term "final judgment" with a "final determination of guilt or innocence"). Indeed, at least one state Supreme Court has declined to follow *Richardson* on common law grounds. *See Berry v. Commonwealth*, 473 N.E.2d 1115, 1116 (1985) (recognizing Massachusetts common law double jeopardy right against retrial after hung jury, if evidence was insufficient).[7]

The fundamental policy of the Double Jeopardy Clause—to avoid giving the prosecution multiple bites at the apple—is also implicated just as strongly after erroneous conviction as after acquittal. And allowing retrials without ever considering the defendant's possibly meritorious sufficiency challenge puts defendants to what the First Circuit acknowledged to be a Hobson's choice. If the defendant abandons his arguments that the trial was procedurally unfair, he guarantees that the district court and court of appeals will reach his sufficiency claim, and if he prevails the Double Jeopardy Clause will preclude retrial. But if he has the temerity to object to "trial errors" by then he places himself in danger of being retried even if the

7. Language in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), suggests that conviction does not terminate jeopardy, but *Lydon* "arose in the unique context of Massachusetts' two-tier trial system," and "the unique trial procedure at issue in the case largely determined the outcome, and subsequent cases have confined *Lydon* to its facts." Wang, *supra*, at 1389.

evidence was also constitutionally insufficient. That is fundamentally unfair and would make sense only if a defendant waives his double jeopardy right in some sense by requesting a new trial. That used to be the rule, *see Yates v. United States*, 354 U.S. 298 (1957); *Bryan v. United States*, 338 U.S. 552 (1950), but this Court expressly rejected that notion in *Burks*, 437 U.S. at 18.

Richardson suggests no abstract theory for determining what sorts of events terminate jeopardy as a formal matter, so the balance of constitutional interests between the prosecution and defense must be considered. There is essentially nothing on the prosecution's side of the ledger once a trial has been fully completed to conviction, if the evidence it mustered at trial was constitutionally insufficient. And in any event "continuing jeopardy" is just a convenient formalism that this Court has readily disregarded when the policies underlying the Double Jeopardy Clause suggest a different answer. *See, e.g.*, Wang, *supra*, at 1398 & n.110; *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982) (retrial after mistrial is barred if the prosecution intentionally provoked the mistrial).

In the wake of *Burks* and *Richardson*, the circuits divided on how to analyze cases involving conviction followed by alternative arguments for retrial and for acquittal. *See* Wang, *supra*, at 1382 & n.4–6. Many of the early cases clearly assumed that some interlocutory review of the defendant's alternative sufficiency arguments was required by double jeopardy principles. *See, e.g., Vogel v. Pennsylvania*, 790 F.2d 368, 377 (3d Cir. 1986) (granting habeas relief because "had the issue been addressed by the Pennsylvania courts,

the meager evidence of sanity relied upon by the Commonwealth at the second trial would have been found insufficient"); *United States v. Haddock*, 961 F.2d 933, 934 (10th Cir. 1992); *United States v. Szado*, 912 F.2d 390, 393 (9th Cir. 1990); *United States v. Quinn*, 901 F.2d 522, 529 & n.5 (6th Cir. 1990). More recently the circuits seem to have settled into a rough consensus that interlocutory review of sufficiency arguments after conviction and prior to retrial is not technically compelled by the Double Jeopardy Clause, but is nonetheless strongly required by principles of fairness and prudence. *But see United States v. Wiles*, 106 F.3d 1516, 1518 (10th Cir. 1997) ("[W]hen we reverse on appeal because of a procedural error at trial and remand for a new trial, the prohibition against double jeopardy requires us to address a defendant's claim that the evidence presented at trial on the reversed count was insufficient."). Accordingly, most circuits have explicitly adopted an internal rule that panels are prudentially required to rule upon a defendant's separate sufficiency argument if it is presented—and are quite serious about enforcing compliance with those rules if a panel fails to comply. *See, e.g., Patterson v. Haskins*, 470 F.3d 645, 651–60 (6th Cir. 2006), *cert. denied*, 2007 U.S. LEXIS 10434 (2007); *United States v. Bobo*, 419 F.3d 1264, 1268 (11th Cir. 2005); *United States v. Adkinson*, 135 F.3d 1363, 1379 n.48 (11th Cir. 1998); *United States v. Miller*, 952 F.2d 866, 872–74 (5th Cir. 1992); *United States v. Bishop*, 959 F.2d 820, 829 n.11 (9th Cir. 1992), *overruled in part as stated in Boyle v. Brown*, 404 F.3d 1159 (9th Cir. 2005); *United States v. Anderson*, 896 F.2d 1076, 1077–78 (7th Cir. 1990); *see also Conn. v. Padua*, 869 A.2d 192, 218–20 (Conn. 2005) (finding it unnecessary to reach double jeopardy argument because "[i]nterests of judicial

