No. 07-515

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

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

CHARLES S. LEEPER
Counsel of Record
MICHAEL R. MINER
MARK H. M. SOSNOWSKY
KENNETH M. VORRASI
JUSTIN O. KAY
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W.
Washington, DC 20005
(202) 842-8800

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the government, consistent with the protections of the Double Jeopardy Clause, can effectively foreclose the termination of "original jeopardy" by obtaining a guilty verdict through prosecutorial misconduct during summation and, once a new trial is granted, retry the accused before he can obtain appellate review of the sufficiency of the evidence at the initial trial?

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private attorneys, public defenders, and law professors.[1] NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the fair and proper administration of criminal justice.

Few protections are more basic or essential to the fair administration of criminal justice than the guarantee that a defendant will not be tried more than once for the same offense. "The defendant's interest in finality is not confined to final judgments; he also has a protected interest in having his guilt or innocence decided in one proceeding." *Oregon v. Kennedy*, 456 U.S. 667, 682 (1982) (Stevens, J., concurring). For its part, "[t]he Government . . . is entitled to resolution of the case by verdict from the jury." *Richardson v. United States*, 468 U.S. 317, 326 (1984). In circumstances such as those present in this case – where the government obtained a verdict, but the verdict was subsequently vacated due to post-evidentiary prosecutorial error – the defendant's

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[1] Pursuant to this Court's Rule 37, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified 10 days prior to filing and have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

interest in finality can be served only if his challenge to the sufficiency of the evidence is considered prior to re-trial.[2]

NACDL members seek a clearly stated rule that prevents this compelling interest in finality from being frustrated through reflexive and unduly rigid application of the collateral order doctrine. In the absence of such a clear rule, the Fifth Amendment's protection against double jeopardy will be illusory in the First Circuit and in those circuits that likewise rely upon a formalistic application of the collateral order doctrine to deny defendants in similar circumstances immediate interlocutory appellate review of their sufficiency claims.

SUMMARY OF ARGUMENT

NACDL respectfully urges the Court to grant the petitioner a writ of certiorari to resolve a conflict of law among the circuits, clarify the scope of appellate jurisdiction over criminal interlocutory appeals, and bring certainty to a procedural circumstance commonly encountered in criminal proceedings. At issue in this case is whether the federal appellate courts have jurisdiction to hear a defendant's cross-appeal of the denial of his motion for acquittal on sufficiency grounds after a jury has rendered a guilty verdict, where the government has appealed an order granting defendant a

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[2] We use the term "post-evidentiary error" to distinguish trial error that occurs after the conclusion of all the evidence, as compared with error that occurs in the issuing of the indictment or in the presentation of the case. The former affects only the jury's deliberations, not the quality or quantum of evidence introduced by either side. The latter necessarily implicates the presentation of evidence going forward, from the point of error onward.

new trial due to the prosecutor's improper summation. This Court's decisions in *Burks v. United States*, 437 U.S. 1 (1978), and *Richardson* counsel that the appellate courts *have* such jurisdiction and that, once the government has had a full and fair opportunity to present its best case against a defendant and failed to do so, retrial of the defendant would violate the Double Jeopardy Clause of the Fifth Amendment.

REASONS FOR GRANTING THE PETITION

This case presents the Court with an ideal opportunity to resolve a split that has developed among the circuits in the wake of *Burks* and *Richardson* regarding whether jeopardy terminates when a criminal trial results in something other than acquittal or an unreversed conviction. The Court should clarify that appellate courts have jurisdiction to entertain a defendant's interlocutory appeal challenging the sufficiency of the evidence introduced at his trial when he has already been granted a new trial on grounds of post-evidentiary prosecutorial error.

The decision below holds that a defendant can *never* have a valid double jeopardy claim when his conviction has been vacated for legal error. Pet. App. 27a. This decision represents an unwarranted and improvident extension of this Court's holding in *Richardson*, conflicts with decisions of the Fourth and Ninth Circuits, and is inconsistent with the double jeopardy principles previously espoused by this Court. Accordingly, we urge the Court to grant certiorari and reverse the decision below.

