No. 17–___

In the
Supreme Court of the United States

Pedro Serrano,

*Petitioner*,

v.

United States of America,

*Respondent*.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

# PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Court held in *Richardson v. United States*, 468 U.S. 317 (1984), that a criminal defendant whose trial ends in a hung jury may not bring a double jeopardy appeal based on evidentiary insufficiency to prevent a second trial. In this case, the Second Circuit held that *Richardson* extends to require dismissal of petitioner's double jeopardy appeal—even though the jury reached a verdict—because the district court set aside the verdict and ordered a new trial.

The question presented divides the federal courts of appeals and the state courts of last resort: does *Richardson* preclude a double jeopardy appeal based on evidentiary insufficiency where the jury returns a guilty verdict that is set aside for a new trial?

## TABLE OF CONTENTS

QUESTION PRESENTED ............ i

TABLE OF AUTHORITIES ............ iv

PETITION FOR A WRIT OF CERTIORARI ............ 1

OPINIONS BELOW ............ 1

JURISDICTION ............ 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS ............ 2

INTRODUCTION ............ 2

STATEMENT OF THE CASE ............ 6

A. Petitioner is tried and found guilty ............ 6

B. The trial court grants a new trial but holds the evidence legally sufficient ............ 7

C. The trial court holds that the Double Jeopardy Clause permits retrial ............ 7

D. The court of appeals dismisses for lack of jurisdiction ............ 8

REASONS FOR GRANTING THE PETITION ............ 10

I. Certiorari is warranted to resolve an important conflict among the federal courts of appeals and the state courts of last resort over the meaning and breadth of this Court's double jeopardy decision in *Richardson* ............ 11

A. Legal background ............ 12

B. At least seven federal circuits and one state court of last resort hold that *Richardson* eliminates appellate jurisdiction in this situation ........ 16

C. At least three federal circuits and two state courts of last resort afford appellate review in this situation despite *Richardson* ........ 18

II. This case presents an ideal vehicle to resolve the conflict ........ 24

III. The Second Circuit erred by extending *Richardson* to preclude appellate review in this context ........ 27

A. The Second Circuit misconstrued *Richardson* ........ 27

B. Extending *Richardson* beyond the hung-jury context undermines the protections of the Double Jeopardy Clause ........ 29

C. Petitioner has alleged a colorable jeopardy-terminating event ........ 33

D. Extending *Richardson* beyond the hung-jury context begets unjust results ........ 35

CONCLUSION ........ 38

<u>APPENDIX</u>

Opinion of the United States Court of Appeals for the Second Circuit ........ 1a

Opinion and Order of the United States District Court for the Southern District of New York Denying Motion to Dismiss Indictment Under Double Jeopardy Clause ........ 14a

Opinion and Order of the United States District Court for the Southern District of New York Denying Motion for Judgment of Acquittal and Granting Motion for a New Trial ........ 17a

Letter from the Government to Defense Counsel, dated June 16, 2017 ........ 30a

## TABLE OF AUTHORITIES

**Cases**


*Abney v. United States*,
431 U.S. 651 (1977) ........................................................................*passim*

*Arizona v. Washington*,
434 U.S. 497 (1978) ........................................................................ 27, 33

*Ball v. United States*,
163 U.S. 662 (1896) ........................................................................ 27

*Bartkus v. Illinois*,
359 U.S. 121 (1959) ........................................................................ 12

*Benton v. Maryland*,
395 U.S. 784 (1969) ........................................................................ 10

*Bravo–Fernandez v. United States,*
137 S. Ct. 352 (2016)........................................................................ 5, 29

*Burks v. United States*,
437 U.S. 1 (1978) ........................................................................*passim*

*Carpenter v. United States*,
134 S. Ct. 901 (2014) ........................................................................ 26

*Cohen v. Beneficial Indus. Loan Corp.*,
337 U.S. 541 (1949) ........................................................................ 12

*Delk v. Atkinson*,
665 F.2d 90 (6th Cir. 1981) .................................................................. ..16

*Evans v. Court of Common Pleas*,
959 F.2d 1227 (3d Cir. 1992)................................................................ 16-17

*Ex parte Queen*,
877 S.W.2d 752 (Tex. Crim. App. Feb. 9, 1994),
*reh'g on pet. for discretionary review denied,*
877 S.W.2d 755 (Tex. Crim. App. May 18, 1994) ........................... 17, 18, 23