efficiency, sound appellate policy and fundamental fairness require a reviewing court to address a defendant's insufficiency of the evidence claim prior to remanding a matter for retrial because of trial error"). Most of the courts of appeals and state courts have concluded, in other words, that these circumstances are within the formalistic "continuing jeopardy" holding of *Richardson*—but that that holding is so obviously unfair and senseless that it should be disregarded as a prudential matter.

Justice Brennan's concerns voiced in *Richardson* apply even more strongly here:

> Accordingly, a defendant who is constitutionally *entitled to an acquittal* but who fails to receive one . . . is worse off than a *guilty* defendant who is acquitted due to mistakes of fact or law. . . . I do not believe this paradoxical result is faithful to the principle we have repeatedly reaffirmed that the Double Jeopardy Clause precludes retrial where the State has failed as a matter of law to prove its case despite a fair opportunity to do so.

Richardson, 468 U.S. at 327–28 (Brennan, J., concurring in part and dissenting in part) (internal citations and quotation marks omitted). The only meaningful difference between *Burks* and this case is that Carpenter exercised his right to complain that his trial was fundamentally unfair, and the district court agreed. If Carpenter had refrained from filing his new trial motion or the district court had denied it, Carpenter would have received appellate review of his sufficiency

claim and the ability to argue that retrial would violate double jeopardy. The post-*Richardson* consensus in the courts of appeals that retrying Carpenter raises no double jeopardy problem because of "continuing jeopardy" is not required by the reasoning of *Richardson* or the history it cites. And it effectively revives the coercive rule, explicitly rejected by this Court in *Burks*, that a defendant waives his right to complain of evidentiary insufficiency by asking for a new trial. This Court should grant certiorari and adopt a rule that is less arbitrary and more consistent with the underlying purposes of the Double Jeopardy Clause. *See Green*, 355 U.S. at 198

> The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance.

2. Cross-Appeal Jurisdiction Exists Under The Collateral Order And Pendent Appellate Jurisdiction Doctrines

If this Court were to hold that a conviction after full trial terminates the "continuing jeopardy" if the evidence was insufficient, then defendants would clearly be entitled to interlocutory cross-appeals on sufficiency grounds under *Richardson* and *Abney*. Indeed, any even "colorable" double jeopardy claim establishes interlocutory appellate jurisdiction under *Richardson*. *See Richardson*, 468 U.S. at 322. But even if this Court

is not prepared to embrace that constitutional principle, it should nonetheless hold that a defendant in Carpenter's position is entitled to appeal—*at least* if the government takes its own interlocutory appeal under § 3731—as a matter of fairness and prudence. The First Circuit acknowledged the longstanding circuit split on this issue in its decision in this case. The issue is of profound importance to individual defendants and the administration of justice, and merits review.

a. Courts of appeals normally have jurisdiction to consider appeals only from "final decisions" of the district courts. 28 U.S.C. § 1291. In criminal cases, this "final judgment" rule "prohibits appellate review until conviction and imposition of sentence." *Flanagan v. United States*, 465 U.S. 259, 263 (1984). One critical exception to the final judgment rule, however, is that a preliminary or interim decision is appealable as a "collateral order" if it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (citing *Cohen*, 337 U.S. 541).