I. The Decision Below Evidences A Split Among The Circuits.

Petitioner was tried and convicted on numerous counts of mail and wire fraud. Pet. App. 4a-7a. Thereafter, petitioner filed a motion for a new trial under Fed. R. Crim. P. 33(b)(2), based, *inter alia*, on the prosecution's improper prejudicial statements in summation; petitioner also filed a motion for judgment of acquittal under Fed. R. Crim. P. 29(c), arguing that the evidence presented was insufficient to warrant a conviction. Pet. App. 7a. The district court granted the new trial motion, but denied the motion for acquittal. Pet. App. 7a. Pursuant to 18 U.S.C. § 3731, the government appealed the new trial ruling, and petitioner, pursuant to Fed. R. App. P. 4(b)(1)(A)(ii), filed a cross-appeal seeking review of the district court's denial of his motion for acquittal, contending that retrial would violate the Double Jeopardy Clause where the evidence presented against him at the first trial was insufficient. Pet. App. 7a-8a. The First Circuit affirmed the district court's grant of a new trial, but concluded that it did not have jurisdiction to entertain petitioner's interlocutory double jeopardy challenge. Pet. App. 33a.

The First Circuit reflexively adopted the reasoning of *United States v. Porter*, 807 F.2d 21 (1st Cir. 1986), which held that a defendant has no double jeopardy claim when his conviction is reversed for trial error. Pet. App. 27a (citing *Porter*, 807 F.2d at 24 & n.2) ("[A] defendant who succeeds on appeal in demonstrating that he is entitled to a new trial because of error at his first trial may not assert a Double Jeopardy bar to retrial. As his original jeopardy has not yet ended, there is no Double Jeopardy to avoid."). In so ruling, the First Circuit ignored that the government had a full and fair opportunity to prove guilt, that the presentation of the

case was uninterrupted by error until after the close of the evidence, and that the jury reached a verdict on the basis of insufficient evidence.

With little analysis, the First Circuit rejected the contrary reasoning of the Fourth Circuit in *United States v. Greene*, 834 F.2d 86, 89 (4th Cir. 1987) ("If Greene 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."), and the Ninth Circuit in *United States v. Szado*, 912 F.2d 390, 392 (9th Cir. 1990) (holding that *Richardson* and *Abney v. United States*, 431 U.S. 651 (1977) counsel review of sufficiency claims notwithstanding the grant of a new trial).[3]

In holding that it lacked jurisdiction to entertain petitioner's sufficiency challenge, the First Circuit joined the Seventh and Tenth Circuits which have declared that a district court's grant of a new trial

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[3] The Ninth Circuit held in *Szado* that the district court erred in not reviewing the sufficiency of the evidence at defendant's trial before the magistrate judge. 912 F.2d at 392. Similarly, in *United States v. Keating*, 147 F.3d 895 (9th Cir. 1998), Judge Kozinski opined that the court should review a defendant's sufficiency claim at the same time it reviews the government's interlocutory appeal brought pursuant to 18 U.S.C. § 3731. *Id.* at 904-05 (Kozinski, J., concurring). But, another panel of the Ninth Circuit held in *United States v. Sarkisian*, 197 F.3d 966 (9th Cir. 1999), without any discussion of *Szado*, that the court lacked jurisdiction to entertain an interlocutory appeal to review the sufficiency of the evidence, finding that the defendant had no colorable double jeopardy claim because his jeopardy never terminated. 197 F.3d at 983. In this respect, *Sarkisian* aligns with the decisions of the First, Seventh and Tenth Circuits foreclosing appellate review of evidentiary sufficiency under similar circumstances.

effectively forecloses appellate review of evidentiary sufficiency in the first trial. *United States v. Ganos*, 961 F.2d 1284, 1285 (7th Cir. 1992) (holding that, after *Richardson*, the court did not have jurisdiction over the interlocutory appeal of the sufficiency claim); *McAleer v. United States*, 138 F.3d 852, 857 (10th Cir. 1998) (holding the court lacked jurisdiction because appellant has no colorable claim; original jeopardy did not terminate because district court granted defendant's motion for a new trial).[4] This case presents the Court with an ideal vehicle to resolve the split among the courts of appeals in the wake of *Burks* and *Richardson* by clearly delineating the terminus of "original jeopardy."