*Ex Parte Queen,*
833 S.W.2d 207 (Tex. App. 1992),
*aff'd*, 877 S.W.2d 752 (Tex. Crim. App. 1994) ........................................... 32

*Green v. United States*,
355 U.S. 184 (1957) .......................................................................... 12, 24, 35

*Greene v. Massey*,
437 U.S. 19 (1978) ........................................................................................ 13

*Hoffler v. Bezio*,
726 F.3d 144 (2d Cir. 2013)...................................................................... 3–4, 32

*Justices of Bos. Mun. Court v. Lydon*,
466 U.S. 294 (1984) ............................................................................... 20, 31

*Kelly v. United States*,
639 A.2d 86 (D.C. 1994) ........................................................................ 18, 21

*Lofton v. State*,
777 S.W.2d 96 (Tex. Crim. App. 1989) ................................................. 17, 18

*North Carolina v. Pearce*,
395 U.S. 711 (1969) ........................................................................................ 13

*Oregon v. Kennedy*,
456 U.S. 667 (1982) ........................................................................................ 27

*Palmer v. Grammer*,
863 F.2d 588 (8th Cir. 1988) .................................................................. 18, 20

*Patterson v. Haskins*,
470 F.3d 645 (6th Cir. 2006) ............................................................... 3, 18, 20

*Richardson v. United States*,
468 U.S. 317 (1984) ..................................................................................*passim*

*Sattazahn v. Pennsylvania*,
537 U.S. 101 (2003) .......................................................................... 15, 28, 35

*Sivri v. Strange*,
338 F. Supp. 2d 357 (D. Conn. 2004)....................................................................3

*Smith v. Massachusetts*,
543 U.S. 462 (2005) ........................................................................................ 28

*State v. Davis*,
324 P.3d 912 (Haw. 2014) ........................................................................ 4, 31

*State v. Lee*,
417 N.W.2d 26 (Neb. 1987)............................................................... 18, 21, 22

*State v. Noll*,
527 N.W.2d 644 (Neb. Ct. App. 1995),
*overruled in part*, *State v. Anderson*,
605 N.W.2d 124 (Neb. 2000) .......... 22

*State v. Padua*,
869 A.2d 192 (Conn. 2005) .......... 23, 32

*Tibbs v. Florida*,
457 U.S. 31 (1982) .......... 30

*United States v. Anderson*,
896 F.2d 1076 (7th Cir. 1990) .......... 36

*United States v. Carpenter*,
494 F.3d 13 (1st Cir. 2007),
*cert. denied*, 552 U.S. 1230 (2008) .......... *passim*

*United States v. Douglas*,
874 F.2d 1145 (7th Cir. 1989) .......... 3, 36

*United States v. Ganos*,
961 F.2d 1284 (7th Cir. 1992) .......... 3, 17

*United States v. Greene*,
834 F.2d 86 (4th Cir. 1987) .......... *passim*

*United States v. Griffin*,
684 F.3d 691 (7th Cir. 2012) .......... 6

*United States v. Gutierrez–Zamarano*,
23 F.3d 235 (9th Cir. 1994) .......... 17

*United States v. Haddock*,
961 F.2d 933 (10th Cir. 1992) .......... 3

*United States v. Jimenez Recio*,
258 F.3d 1069 (9th Cir. 2000) .......... 23

*United States v. Julien*,
318 F.3d 316 (1st Cir. 2003) .......... 36

*United States v. Kaiser*,
660 F.2d 724 (9th Cir. 1981) .......... 34

*United States v. Marolda*,
648 F.2d 623 (9th Cir. 1981) .......... 16

*United States v. Martin Linen Supply Co.*,
430 U.S. 564 (1977) .......... 30

*United States v. McAleer*,
138 F.3d 852 (10th Cir. 1998) .......... 17

*United States v. McManaman*,
606 F.2d 919 (10th Cir. 1979) .......... 16

*United States v. McQuilkin*,
673 F.2d 681 (3d Cir. 1982) .......... 16

*United States v. Miller*,
952 F.2d 866 (5th Cir. 1992) .......... 3, 17

*United States v. Perez*,
22 U.S. (9 Wheat.) 579 (1824) .......... 28

*United States v. Ramirez*,
884 F.2d 1524 (1st Cir. 1989) .......... 34

*United States v. Richardson*,
702 F.2d 1079 (D.C. Cir. 1983),
*rev'd*, 468 U.S. 317 (1984) .......... 37