Since *Cohen*, this Court has allowed interlocutory appeals in criminal cases under the collateral order doctrine in four situations: (i) denial of a motion to reduce bail, *Stack v. Boyle*, 342 U.S. 1, 7 (1951); (ii) denial of a motion to dismiss on double jeopardy grounds, *Abney*, 431 U.S. 651; (iii) denial of a motion to dismiss under the Speech or Debate Clause, *Helstoski v. Meanor*, 442 U.S. 500 (1979); and, most recently, (iv) denial of an objection to a pretrial forced-medication order, *Sell v. United*

States, 539 U.S. 166 (2003). The circuits are divided over whether the collateral order doctrine permits interlocutory appellate review in Carpenter's situation: denial of a motion for judgment of acquittal where the government *first* appeals a new trial order under 18 U.S.C. § 3731.

The First Circuit (App. 27a–28a) has now joined at least the Second, Third, and Seventh Circuits in answering that question in the negative. *See United States v. Ferguson*, 246 F.3d 129, 138 (2d Cir. 2001) ("denial of a Rule 29 motion does not fall within the narrow scope of the collateral order doctrine"); *United States v. Cahalane*, 560 F.2d 601, 608 (3d Cir. 1977) ("Defendants do not have the right to cross-appeal when the Government appeals under 18 U.S.C. § 3731."); *United States v. Eberhart*, 388 F.3d 1043, 1051 (7th Cir. 2004), *rev'd on other grounds*, 546 U.S. 12 (2005) ("The order at issue does not satisfy the latter two elements" of the collateral order doctrine.).

As the First Circuit recognized below, however, the Fourth Circuit has reached the opposite conclusion. That court held that

> [i]f [the defendant] was entitled to a judgment of acquittal, this right is too important to be denied review, particularly since a retrial might result in twice placing him in jeopardy for the same crime. It is also a right that can be irreparably lost if review is postponed until final determination of the case, because by then [the defendant] would have been put

> through the trauma and the expense of another trial.

Greene, 834 F.2d at 89; *see* App. 29a (recognizing conflict). The Fourth Circuit's reasoning is persuasive, and there is a manifest need for the Court to settle this well-established conflict. *See* Sup. Ct. R. 10(a).

b. This Court could also reach a conclusion similar to the Fourth Circuit under the doctrine of pendent appellate jurisdiction, which grants authority to "a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable . . . [where the two rulings are] inextricably intertwined." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50–51 (1995). *See also* Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After Swint*, 49 Hastings L.J. 1337, 1353 (1998) ("[P]endent appellate jurisdiction allows appellate courts to review issues that lack an independent basis of appellate jurisdiction if they bear a particular relationship to issues for which there is such jurisdiction."). This Court took a narrow view of the doctrine in *Swint*, but acknowledged that its prior cases had permitted the courts of appeals leeway to consider related issues in appropriate circumstances. Whether retrial is appropriate in a criminal case is certainly "inextricably intertwined" with whether the evidence was sufficient to justify conviction, in a practical even if not formal sense.

In *civil* cases, "[t]he Federal Courts of Appeals have endorsed the doctrine of pendent appellate jurisdiction, although they have expressed varying views about when

such jurisdiction is properly exercised." *Swint*, 514 U.S. at 44 n.2. There is a deep conflict among the courts of appeals as to whether the pendent appellate jurisdiction doctrine applies in *criminal* cases, however, and this Court could easily resolve that broader split in the process of considering the doctrine's application in these circumstances.

The Second and D.C. Circuits hold that pendent appellate jurisdiction is never available in criminal cases. *See Ferguson*, 246 F.3d at 138 ("[T]here is no pendent appellate jurisdiction in criminal cases."); *United States v. Hsia*, 176 F.3d 517, 527 (D.C. Cir. 1999) ("[E]ven where the interlocutory appeal is brought by the government, as here, we see no reason to give the defendant a windfall opportunity to delay proceedings via cross-appeal."). The Seventh Circuit has intimated that it would follow that rule: "It is *doubtful* that pendent appellate jurisdiction is available in criminal cases." *Eberhart*, 388 F.3d at 1051 (emphasis added). The Fourth Circuit has questioned whether the doctrine "ever exists." *United States v. Bundy*, 392 F.3d 641, 649 (4th Cir. 2004).