II. The Circuit Courts Have Not Consistently Applied This Court's Double Jeopardy Jurisprudence.

The opinions in *Burks* and *Richardson* when read together with the Court's previous double jeopardy

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[4] The Fifth and Sixth Circuits also appear to embrace the same continuing jeopardy rationale in their treatment of sufficiency claims on direct appeal. *United States v. Miller*, 952 F.2d 866, 874 (5th Cir. 1992) ("[W]e hold that double jeopardy does not bar this retrial, and because under *Richardson* jeopardy has not terminated, double jeopardy will not be available as a ground for challenging any subsequent conviction that may result."); *Patterson v. Haskins*, 470 F.3d 645, 657 (6th Cir. 2006) ("[A] retrial is not barred by *Burks* unless and until an appellate court enters judgment reversing a conviction on the ground that the evidence was insufficient to support the conviction. . . . Absent such a declaration, jeopardy continues, and the defendant can be tried once again on the same charges."). This logic, when applied in cases like petitioner's, makes the collateral order doctrine unavailable as a basis for appellate jurisdiction.

decisions, establish that appellate courts do have jurisdiction – in certain instances – to decide whether an accused may be subjected to a second trial when the evidence presented by the government in the first trial was legally insufficient to sustain a guilty verdict. The decision below, in concluding that retrial is barred only where the accused has first obtained a judicial determination of insufficiency, misapprehends the practical considerations underlying these well-settled principles and applies an overly technical analysis that is inconsistent with the more flexible approach counseled by this Court and adopted by other Circuits. *See Richardson*, 468 U.S. at 322.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. For purposes of applying this Clause's protection against double jeopardy, this Court has had to determine both when original jeopardy begins and when it ends. The point at which jeopardy begins is now fairly clear. Jeopardy attaches when the jury is empanelled and sworn in a jury trial or when the first witness is sworn in a bench trial. *Crist v. Bretz*, 437 U.S. 28, 29 & 37 n.15 (1978). Identifying the various potential termini of original jeopardy, however, has proven to be substantially more difficult. *See, e.g.*, *Burks*, 437 U.S. at 9 ("The Court's holdings in this area . . . can hardly be characterized as models of consistency and clarity."); *Ganos*, 961 F.2d at 1286 (Ripple, J., concurring) ("[T]he present state of double jeopardy jurisprudence is hardly a seamless garment."); *United States v. Wood*, 958 F.2d 963, 969 (10th Cir. 1992) ("*Richardson* gives us little guidance on what events, other than an acquittal, terminate jeopardy.").

This Court has determined, for instance, that jeopardy terminates, and retrial of the accused for the same offense is barred, upon an un-reversed conviction, *In re Nielsen*, 131 U.S. 176, 188 (1889), an acquittal by a verdict duly rendered, *Kepner v. United States*, 195 U.S. 100, 130 (1904), a judgment of acquittal by the trial court prior to verdict, *Fong Foo v. United States*, 369 U.S. 141, 143 (1962), or a determination by an appellate court that the evidence at trial was insufficient, *Burks*, 437 U.S. at 18. At the other end of the spectrum, the Court has determined that the declaration of a mistrial upon the jury's failure to reach a verdict, or a reversal of a conviction because of the erroneous admission of evidence, does not terminate the initial jeopardy and therefore does not bar a second trial on the same charges. *See Richardson*, 468 U.S. at 325; *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988).

No bright line separates these two extremes. With regard to the latter category of cases, the Court has reasoned that original jeopardy has not ended, but rather is "continuing." *Price v. Georgia*, 398 U.S. 323, 329 (1970) (noting that "[t]he concept of continuing jeopardy [is] implicit in [*United States v. Ball*, 163 U.S. 662 (1896)]"). The "principle" of continuing jeopardy, however, appears to rest on a policy determination that the protections of the Double Jeopardy Clause should not be broadly applied:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle [of continuing jeopardy] are *the implications of that principle for the sound administration of justice*. Corresponding to the right of an accused to be given a fair trial is the societal interest in

> punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

United States v. Tateo, 377 U.S. 463, 466 (1964) (emphasis added); *see also Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 308 (1984) ("Interests supporting the continuing jeopardy principle involve fairness to society, lack of finality, and limited waiver.").

Nevertheless, the Court has attempted to fit its precedent into some logical and objective framework. At one time, the Court advanced the concept of waiver to support its policy-based holding that a defendant who requests a new trial as one avenue of relief may be required to stand trial again, even when his conviction was reversed due to failure of proof at the first trial. *See Burks*, 437 U.S. at 6-10 (re-examining *Bryan v. United States*, 338 U.S. 552 (1950); *Sapir v. United States*, 348 U.S. 373 (1955); *Yates v. United States*, 354 U.S. 298 (1957); *Forman v. United States*, 361 U.S. 416 (1960)). In *Burks*, however, the Court concluded that those earlier decisions were "not [] consistent with what we believe the Double Jeopardy Clause commands," and that "[t]o the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled." *Id.* at 12, 18.