*United States v. Simpson*,
910 F.2d 154 (4th Cir. 1990) .......... 19

*United States v. Sneed*,
705 F.2d 745 (5th Cir. 1983) .......... 16, 17

*United States v. Stevens*,
177 F.3d 579 (6th Cir. 1999) .......... 33

*Vanderbilt v. Collins*,
994 F.2d 189 (5th Cir. 1993) .......... 3

*Yeager v. United States*,
557 U.S. 110 (2009) .......... 5, 28

**Constitutional Provisions, Statutes, and Rules**

U.S. Const. amend. V (Double Jeopardy Clause).................................... *passim*

18 U.S.C. § 922(g)(1) .....................................................................................6

18 U.S.C. § 3231..............................................................................................6

28 U.S.C. § 1254(1) .........................................................................................1

28 U.S.C. § 1257(b) ........................................................................................ 21

28 U.S.C. § 1291.......................................................................................... 2, 12

Fed. R. Crim. P. 29.................................................................................. 7, 10, 25

Fed. R. Crim. P. 33(a) .......................................................................................7

**Other Authorities**

Brief for the United States in Opposition,
*Carpenter v. United States*, 552 U.S. 1230 (2008) (No. 07-515) ................. 25

Brief for the United States in Opposition,
*Carpenter v. United States*, 134 S. Ct. 901 (2014) (No. 13-291) ........... 26, 34

15B Charles Alan Wright *et al.*, *Federal Practice and Procedure*
(2d ed. Apr. 2017 update) ............................................................................ 34

6 Wayne R. LaFave *et al.*, *Criminal Procedure*
(4th ed. Dec. 2016 update).......................................................................... 29

4 William Blackstone, *Commentaries on the Laws of England* (1769)........... 12

Sarah O. Wang, Note, *Insufficient Attention to Insufficient Evidence: Some Double Jeopardy Implications*, 79 Va. L. Rev. 1381 (1993) ...............4

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Pedro Serrano respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The Second Circuit's decision (App. 1a–13a) dismissing petitioner's appeals for lack of jurisdiction is published at 856 F.3d 210. The district court's order denying petitioner's motion to dismiss the indictment under the Double Jeopardy Clause (App. 14a–16a) is unpublished but reported at 2017 WL 590321. The district court's order denying petitioner's motion for a judgment of acquittal and granting his motion for a new trial (App. 17a–29a) is published at 224 F. Supp. 3d 248 and reported at 2016 WL 7335666.

## JURISDICTION

The court of appeals entered judgment on May 10, 2017. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution 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.

Section 1291 of title 28, U.S.C., provides in relevant part: "The courts of appeals … shall have jurisdiction of appeals from all final decisions of the district courts of the United States … except where a direct review may be had in the Supreme Court."

## INTRODUCTION

The Double Jeopardy Clause prohibits the government from retrying a defendant for the same offense following, *inter alia*, an "acquittal," which includes an appellate determination that the evidence was legally insufficient to support conviction. *See Burks v. United States*, 437 U.S. 1, 17–18 (1978). In *Richardson v. United States*, 468 U.S. 317 (1984), the Court narrowed the *Burks* rule, holding that retrial is permitted if the jury at the first trial could not reach a verdict—"[r]egardless of the sufficiency of the evidence." *Id.* at 326. But what happens when a jury returns a guilty verdict, and the trial court finds the evidence sufficient, but grants a new trial on other grounds? Is the defendant entitled to appellate review of her claim that the evidence at the first trial was insufficient, such that double jeopardy bars retrial? Or does

*Richardson* extend to this scenario too? In other words, does *Richardson* apply where, as here, the jury *did* reach a verdict but the verdict was set aside after trial because of trial error?[1]

