No. 08-1391

IN THE
Supreme Court of the United States

ISAAC SIMEON ACHOBE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

REPLY FOR PETITIONER

The government concedes that the Fifth Circuit's decision in this case acknowledges a circuit conflict. Expressly "declin[ing] to follow" the Ninth Circuit, the Fifth Circuit aligned itself with three other circuits instead. The government admits that the decision conflicts with dicta from yet another circuit. And it concedes that the decision contradicts its own prior position before this Court. The government nonetheless opposes review. But its efforts to reconcile the conflict are unpersuasive. Its unconvincing preview of its merits arguments provides no basis for denying review. And its suggestion that the Court deny the petition because the case is "interlocutory" is so divorced from reality as to border on the absurd.

I. THE COURTS OF APPEALS ARE EXPRESSLY DIVIDED

A. The government's attempts to reconcile the circuit conflict fail. The government similarly tried to harmonize the cases before the court of appeals, see Oral Arg. Audio 34:04-34:59, but that court found its efforts unconvincing. Thus, while the government insists that *United States* v. *Recio*, 371 F.3d 1093 (9th Cir. 2004), "arose in a far different procedural posture," Br. in Opp. 11, the Fifth Circuit concluded that *Recio* arose in a "procedural posture * * * analogous to the instant case," Pet. App. 14a n.25. And while the government insists that "[t]he Fifth Circuit's decision in this case does not conflict with *Recio*," Br. in Opp. 12, the Fifth Circuit thought otherwise, "declin[ing] to follow the *Recio* court," Pet. App. 14a. The government thus does not and cannot deny that the *courts of appeals themselves* profess to be divided.

The conflict, moreover, is unmistakable. Whatever *Recio*'s procedural nuances, the relevant facts are undisputed. The defendants there were convicted at their sec-

ond trial, 371 F.3d at 1097; they argued on appeal that the insufficiency of the evidence at their *first* trial entitled them to a judgment of acquittal terminating the prosecution, see *id.* at 1103-1104; the Ninth Circuit held that it could review that claim under the general rule that "appellants [can] challenge interlocutory orders on appeal from a final judgment," *id.* at 1104; and the court rejected the argument that *Richardson* v. *United States*, 468 U.S. 317 (1984), required a different result because that case addressed only "whether the second trial violated the Double Jeopardy Clause," 371 F.3d at 1104-1105. That analysis cannot be reconciled with the decision below or with the government's defense of that decision here. On the government's and the Fifth Circuit's theory, the *Recio* defendants' convictions at the second trial would have rendered "moot" any first-trial insufficiency, Br. in Opp. 10, so that it could have "no role to play in barring later proceedings," *id.* at 9; see Pet. App. 12a, 14a. The Ninth Circuit's contrary holding that it could "review the evidence presented at the first trial," 371 F.3d at 1104, is thus facially incompatible with the position the government defends.

None of the government's attempts to distinguish *Recio* succeeds. The government first claims that *Recio* is irrelevant because the court there ultimately found the evidence sufficient. Br. in Opp. 12-13. But the legal issue that divides the courts of appeals is whether first-trial sufficiency rulings are *reviewable*—not whether the evidence is sufficient in any particular case.

Nor does it matter that, in *Recio*, the district court granted a new trial after the verdict but before judgment, as opposed to declaring a mistrial before the verdict. Br. in Opp. 13. The government admits that the Ninth Circuit "did not address" the supposed significance

of that fact. *Ibid.* To the contrary, the court relied on the general rule that interlocutory rulings are reviewable after final judgment, see 371 F.3d at 1104—a rule that applies to both pre-verdict and post-verdict rulings, see, *e.g.*, 15A C. Wright, *et al.*, *Federal Practice and Procedure* § 3905.1, at 257 & n.24 (2d ed. 1991). Although the government speculates that the Ninth Circuit "may have been of the view" that the timing mattered because, but for the grant of the new trial, a judgment would have followed, the government does not even attempt to explain how the judgment's imminence could "save[ ] [the ruling] from mootness." Br. in Opp. 13. If the government's and the Fifth Circuit's position were correct, the error in *Recio* would have been "moot"—and thus unreviewable—because the defendants were convicted at their second trial. See *id.* at 9-10. The government cannot distinguish *Recio* on a procedural detail with no conceivable relevance to either the Ninth Circuit's rationale or its own.