In contrast, the Eleventh Circuit has held that the pendent appellate jurisdiction doctrine applies in criminal cases, and has utilized it to permit interlocutory review of a non-final district court order when the government took a § 3731 appeal in a mail fraud case. *See United States v. Lopez-Lukis*, 102 F.3d 1164, 1167 n.10 (11th Cir. 1997) ("[W]e are confident that our application of pendent jurisdiction is proper in this case."). The Tenth Circuit has also applied the doctrine in a mail and wire fraud case involving an appeal by the government under § 3731, although the decision predates

Swint. *See United States v. Zabawa*, 39 F.3d 279, 283 (10th Cir. 1994) ("We have pendent jurisdiction to review on appeal issues that are otherwise not appealable when raised by an appellant or a cross-appellant."). The First and Sixth Circuits have also rejected particular claims for pendent appellate jurisdiction in criminal cases on the merits, without intimating that the doctrine could never apply in a criminal case. *See United States v. Marino*, 200 F.3d 6, 12–13 (1st Cir. 1999); *United States v. A.R.*, 203 F.3d 955, 962–63 n.4 (6th Cir. 2000). This case provides an appropriate vehicle for this Court to resolve this conflict on such an important issue.

c. All of the policy considerations discussed in Section 1 *supra* that make the constitutional issue debatable—and that have led the courts of appeals to adopt their "prudential" rules requiring panels to reach sufficiency claims after final judgment—support the Fourth Circuit's rule. Furthermore *none* of the policy concerns arguing against interlocutory appeals in criminal cases exist with respect to a defendant's cross-appeal of the denial of a motion for judgment of acquittal *after* the government has already appealed the grant of a motion for a new trial under § 3731. *See Flanagan*, 465 U.S. 269–70 (discussing concerns); *Sell*, 539 U.S. at 188–93 (Scalia, J., dissenting) (discussing concerns).

First, a cross-appeal by a defendant obviously does not "interrupt[] the trial," *Flanagan*, 465 U.S. at 269, because the trial has already been completed and the district court is divested of jurisdiction when the government takes its appeal under § 3731. There is nothing to "interrupt." *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per

curiam) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). For the same reason, there is no "concern for the disruption of criminal proceedings." *Sell*, 539 U.S. at 191 (Scalia, J., dissenting).

Second, unlike with interlocutory bail issues where "[t]he prosecution would continue, though only after long delay," *Flanagan*, 465 U.S. at 269, if a court of appeals hears a defendant's cross-appeal and grants the judgment of acquittal, the case is over. And even if the claim is unsuccessful, it does not delay the new trial any more than the government's appeal already has.

Third, "little seems to be gained by examining the sufficiency of the evidence on appeal through the lens of new trial standards but refusing to examine the sufficiency of the same evidence through the lens of acquittal standards." 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure: Jurisdiction & Related Matters § 3919.7 (2d ed. 2007). A court of appeals confronted with the government's appeal of a new trial order will generally have to engage with the record in any event. And denying a defendant's cross-appeal on sufficiency grounds prior to retrial conserves judicial resources only in an extraordinarily blinkered and obtuse sense. The court of appeals perhaps defers or avoids some analysis, at the expense of putting the defendant, the government, and the district court through a second trial that a timely sufficiency review may prove unnecessary. If the defendant is acquitted at the second trial then the case

may never come back to the court of appeals, but those are precisely the cases in which sufficiency review prior to retrial would serve the interests of justice and judicial economy on the whole. If the defendant is *convicted* on retrial then presumably he will be right back in the court of appeals raising his sufficiency arguments. And one of two things will be true: either the government will put on the same case the second time, in which case the same inevitable sufficiency review could have been conducted just as easily before the retrial; or the government will learn from experience and put on a *better* case the second time, in which case the core values of the Double Jeopardy Clause are plainly implicated. Critically, in that event, the defendant *never* has the chance to challenge on appeal the sufficiency of the evidence introduced at his *first* trial. *See United States v. Julien*, 318 F.3d 316, 321 (1st Cir. 2003) ("We hold that defendant may not, on appeal from a judgment of guilt in a second trial following a mistrial, then raise a claim that he was wrongly denied his motion for acquittal on insufficiency of the evidence at the first trial.").