This case presents an ideal opportunity for this Court to resolve this substantial and recurring question, which has now vexed the federal courts of appeals and the state high courts for more than three decades. The question arises on direct appeals from final judgments, *see, e.g.*, *United States v. Haddock*, 961 F.2d 933, 934 n.1 (10th Cir. 1992) (en banc); *United States v. Douglas*, 874 F.2d 1145, 1149–50 (7th Cir. 1989); on interlocutory appeals from double jeopardy/sufficiency rulings, *see, e.g.*, App. 9a–10a (decision below); *United States v. Ganos*, 961 F.2d 1284, 1285–86 (7th Cir. 1992) (per curiam); *United States v. Miller*, 952 F.2d 866, 871–72 (5th Cir. 1992); and on post-judgment petitions for collateral review, *see, e.g.*, *Patterson v. Haskins*, 470 F.3d 645, 655–60 (6th Cir. 2006); *Vanderbilt v. Collins*, 994 F.2d 189, 194–96 (5th Cir. 1993); *Sivri v. Strange*, 338 F. Supp. 2d 357, 358, 360–63 (D. Conn. 2004). Thus, the issue is enormously important. And the conflict among the lower courts has been repeatedly acknowledged. *See, e.g.*, *Hoffler*

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[1] The term "trial error" refers to "incorrect receipt or rejection of evidence, incorrect instructions, … prosecutorial misconduct," or the like. *See Burks,* 437 U.S. at 15. Such an error "does not constitute a decision ... that the government has failed to prove its case," but only "that a defendant has been convicted through a judicial process which is defective." *Id.*

*v. Bezio*, 726 F.3d 144, 161 (2d Cir. 2013) (recognizing circuit split over whether "*Richardson*'s rejection of a sufficiency-ruling requirement for retrial does not apply outside the mistrial context"); *State v. Davis*, 324 P.3d 912, 924 (Haw. 2014) ("The federal courts of appeals appear to be divided on the question of whether *Burks* and *Richardson* require an appellate court to review the sufficiency of the evidence before ordering a retrial based on a trial error, 'as well as on the issue of whether sufficiency review before retrial is prudentially sound or constitutionally required.'") (quoting *Hoffler*, 726 F.3d at 161, and setting out split).[2] Indeed, the First Circuit has expressly "decline[d] to follow" the Fourth Circuit's contrary decision in *United States v. Greene*, 834 F.2d 86, 89 (4th Cir. 1987). *See United States v. Carpenter*, 494 F.3d 13, 26 (1st Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

This case provides a perfect vehicle for resolving the split and ending the confusion *Richardson* has sown. The question presented is a pure issue of

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[2] *See also* Sarah O. Wang, Note, *Insufficient Attention to Insufficient Evidence: Some Double Jeopardy Implications*, 79 Va. L. Rev. 1381, 1382 (1993) ("The federal appellate courts are divided over the proper treatment of a convicted defendant's insufficient evidence claim where there has already been a finding of reversible trial error. Some circuits find that the Constitution permits a retrial without any consideration of evidentiary sufficiency, while other circuits hold that the Double Jeopardy Clause requires review of a properly presented insufficiency claim. […] Given the importance of the question and the frequency with which it recently has arisen, the [Supreme] Court ought to resolve the issue . . . .") (footnotes omitted).

law, was squarely addressed below, and is outcome-determinative: if petitioner prevails, the court of appeals would have jurisdiction to review his double jeopardy claim. And if the court were to hold that the evidence at the first trial was insufficient, jeopardy would bar further prosecution. *See Burks,* 437 U.S. at 18 (holding that an appellate determination that a guilty verdict was based on insufficient evidence bars retrial).

Finally, review is warranted because the Second Circuit's decision, like similar decisions from other courts, misinterprets *Richardson* by overlooking the crucial distinction for double jeopardy purposes—emphasized in *Richardson* itself—between a hung jury, a constitutional "nonevent," *Yeager v. United States*, 557 U.S. 110, 118 (2009), and a guilty verdict. While the court of appeals saw no material difference between a hung-jury mistrial and a guilty verdict that is set aside, this Court reiterated just last Term that the two events are not equivalent for jeopardy purposes. *See Bravo–Fernandez v. United States*, 137 S. Ct. 352, 366 (2016) ("[W]hen a jury hangs, there is *no decision*"; "A verdict of guilt, by contrast, *is* a jury decision, even if subsequently vacated[.]").