The government finally urges that the defendants in *Recio* were not challenging an "otherwise valid judgment"—the district court had committed other, unrelated errors at the second trial, so there was going to be a reversal of some sort regardless. See Br. in Opp. 13-14. To be sure, those other errors meant that the consequence of an *unsuccessful* sufficiency challenge would be different. In *Recio*, an unsuccessful challenge would result in a third trial; here, the court of appeals would simply affirm. But the consequence of a *successful* sufficiency challenge would be the same: a judgment of acquittal terminating the prosecution. It cannot conceivably be the law that a first-trial sufficiency ruling is reviewable under general final-judgment principles only if the district court hap-

pens to commit some other, unrelated error at the second trial.[1]

Given the government's inability to distinguish *Recio*, it is no surprise that the Fifth Circuit—despite ruling against Mr. Achobe on nearly every other issue—agreed that the Ninth Circuit's decision is on point and irreconcilable. That express circuit conflict warrants review.

B. The government does not dispute that *United States* v. *Gulledge*, 739 F.2d 582 (11th Cir. 1984), conflicts with the decision below. Apart from belaboring the already-conceded point that *Gulledge*'s discussion is dicta, the government responds only that *Gulledge* relied on two Fifth Circuit cases that the court below deemed superseded by *Richardson*. Br. in Opp. 14-15. As *Gulledge* points out, however, those pre-Fifth-Circuit-split decisions are precedents of the Eleventh Circuit no less than the Fifth. See 739 F.2d at 584 n.2. That the two circuits disagree over whether the *very same precedents* survive *Richardson* simply confirms the severity of the conflict.

C. Finally, the government concedes that, in its prior arguments to this Court, it flatly contradicted its current position, maintaining that "a claim such as petitioner's could be reviewed following the entry of a final judgment." Br. in Opp. 10-11 n.4. The government explains that it took that position in *Richardson* to press its juris-

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[1] The government quotes the Ninth Circuit's statement that it was "'not consider[ing] [the defendant's] first-trial insufficiency argument in order to decide whether the second trial violated the Double Jeopardy Clause,' but rather was addressing the 'entirely different question [of] whether the defendant[ ] may be prosecuted at a third trial if the government presented insufficient evidence at the first.'" Br. in Opp. 13-14 (quoting 371 F.3d at 1104) (emphasis omitted). The court's point was simply that the defendants were not claiming that "the second trial *violated the Double Jeopardy Clause*"—a claim petitioner does not make either.

dictional argument that interlocutory review was unnecessary. *Ibid.* Now that *Richardson* has rejected its jurisdictional argument, the government asserts, it may disavow its former position. See *ibid.* But the government in *Richardson* made *both* the jurisdictional argument *and* the merits argument the Court ultimately adopted. See U.S. Br. in No. 82-2113, at 9-18, 24-31. The government saw no inconsistency between those positions then, and none exists now.

II. THE GOVERNMENT'S ARGUMENTS ON THE MERITS ARE UNPERSUASIVE

While acknowledging that *Richardson* addressed only a double-jeopardy claim, the government contends that *Richardson*'s holding logically forecloses *any other* challenge to a first-trial sufficiency ruling as well. An appellant, the government reasons, must necessarily claim his "second trial never should have taken place," and "[t]he only plausible basis for that claim is the Double Jeopardy Clause." Br. in Opp. 8. That reasoning is flawed.

Richardson holds that a retrial following the erroneous denial of a motion to acquit does not violate double jeopardy. Petitioner, however, does not contend that his retrial violated double jeopardy. He claims only that the district court erred in denying his motion to acquit at the first trial. Under Federal Rule of Criminal Procedure 29(a), the district court was required to grant petitioner a judgment of acquittal because the government's evidence was insufficient. Had the court correctly granted that motion, there never would have *been* a retrial—the prosecution simply would have ended. The court's ruling was thus both erroneous and prejudicial. Like any other prejudicial interlocutory ruling, it is reviewable on appeal following final judgment. See Pet. 20-24.