If the decision in *Burks* overruling the waiver paradigm signaled to the appellate courts a new direction in the Court's double jeopardy jurisprudence, the arrival of *Richardson* only presaged more confusion. Indeed, a survey of the post-*Richardson* case law

reveals that the circuit courts have been wildly inconsistent in their application of this Court's double jeopardy precedents. *Compare, e.g.*, *Szado*, 912 F.2d at 392 ("[A]pplication of the principles of [*Richardson* and *Abney*] directs a conclusion that [the] appeal falls within *Cohen*'s collateral order exception"), *with Miller*, 952 F.2d at 872 n.5 ("In light of our holding today, future appeals raising similar claims will no longer be colorable and will not be appealable before final judgment in this Circuit.").

Some courts have held that the Double Jeopardy Clause does not require review of the sufficiency of the evidence before a new trial where the retrial is a result of procedural error, instead waiting until *after* the defendant has endured a second trial before reviewing the sufficiency of the evidence at the *first* trial. *See, e.g.*, *United States v. Recio*, 371 F.3d 1093, 1104 (9th Cir. 2004) (reviewing the sufficiency of evidence presented at the first trial after a *second* trial to determine if a *third* trial would violate the Double Jeopardy Clause); *United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir. 1989) (reviewing the sufficiency of the evidence presented at defendants' first trial after final judgment in a second trial).

Other courts, addressing the issue on appeal from a final judgment, have held precisely the contrary. *See, e.g.*, *United States v. Haddock*, 961 F.2d 933, 934 (10th Cir. 1992) ("[W]hen we reverse on appeal because of a procedural error at trial and remand for a new trial, we nevertheless must address the defendant's claim that the evidence presented at trial on the reversed count was insufficient. . . . [I]f evidence indeed was insufficient, retrial is barred by double jeopardy principles."); *United States v. Simpson*, 910 F.2d 154, 159 (4th Cir. 1990) ("Lastly, even though we reverse

appellant's convictions on Rule 403 grounds, it is still necessary to reach his claim of insufficient evidence . . . . [I]f he were to prevail on this claim, the double jeopardy clause would bar his retrial."); *Vogel v. Pennsylvania*, 790 F.2d 368, 376 (3d Cir. 1986) ("[W]hen a defendant raises an insufficiency of evidence contention that the trial court finds unnecessary to address, a court subsequently presented with a double jeopardy argument must address and resolve that issue.").

Still other courts have determined that sufficiency of evidence arguments *should* be addressed before retrial, but that the Double Jeopardy Clause does not mandate such review. *See, e.g.*, *United States v. Adkinson*, 135 F.3d 1363, 1379 n.48 (11th Cir. 1998) ("Although not mandated by the double jeopardy clause, it is clearly the better practice for the appellate court on an initial appeal to dispose of any claim properly presented to it that the evidence at trial was legally insufficient to warrant the thus challenged conviction."); *Miller*, 952 F.2d at 874 (same).

It is out of this fog of confusion that petitioner's case arrives at the Court.

III. *Richardson* Supports Interlocutory Appellate Review.

The First Circuit, like the courts of those circuits that share its reasoning, reads *Richardson* to mean that "a defendant who succeeds on appeal in demonstrating that he is entitled to a new trial because of error at his first trial may not assert a double jeopardy bar to retrial" because, "[a]s his original jeopardy has not yet ended, there is no double jeopardy to avoid." Pet. App. 27a; *see also United States v. Gutierrez-Zamarano*, 23 F.3d 235, 238 (9th Cir. 1994) (holding that where district court denies motion for acquittal based on sufficiency of

the evidence, but grants a new trial, "there has been no event terminating Appellant's original jeopardy"); *Ganos*, 961 F.2d at 1285 (reading *Richardson* to hold that there is no colorable double jeopardy claim before retrial "when *no court* has determined that the evidence at the first trial was insufficient" (emphasis added)). This extension of *Richardson* is wholly unwarranted and demonstrates the need for clarification of the Court's guiding principles.