## STATEMENT OF THE CASE

### A. Petitioner is tried and found guilty.

In June 2016, petitioner was tried before a jury in the United States District Court for the Southern District of New York on a single count of unlawfully possessing ammunition after being convicted of a felony, in violation of 18 U.S.C. § 922(g)(1).[3] The charge arose after police discovered a closed opaque plastic box containing bullets hidden in the back corner of a bedroom closet of the apartment in which petitioner and others were residing.

The evidence that petitioner knowingly possessed the ammunition was weak. There was no proof that petitioner ever physically handled or even knew about the plastic box or the ammunition it contained. And the evidence of "constructive possession" was similarly anemic. While the jury could have concluded that petitioner kept some clothes in the closet, no evidence connected him to the box of ammunition itself, as courts require. *See, e.g.*, *United States* v. *Griffin*, 684 F.3d 691, 697 (7th Cir. 2012) ("[W]hen the defendant jointly occupies a residence," and contraband is hidden, "proof of constructive possession of contraband in the residence requires the government to demonstrate a 'substantial connection' between the defendant and the contraband itself, not just the residence") (citing support from the

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[3] The district court had jurisdiction under 18 U.S.C. § 3231.

Third, Fifth, Ninth, Tenth, and D.C. Circuits). The jury nevertheless found petitioner guilty.

### B. The trial court grants a new trial but holds the evidence legally sufficient.

After trial, petitioner renewed his motion for acquittal under Fed. R. Crim. P. 29.[4] Alternatively, he sought a new trial under Fed. R. Crim. P. 33(a).[5] The court denied the motion for acquittal, holding the evidence sufficient. App. 17a–25a. But the court held that the jury instructions on "conscious avoidance," which the government had proposed, violated Second Circuit law (App. 26a–29a), and ordered a new trial because of "a real concern that an innocent person may have been convicted." App. 25a (citation and internal quotation marks omitted); *see also* App. 29a.

### C. The trial court holds that the Double Jeopardy Clause permits retrial.

Petitioner then moved to bar the new trial under the Double Jeopardy Clause. He renewed his argument that the evidence at the first trial was insufficient, such that double jeopardy principles prohibit a second trial. *See*

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[4] Rule 29 provides in relevant part: "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a).

[5] Rule 33(a) provides in relevant part: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a).

*Burks,* 437 U.S. at 17–18. The court denied the motion because it disagreed that the evidence was insufficient. App. 15a.

The court also stated that any appeal from the double jeopardy ruling would be “frivolous.” *Id.* The court relied on *Richardson,* which involved a hung jury, not a guilty verdict that was set aside. But the court held that the two situations were “analogous” (App. 15a), that jeopardy never “terminated” (even if the evidence was indeed insufficient), and that petitioner therefore did not have a colorable jeopardy claim. App. 16a.

**D. The court of appeals dismisses for lack of jurisdiction.**

Petitioner timely appealed both the denial of his acquittal motion and the denial of his double jeopardy motion. The Second Circuit consolidated the two appeals but, before merits briefing was completed, dismissed them for lack of jurisdiction.

With respect to the double jeopardy appeal, the court recognized that *Abney v. United States*, 431 U.S. 651, 662 (1977), allows an interlocutory appeal from the denial of a motion to dismiss under the Double Jeopardy Clause. App. 8a & n.17. But the Second Circuit held that *Abney*’s rule does not apply where the district court sets aside a guilty verdict before final judgment based on a trial error such as an erroneous jury instruction.

App. 10a. In so holding, the court concluded that petitioner's appeals fail to raise even a colorable double jeopardy claim under *Burks*.

Instead, like the district court, the Second Circuit held that *Richardson,* not *Burks*, governed, and deprived the court of jurisdiction. *Id.* As noted, *Richardson* involved a hung-jury mistrial. The Court there held that such an event does not terminate jeopardy because "the Government, like the defendant, is entitled to resolution of the case by verdict from the jury," *Richardson*, 468 U.S. at 326, and because retrial following a hung jury does not implicate the "type of oppressive practices at which the double-jeopardy prohibition is aimed." *Id.* at 324–25. Instead, requiring the defendant to submit to a second trial in that circumstance would serve society's interest in "'giving the prosecution one complete opportunity to convict those who have violated its laws.'" *Id.* at 324 (citation omitted).