Double-jeopardy principles are relevant only in the limited sense that they explain why the error was prejudicial. See Pet. 24-25 n.7. Absent the Double Jeopardy Clause, the government could argue that any error in denying the first-trial motion to acquit was harmless because, even if the district court had granted the motion, the government still could have retried the defendant. The Double Jeopardy Clause forecloses that harmless-error argument because, even after *Richardson*, it is clear that a district court's *grant* of a motion to acquit bars retrial. See 468 U.S. at 325 n.5. There is an obvious difference between arguing that a retrial following the erroneous denial of a motion to acquit *actually violated* double jeopardy (the argument *Richardson* forecloses) and arguing that the erroneous denial of a motion to acquit was prejudicial—and thus grounds for reversal—because, had the court *granted* the motion, any retrial *would have violated* double jeopardy (an argument *Richardson* supports, see *ibid.*).

That is why *Richardson*'s procedural posture matters. On interlocutory review, a defendant must show that his retrial *would actually violate double jeopardy*, because *Abney* provides jurisdiction only over claims that a defendant would be "'forced to endure a trial that the Double Jeopardy Clause was designed to prohibit.'" *Richardson*, 468 U.S. at 320-321 (quoting *Abney* v. *United States*, 431 U.S. 651, 662 (1977)). After final judgment, by contrast, the defendant need only show that the district court committed an error that was prejudicial. See Pet. 21-22. To make that showing, it suffices that denial of the motion to acquit was erroneous and that, *if* the court had correctly granted the motion, double jeopardy *would have barred* retrial.

The government thus errs in relying on cases refusing to review claims of ordinary trial error committed at the first trial but not the second. Br. in Opp. 10 n.3. Such errors truly are "moot" because, even if the district court had ruled correctly, nothing would have prevented the government from continuing the prosecution. The erroneous denial of a motion to acquit is different because, had the district court correctly granted the motion, no second trial could have occurred. See *United States* v. *Wilkinson*, 601 F.2d 791, 794 (5th Cir. 1979).

III. THE ISSUE IS IMPORTANT

The government urges that "only" six federal courts of appeals and seven state appellate courts have weighed in. Br. in Opp. 15. But twenty-two appellate decisions from thirteen jurisdictions (Pet. 25-26 & nn.8-10) is hardly a paltry showing. In the few months since this case was decided, moreover, the Fifth Circuit has already applied its holding to reject another first-trial sufficiency challenge. See *United States* v. *Garcia*, 567 F.3d 721, 730-731 (5th Cir. 2009). And the reported cases represent only a fraction of the hundreds or thousands of retrials each year where counsel must decide whether first-trial deficiencies support a claim on appeal. See Pet. 26.

The government invokes "society's compelling interest in having one full and fair opportunity to convict." Br. in Opp. 15. No one questions that interest. But when the government squanders its "one full and fair opportunity" by presenting insufficient evidence, the federal rules entitle the defendant, upon motion, to a judgment of acquittal. Fed. R. Crim. P. 29(a). The government is not entitled to a *second* "full and fair opportunity" merely because the district court fails to recognize the deficiency and erroneously denies the motion.

This case is at least as compelling a candidate for certiorari as *Richardson* itself. The defendant there sought review because the court of appeals had acknowledged a 3-1 circuit conflict. See Pet. in No. 82-2113, at 3-4. The government opposed review, contending that the decisions were reconcilable. See Br. in Opp. in No. 82-2113, at 11-13. This Court granted review, citing the 3-1 conflict and the issue's "implications * * * for the administration of criminal justice." 468 U.S. at 320 & n.4. Here, the court of appeals acknowledged a 4-1 conflict, Pet. App. 12a-14a, and the government's attempts to reconcile it are equally unavailing. Unlike in *Richardson*, moreover, yet another circuit has rejected the government's position in dicta, and the government's position conflicts with its own prior contentions before this Court. Finally, the issue here is even more important to the "administration of criminal justice." *Richardson* addressed only the *timing* of review. This case addresses whether review is available *at all*. See Pet. 27-28.