Fourth, indeed it is the First Circuit's rule that risks wasting judicial resources—by giving the government an entirely risk-free opportunity to take an interlocutory appeal from a district court's order granting a new trial. That "no-lose" scenario in favor of the government constitutes a paradigmatic "moral hazard" whereby the total insulation from risk (i.e., that the government could lose a defendant's challenge to the sufficiency of the evidence on cross-appeal) leaves the government less concerned about the negative consequences of appealing the grant of a new trial than it otherwise might be. In fact, because there is *no* risk to the government in

bringing such an appeal, the moral hazard is that the government will develop an insatiable appetite to pursue interlocutory appeals in *all* cases where the district court grants a new trial.[8] The only guaranteed loser is the defendant, who *at best* will be forced to run the gauntlet a second time, and *at worst* will suffer a reversal of the new trial order, be convicted and sentenced. If the government decides to appeal a district court's new trial order, it should also face appellate scrutiny of the district court's denial of a defendant's motion for judgment of acquittal. "There is no unfairness to the government if it [loses] that gamble." App. 18a.

Finally, the First Circuit's interpretation of §§ 3731 and 1291 effects an undesirable inversion of the historical appellate rights of the government and individual defendants in criminal cases. "[F]rom the time of Lord Hale. . . . the textbooks, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case." *United States v. Sanges*, 144 U.S. 310, 312 (1892) (holding that the government cannot take an appeal in a criminal case without express statutory authority). The Criminal

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8. *See* Amitai Aviram, *The Placebo Effect of Law: Law's Role in Manipulating Perceptions*, 75 Geo. Wash. L. Rev. 54, 94–95 (2006) ("Economists long ago noted that third-party actions that reduce a risk to an individual may create an incentive for the individual to take fewer precautions against the same risk, and therefore may lead to an offsetting increase in the risk."); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 659 (1990) (Stevens, J., dissenting) (criticizing the lack of "a legitimate curative to the problem of moral hazard").

Appeals Act of 1907, 34 Stat. 1246, gave the government the right to appeal the district court's dismissal of an indictment in limited circumstances. *See generally United States v. Sisson*, 399 U.S. 267, 291–96 (1970) (providing history). Congress later replaced the Act in its entirety with the Criminal Appeals Act of 1970. *See* Title III of the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 1970 U.S.C.C.A.N. (84 Stat.) 2206, 2217 (codified as amended at 18 U.S.C. § 3731). The 1984 amendments to that statute for the first time gave the government the right to appeal orders granting a defense motion for a new trial. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 1837, 2153. Nonetheless, the historical presumption is that "appeals by the Government in criminal cases are something unusual, exceptional, not favored." *Carroll v. United States*, 354 U.S. 394, 400 (1957). Permitting the government to appeal new trial orders while denying defendants parallel appellate consideration of their sufficiency challenges runs counter to the historic values of the criminal law.

This Court should give federal criminal defendants the same appellate rights on interlocutory cross-appeals of denials of motions for judgment of acquittal that Congress thought it so important to give the government on appeals of new trial orders—and for many of the same reasons. Any new rule could be confined to that class of critical cases where (i) the district court grants a defendant's motion for a new trial, (ii) the district court denies a defendant's motion for judgment of acquittal,

and (iii) the government appeals the new trial order.[9] Unlike with respect to attorney disqualification orders as in *Flanagan*, "[t]he costs of such expansion are [small], and the potential rewards are [great]." 465 U.S. at 269.

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9. "The proportion of defendants convicted in the Federal courts increased from 81% during 1990 to 90% during 2004. The proportion of convicted defendants who pleaded guilty increased from 87% during 1990 to 96% during 2004." U.S. Dep't of Justice, *Compendium of Federal Justice Statistics*, 2004 2 (December 2006), *available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0402.pdf* (last visited Oct. 12, 2007). Because 96% of defendants who were convicted pleaded guilty, that means only 4% of defendants who were convicted went to trial. Consequently, the new exception to the final judgment rule that Carpenter proposes will be applicable in, at most, only 4% of the convictions. (The actual number will be a small fraction of 1%, because the vast majority of defense motions for a new trial are *denied* by the district court.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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