The Second Circuit recognized that this case, unlike *Richardson*, involved a guilty verdict. App. 10a. Thus, the prosecution has already *had* a "resolution of the case by verdict" and "one complete opportunity to convict" petitioner. *See Richardson*, 468 U.S. at 324, 326. No matter, said the court: "just as the declaration of a mistrial does not terminate jeopardy, so also a jury verdict that is set aside for a new trial prior to the entry of a judgment of conviction does not terminate jeopardy." App. 10a. Thus, the court concluded,

petitioner's "original jeopardy is therefore ongoing. His claim of double jeopardy is thus not 'colorable' and we lack jurisdiction to hear the claim." *Id.*

The court also dismissed petitioner's appeal from the denial of his acquittal motion under Rule 29. The court ruled that denial of a Rule 29 motion following a guilty verdict is not a "collateral order" that may appealed before final judgment, even where the defendant has been ordered to stand trial a second time before any judgment is entered. App. 12a–13a.

Petitioner's retrial is scheduled to commence on August 7, 2017.[6] He remains free on bail, subject to conditions of pretrial release.

## REASONS FOR GRANTING THE PETITION

Certiorari is warranted for three overriding reasons. First, the Second Circuit's decision to dismiss for lack of jurisdiction exacerbates an entrenched conflict among the federal courts of appeals and the state high courts[7] regarding the meaning and breadth of this Court's double jeopardy decision in *Richardson*. Specifically, the conflict concerns whether *Richardson* applies beyond the hung-jury context to vacated-conviction cases. Second, this case presents an ideal vehicle for resolving the conflict. And third, the decision

[6] To prevent irreparable injury, petitioner has filed an application asking the Court to stay his retrial pending consideration of this petition.

[7] The Double Jeopardy Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784, 794 (1969).

below fundamentally misconceives this Court's decision in *Richardson* and significantly undermines the protections afforded by the Double Jeopardy Clause. No defendant should have to endure the public embarrassment, opprobrium, and immense personal hardship of being subjected to a second trial after being found guilty without a chance to demonstrate on appeal that the evidence at the first trial was insufficient, such that retrial is barred. Denying appellate review—only because the first trial was so unfair that the trial court felt compelled to set aside the jury's verdict and order a second trial—unfairly penalizes petitioner for successfully moving for a new trial, stands the Double Jeopardy Clause on its head, and conflicts with this Court's precedents.

## I.

### Certiorari is warranted to resolve an important conflict among the federal courts of appeals and the state courts of last resort over the meaning and breadth of this Court's double jeopardy decision in *Richardson*.

The decision below deepens a longstanding conflict among the courts of appeals and the state high courts over whether—and how—*Burks* and *Richardson* apply to sufficiency-of-the-evidence-based double jeopardy claims when a guilty verdict is set aside for trial error. The time has come for the Court to resolve this schism.

### A. Legal background

The Double Jeopardy Clause protects people from facing prosecution for the same offense more than once. This right predates the Constitution: "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization." *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting); *accord* 4 William Blackstone, *Commentaries on the Laws of England* 329–30 (1769). "The underlying idea … 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." *Green v. United States*, 355 U.S. 184, 187–88 (1957).

In light of the unique interests protected by the Double Jeopardy Clause, the denial of a double jeopardy motion is a "final decision" under 28 U.S.C. § 1291 and therefore subject to immediate appeal under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Abney,* 431 U.S. at 659–60. As this Court explained in *Abney*, a claim under the Double Jeopardy Clause "contest[s] the very authority of the Government to hale [the defendant] into court to face trial on the charge against him." *Id.* at 659. Thus, though a double jeopardy decision permitting

retrial is not a final judgment, it is immediately appealable because the Double Jeopardy Clause's protections "would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken." *Id.* at 662. "[I]f a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause," the Court has held, "his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.*

The Double Jeopardy Clause prohibits retrial following, *inter alia*, an acquittal or an unreversed conviction. *See, e.g.*, *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). These events are said to "terminate" the original jeopardy, thereby precluding the initiation of a second or "double" jeopardy. *See Richardson*, 468 U.S. at 325. Likewise, an unreversed determination that the evidence was insufficient to sustain a jury's guilty verdict terminates the original jeopardy and precludes further prosecution. *See Burks*, 437 U.S. at 18. This rule is justified because insufficiency is the functional equivalent of an acquittal, which is afforded "absolute finality." *Id.* at 16. When a reviewing court determines that the evidence is insufficient, it has decided as a matter of law that the case "should not have even been *submitted* to the jury," and that no jury could have properly returned a guilty verdict. *See id.* Accordingly, the only just remedy is direction for judgment of acquittal, not a second trial. *Id*. at 18; *accord Greene v. Massey*, 437 U.S. 19, 24 (1978).