IV. THIS CASE IS AN EXCELLENT VEHICLE

The government does not dispute that this case squarely presents the question, or that the substantially weaker evidence at the first trial makes this a particularly compelling vehicle. See Pet. 28-30.[2] It nonetheless

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[2] While not expressly arguing that the evidence was sufficient, the government—like the court below—repeatedly puts the words "pain management" and "patients" in quotation marks as if the mere addition of punctuation transformed neutral facts into evidence of guilt. Br. in Opp. 2. It also quotes descriptions of the evidence against the *six pharmacists generally* as if they applied to Mr. Achobe specifically, which they do not. See *id.* at 2-3. For example, it is not true with respect to Mr. Achobe that, "in many cases, dealers would 'come in repeatedly with scripts filled out in many different individuals' names.'" *Id.* at 3. The government's own witnesses testified without contradiction that, unlike the other five pharmacists, Mr. Achobe

opposes review because the court of appeals remanded for resentencing following reversal of two of the six money-laundering counts. Br. in Opp. 5-6. That argument lacks any semblance of merit.

The two money-laundering counts that were reversed had *no effect* on Mr. Achobe's ultimate term of imprisonment, fine, or forfeiture order. See PSR ¶¶ 51-63, 89-90, 99-101; 2/28/06 Tr. 7, 14-17; 5th Cir. R. 4955-4958 & nn.4, 6, 4961, 4986. The remand will thus entail an entirely ministerial adjustment to the judgment and will not generate *any* appealable issue, let alone an issue relevant to the question presented. The government effectively proposes that Mr. Achobe return to district court for a trivial technical adjustment; appeal again to the Fifth Circuit raising the same argument that court has already rejected; and then file a second petition in this Court raising exactly the same issue on exactly the same record. That is a pointless exercise of no value to anyone.

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only filled prescriptions for the people whose names appeared on them, with the sole exception that a customer appearing in person could sign a form authorizing someone else to pick up his refills. See Pet. App. 6a & n.5; C.A. Br. 19-20. Furthermore, the prescriptions Mr. Achobe filled were not "'nearly identical'" (cf. Br. in Opp. 3); they varied widely in amount, strength, medication, and number of refills. See C.A. Br. 38-39; Gov't Ex. 75. While the court of appeals asserted that "everything was done in cash" (Pet. App. 4a; cf. Br. in Opp. 2), documentary and other evidence showed that Mr. Achobe routinely accepted checks, credit cards, and insurance. See 9/16 Tr. 195-201. Mr. Achobe did indeed fill a total of 603 Herpin prescriptions (cf. Br. in Opp. 3), but that is only two per day over the span of a year—hardly an excessive amount. See Gov't Ex. 75. Finally, medications such as Vicodin are indeed "'prone to abuse'" (Br. in Opp. 3), but so are many other legitimate pain medications. See C.A. Br. 4. Ultimately, the government does not dispute that there are substantial grounds for challenging the sufficiency of the evidence at the first trial. See Pet. 29-30 n.12. That is all that matters here.

This Court has "unquestioned jurisdiction to review interlocutory judgments of federal courts." E. Gressman, *et al.*, *Supreme Court Practice* § 4.18, at 280 (9th ed. 2007). Although a case's interlocutory posture is relevant to the "discretionary assessment of the appropriateness of * * * review[ ]," a case may be "reviewed despite its interlocutory status" where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." *Id.* at 280-281. That is precisely the case here. The government does not suggest that the ministerial proceedings on remand could somehow moot the question presented or inform this Court's review. By contrast, this Court's review would not merely be "fundamental to the further conduct of the case"; it could render the remand wholly unnecessary by invalidating Mr. Achobe's convictions.

The government itself routinely seeks—and obtains—review despite far more extensive proceedings remaining on remand. In one recent case, for example, the government successfully urged that "[t]his Court frequently grants certiorari to resolve important threshold questions when, as here, a federal court of appeals has * * * remanded the case for further proceedings," citing *nine* precedents. Pet. Reply in *Norton* v. *S. Utah Wilderness Alliance*, No. 03-101, at 2. Review was warranted, the government explained, because the court of appeals had "definitively addressed" the "purely legal question" presented and there was no indication its holding "might be subject to revision." *Ibid.*; see also Pet. Reply in *Gates* v. *Bismullah*, No. 07-1054, at 11; Pet. Reply in *U.S. Dep't of Commerce* v. *City of New York*, No. 94-1985, at 9-10; *United States* v. *Denedo*, No. 08-267; *United States* v. *Navajo Nation*, No. 07-1410. For exactly the same reasons, review is warranted here.

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For the foregoing reasons and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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