This Court granted certiorari in *Richardson* to resolve a conflict between the D.C. Circuit's decision in that case and the Third Circuit's decision in *United States v. McQuilkin*, 673 F.2d 681 (3rd Cir. 1982). *See Richardson*, 468 U.S. at 320. In *Richardson*, following the declaration of a mistrial upon the jury's failure to reach a verdict, the D.C. Circuit dismissed for lack of jurisdiction petitioner's appeal of the district court's denial of his motion for acquittal based on the insufficiency of the evidence and his separate double jeopardy claim. *United States v. Richardson*, 702 F.2d 1079, 1083 (D.C. Cir. 1983) ("[S]ince Richardson's double jeopardy claim exists at the appellate level *only* if the district court's sufficiency of the evidence ruling is overturned, our refusal to review that ruling precludes any meaningful review of his double jeopardy claim at this time."). In dissent, then-Judge Scalia concluded that the appellate court did have jurisdiction to entertain Richardson's appeal, a disposition that he contended was supported by *McQuilkin*. *Id.* at 1089 (Scalia, J., dissenting).

In *McQuilkin*, the guilty verdict entered by a magistrate judge sitting as the trier of fact was reversed by the district court on the ground that appellants had been denied their statutory right to a jury trial. *McQuilkin*, 673 F.2d at 683. Appellants in *McQuilkin*

argued in a motion for reconsideration of the district court's order that the evidence against them in the first trial was insufficient to support a conviction and that a retrial would violate the Double Jeopardy Clause. *Id.* The Third Circuit, relying on this Court's decisions in *Burks* and *Abney v. United States*, 431 U.S. 651 (1977), concluded that it had jurisdiction under the collateral order doctrine to review the sufficiency of the evidence from the first trial as a necessary component of defendant's separate claim of double jeopardy. *McQuilkin*, 673 F.2d at 685.[5] *McQuilkin* reasoned that "[a]lthough the evidence which must be reviewed when determining whether a double jeopardy claim has been demonstrated may be the same as that considered on review of a conviction, that factor does not destroy appealability. Even though the evidence is reviewed for its sufficiency, it is, as *Abney* emphasizes, the *nature of the claim* that makes the case eligible for immediate appellate review." *Id.* (emphasis added).

In *Richardson*, this Court rejected the D.C. Circuit's narrow interpretation of the collateral order doctrine, which foreclosed interlocutory review of any double jeopardy claim when the outcome was dependent upon a

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[5] As then-Judge Scalia pointed out in his dissent in *Richardson*, "*McQuilkin* was foreshadowed by the same circuit's decision in *United States v. United States Gypsum Co.*, 600 F.2d 414 (3d Cir. 1979). There, defendants' convictions had been reversed on appeal without consideration of evidentiary sufficiency, and the case remanded. Prior to retrial, defendants moved for acquittal on the grounds of insufficient evidence at their first trial. The Third Circuit permitted appeal from denial of this motion because, it said, double jeopardy principles would prohibit retrial if the evidence at the first trial was insufficient." *Richardson*, 702 F.2d at 1089 n.5 (Scalia, J., dissenting).

review of the sufficiency of the evidence presented at the first trial. 468 U.S. at 321-22. Instead, this Court appeared to endorse the Third Circuit's approach in *McQuilkin*, reasoning that:

> Petitioner seeks review of the sufficiency of the evidence at his first trial, not to reverse a judgment entered on that evidence, but as a necessary component of his separate claim of double jeopardy. While consideration of petitioner's double jeopardy claim would require the appellate court to canvass the sufficiency of the evidence at the first trial, *this fact alone does not prevent the District Court's order denying petitioner's double jeopardy claim from being appealable.*

Id. at 322 (emphasis added).[6] Furthermore, this Court applied a "practical rather than [] technical" construction of the jurisdictional rules, *id.* (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)), in concluding that petitioner's double jeopardy claim was "colorable," and therefore, that the appellate court had jurisdiction to entertain the claim. *Id.* ("[W]e have indicated that the appealability of a double jeopardy claim depends upon its being at least 'colorable.'" (citation omitted)). This "practical" rather than "technical" consideration seemed to mirror the shift that had occurred in *Burks*, where the Court looked

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[6] The confusion wrought by this Court's decision in *Richardson* appears to have extended to leading commentators and legal scholars. *See, e.g.*, 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3918.5 (2d ed. 1992 & Supp. 2007) (wrongly stating that in the wake of *Richardson*, *McQuilkin* "must be regarded as overruled").

to balance society's interest in ensuring that the guilty are punished with the accused's interest in being free from repeated prosecution. *Burks*, 437 U.S. at 15-16. Although the *Richardson* Court ultimately concluded that initial jeopardy did not terminate upon discharge of a *hung jury*, and thus the petitioner there had no valid double jeopardy claim to prevent his retrial, the Court plainly recognized that some event, *other than an acquittal or un-reversed conviction*, could terminate jeopardy. *Richardson*, 468 U.S. at 325.