In *Richardson*, the Court confined *Burks* to cases in which the jury returned a guilty verdict. Richardson had appealed the denial of his motion to bar retrial following a hung jury. He asserted that the prosecution presented insufficient evidence at the first trial and that a retrial would therefore violate the Double Jeopardy Clause under *Burks*. After the D.C. Circuit dismissed the appeal for lack of jurisdiction (over a dissent by then-Judge Scalia), this Court granted certiorari and held, first, that appellate jurisdiction existed because the appeal was "colorable." *Richardson*, 468 U.S. at 322. The Court rejected the government's argument that jurisdiction was absent because the double jeopardy claim "inevitably involve[d] evaluation of the sufficiency of the evidence against petitioner at the first trial," and therefore had to await "a final judgment of conviction after a second trial." *Id.* at 321. The Court reasoned that petitioner was "seek[ing] 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." *Id.* at 322. Accordingly, though petitioner's double jeopardy claim "would require the appellate court to canvass the sufficiency of the evidence at his first trial, this fact alone does not prevent the District Court's order denying petitioner's double jeopardy claim from being appealable." *Id.*

On the merits, however, the *Richardson* Court held that the original jeopardy at the first trial never terminated, precluding a viable double jeopardy claim. Retrial does not violate double jeopardy unless "there has been some event, such as an acquittal, which terminates the original jeopardy." *Id.* at 324.[8] A hung jury has never been considered such an event. The Court noted that the double jeopardy case law concerning hung juries, stretching back at least "160 years," has "its own sources and logic," *id.* at 323, and that the prosecution is entitled to "one complete opportunity to convict" a defendant and secure a "verdict from the jury." *Id.* at 324, 326. For these reasons, retrial following a hung-jury mistrial does not violate the Double Jeopardy Clause "[r]egardless of the sufficiency of the evidence at [the] first trial." *Id.* at 323, 326. Further, the Court stated that future double jeopardy claims "like petitioner's" would no longer be "colorable." *Id.* at 326 n.6.

The central question here is whether Mr. Serrano's double jeopardy claim is "like petitioner's" in *Richardson*, *id.*, and therefore not "colorable," *id.,* or whether it is fundamentally different—because the jury here, like Burks's jury but unlike Richardson's, returned a unanimous guilty verdict.

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[8] As the "such as" reference shows, "jeopardy can terminate in circumstances other than an acquittal." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 119 (2003) (Ginsburg, J., dissenting) (citing *Richardson*, 468 U.S. at 325).

### B. At least seven federal circuits and one state court of last resort hold that *Richardson* eliminates appellate jurisdiction in this situation.

Before *Richardson*, the appellate courts agreed that *Burks* required them to review a defendant's sufficiency-based double jeopardy claim before allowing retrial—even if the conviction was set aside because of trial error. *See, e.g.*, *United States v. Sneed*, 705 F.2d 745, 746–49 (5th Cir. 1983); *United States v. McQuilkin*, 673 F.2d 681, 684–86 (3d Cir. 1982); *United States v. Marolda*, 648 F.2d 623, 624 (9th Cir. 1981); *Delk v. Atkinson*, 665 F.2d 90, 92–93 & n.1 (6th Cir. 1981); *United States v. McManaman*, 606 F.2d 919, 927 (10th Cir. 1979). These decisions would entitle petitioner—before retrial—to appellate review of his double jeopardy claim.