IV. Review Of The Double Jeopardy Claim On Petitioner's Cross-Appeal Will Not Delay Proceedings Below.

The decision below rejects the premise that an interlocutory sufficiency review prior to retrial would result in substantial judicial efficiency. Pet. App. 31a-33a. In focusing so narrowly on the efficiencies (or lack thereof) to be achieved by the appellate court itself, however, the decision below altogether ignores the systemic efficiencies that would be achieved if an interlocutory sufficiency review was conducted in this and other similarly situated cases.

Contrary to the First Circuit's implication that such a review would slow the wheels of justice, Pet. App. 32a-33a, an appellate review of the evidence presented at petitioner's first trial might obviate the need to conduct a second trial at all. As this Court recognized in *Richardson*, where a defendant asserts his double jeopardy claim at the conclusion of his first trial, and before his second trial has begun, the timing is ideal, because there has been "no effort to interrupt or delay proceedings during the time that a jury was empanelled or that the District Court had under advisement motions relating to the first trial." *Richardson*, 468 U.S. at 322;

see also Richardson, 702 F.2d at 1089 (Scalia, J., dissenting) (stating that interlocutory sufficiency review was appropriate where appeal was taken "[not] in the midst of an ongoing trial, but during an interlude that has already occurred, requiring the selection and empanelling of a new jury. Not infrequently, such interludes are in any event protracted."). In all events, here it was the government's misconduct during closing argument, and its appeal of the trial court's grant of a new trial, which caused the appellate "interlude," not any action by petitioner to interrupt or delay the proceedings.

V. The Decision Below Rests On A Misapplication Of *Richardson* And *Burks*.

The decision below, relying on the First Circuit's earlier decision in *Porter*, improperly extends the holding in *Richardson* that a mistrial does not terminate jeopardy to an entirely different set of facts – the vacatur of a conviction on grounds of post-evidentiary prosecutorial error. Pet. App. 26a-27a. In *Porter*, the First Circuit held that because the reversal of the defendant's conviction for trial error (improper admission of inculpatory statements) did not terminate his original jeopardy, the defendant did not have a viable double jeopardy claim, and the appellate court therefore need not review the sufficiency of the evidence presented at the first trial as a prerequisite to retrial. *Porter*, 807 F.2d at 23-24. In so holding, the First Circuit concluded that the principles upon which the Court relied in *Richardson* were "equally applicable here." *Id.* at 23. Specifically, the *Porter* court opined that "[j]ust as society has a strong interest in retrying a defendant after his jury cannot agree on a verdict, so it also has a strong interest in providing the government

with a full and fair opportunity to prosecute a defendant whose conviction is reversed due to trial error." *Id.* Further, the court indicated that its expansion of *Richardson* would mitigate any concern that reversal for trial error would result in the guilty going unpunished. *Id.* (quoting *Burks*, 437 U.S. at 15).[7]

In referring to "trial error" in the general sense, *Porter* made no distinction between those errors that influence the presentation of evidence and those that come after the evidence is closed. In the former circumstance, evidentiary rulings will necessarily influence the course of the case going forward, and *Porter*'s reasoning is thus arguably defensible. In the latter situation, however, where the government injects error into the proceedings *after* it has presented all the evidence it could marshal against the defendant, the balancing of the equities espoused by *Porter* breaks down. Therefore the decision below, which blindly follows *Porter*, is untethered to either reliable precedent or sound reasoning.

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[7] The First Circuit misread *Richardson*'s analysis. *Richardson* merely reiterated a rule that followed from a long line of cases squarely addressing the applicability of the Double Jeopardy Clause to *hung juries* in holding that "the failure of the jury to reach a verdict is not an event which terminates jeopardy," 468 U.S. at 325, which clearly does not answer the question presented here. Indeed, the *Richardson* Court distinguished its decision from those cases where the jury arrived at a verdict, explaining, "[w]e are entirely unwilling to uproot this settled line of cases by extending the reasoning of *Burks*, which arose out of an appellate finding of insufficiency of evidence to convict following a jury verdict of guilty, to a situation where the jury is unable to agree on a verdict." *Id.* at 324.

This Court's decision in *Burks* instructs that even if trial error might otherwise result in a new trial, where the evidence presented by the government at the first trial was so lacking that the case should not even have been *submitted* to the jury, it would negate the protections of the Double Jeopardy Clause to subject the defendant to a second trial for the same offense. 437 U.S. at 15-18. *Porter*'s contrary reasoning, which accords greater weight to society's interest in providing the government with another opportunity to prosecute a defendant whose conviction is reversed due to trial error, is less convincing when the trial error in no way impacted the prosecution's evidentiary strategy or impeded the prosecution's ability to present its best case. On these facts, "the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." *Id.* at 16.

Equally unpersuasive is the notion that society would pay too high a price were every accused granted immunity from further prosecution because of any defect in the proceedings sufficient to constitute reversible error. *Porter*, 807 F.2d at 23. That concern is not implicated where, as here, petitioner *will* be retried if the appellate court ultimately determines that the evidence presented at the first trial was sufficient to sustain the verdict. The evidence presented against petitioner was either sufficient or it was not. If it was sufficient, then society's interest in retrying the accused will be vindicated. If it was *not* sufficient, then the government will have had its one full and fair opportunity to present its best case, and no legitimate interest could possibly be served by subjecting the accused to the rigors of a second trial for the same offense. *See United States v. Difrancesco*, 449 U.S. 117, 127-28 (1980) ("[T]he State with all its resources and

power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . ." (internal quotations omitted)).

In *Burks*, the Court stated that "[t]he 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." 437 U.S. at 11 (emphasis added); *see also Tibbs v. Florida*, 457 U.S. 31, 41 (1982). To the extent the First Circuit and other courts of appeals have read *Richardson* to limit or diminish *Burks*, those courts have erred. *See Lockhart*, 488 U.S. at 40-41 ("It is quite clear from our opinion in *Burks* that a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause – indeed, that was the *ratio decidendi* of *Burks*, see 437 U.S., at 16-17 – and the overwhelming majority of appellate courts considering the question have agreed." (footnote omitted)). If a criminal defendant is to truly enjoy the protections that the Fifth Amendment guarantees, immediate appellate review cannot be so casually cast aside. *Abney*, 431 U.S. at 662.

VI. The Decision Below Conflicts with *Abney*'s Endorsement Of Interlocutory Review Of Double Jeopardy Claims.

Finally, the decision below endorses an absolutist rule that a defendant can *never* have a valid double jeopardy claim when his conviction has been vacated for legal error. Pet. App. 27a. By effectively eliminating *all* interlocutory review of double jeopardy claims where the defendant has sought a new trial, the decision below is in direct conflict with *Abney*. In *Abney*, the Court encouraged interlocutory review of claims that implicate double jeopardy rights, recognizing that "the rights

conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." 431 U.S. at 659-60. Accordingly, the Court concluded that "if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.* at 662.

* * *

We respectfully submit that this Court should grant petitioner certiorari and clarify that appellate courts do have jurisdiction immediately to review defendants' claims that the prosecution failed to introduce sufficient evidence at trial once the conviction has been reversed due to post-evidentiary error.

The circumstances of this case present compelling grounds for intervention by the Court and clarification of this jurisdictional question. It was the prosecutor's misconduct during summation that necessitated a new trial, thereby preventing traditional termination of jeopardy through sentencing and entry of final judgment and prompt appellate review of the sufficiency challenge. A formalistic and narrow application of the collateral order doctrine to facilitate this result benefits only the government, and is impossible to square with the underlying principles of the Double Jeopardy Clause. NACDL urges the Court to rectify this glaring injustice in the present case and to announce a rule of appellate jurisdiction that will allow defendants to challenge government trial misconduct without sacrificing their double jeopardy rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES S. LEEPER
Counsel of Record
MICHAEL R. MINER
MARK H. M. SOSNOWSKY
KENNETH M. VORRASI
JUSTIN O. KAY
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W.
Washington, DC 20005
(202) 842-8800

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