Since *Richardson*, however, the appellate courts have disagreed over whether sufficiency/double jeopardy review is required—or even permitted—after there has already been a finding of reversible trial error. In addition to the court below, six circuits—the First, Third, Fifth, Seventh, Ninth, and Tenth—hold that *Richardson* precludes review because the grant of a new trial, like the declaration of a mistrial following a hung jury, means the original jeopardy never "terminated," regardless of the insufficiency of the evidence. *See Carpenter*, 494 F.3d at 26 (a defendant whose conviction is set aside for trial error "may not assert a double jeopardy bar to retrial" based on claimed insufficiency of evidence at first trial); *Evans v. Court of Common*

*Pleas*, 959 F.2d 1227, 1236 (3d Cir. 1992) (reversal of conviction "for trial error simply continues the jeopardy that was begun in [the] first trial, … '[r]egardless of the sufficiency of the evidence'") (quoting *Richardson*, 468 U.S. at 326); *United States v. Miller*, 952 F.2d 866, 874 (5th Cir. 1992) (overruling *Sneed* in light of *Richardson* and holding that double jeopardy does not bar retrial after conviction is set aside even if evidence at initial trial was insufficient); *Ganos*, 961 F.2d at 1285–86 ("*Richardson* holds that the double jeopardy clause never bars the second trial … when no court has determined that the evidence at the first trial was insufficient[.]"); *United States v. Gutierrez–Zamarano*, 23 F.3d 235, 238 (9th Cir. 1994) (retrial following grant of new trial "will not violate the Double Jeopardy Clause regardless of the sufficiency of the evidence at the first trial"); *United States v. McAleer*, 138 F.3d 852, 857 (10th Cir. 1998) ("[W]hen a guilty verdict is set aside on the defendant's motion, original jeopardy has not been terminated and retrial does not violate the Double Jeopardy Clause 'regardless of the sufficiency of the evidence at the first trial.'").

At least one state high court, relying on *Richardson*, embraces a similar view. In *Ex parte Queen*, 877 S.W.2d 752 (Tex. Crim. App. Feb. 9, 1994), *reh'g on pet. for discretionary review denied,* 877 S.W.2d 755 (Tex. Crim. App. May 18, 1994), Texas's highest criminal court, relying on its earlier decision in *Lofton v. State*, 777 S.W.2d 96 (Tex. Crim. App. 1989), held that *Richardson*

is not limited to the hung-jury context. The *Queen* court reiterated *Lofton*'s conclusion that hung-jury cases are "sufficiently analogous to the grant of a defendant's motion for a new trial after the jury rendered a verdict," such that "'as with a new trial after a mistrial, initial jeopardy continues.'" *Queen*, 877 S.W. at 754 (quoting *Lofton*, 777 S.W.2d at 97). Accordingly, a guilty verdict that is set aside for trial error never terminates jeopardy, "regardless of the sufficiency of the evidence at the former trial." *Id.* at 754–55.

### C. At least three federal circuits and two state courts of last resort afford appellate review in this situation despite *Richardson*.

In contrast, at least three federal circuits—the Fourth, Sixth, and Eighth—and two state high courts hold that, even after *Richardson*, appellate review of a defendant's sufficiency/double jeopardy claim is appropriate before retrial, whether or not the guilty verdict is set aside for trial error. *See United States v. Greene*, 834 F.2d 86, 89 (4th Cir. 1987); *Patterson v. Haskins*, 470 F.3d 645, 659 (6th Cir. 2006); *Palmer v. Grammer*, 863 F.2d 588, 594 (8th Cir. 1988); *Kelly v. United States*, 639 A.2d 86, 89 (D.C. 1994); *State v. Lee*, 417 N.W.2d 26, 30 (Neb. 1987); *State v. Fernandez*, 501 A.2d 1195, 1205 (Conn. 1985).

In *Greene*, decided three years after *Richardson*, a jury found the defendant guilty but the district court granted him a new trial before sentencing because of trial error. The government immediately appealed the

new-trial grant and the defendant cross-appealed the denial of his acquittal motion, arguing that the evidence was insufficient and that a retrial would therefore violate double jeopardy. The Fourth Circuit held, in direct conflict with both the Second Circuit's decision below and the First Circuit's decision in *Carpenter*, *see* 494 F.3d at 26 ("declin[ing] to follow" *Greene*), that jurisdiction existed over the defendant's interlocutory appeal. *See Greene*, 834 F.2d at 89. The *Greene* court, without citing *Richardson*, stated two separate grounds for its decision. First, because the government had appealed the new-trial grant, exercising jurisdiction over the defendant's appeal would promote efficiency. *Id.* Second, the court declared, "*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.* It is also a right that can be irreparably lost if review is postponed until final determination of the case, because by then Greene would have been put through the trauma and the expense of another trial." *Id.* (emphasis added). Under that rationale, petitioner would similarly be entitled to appellate review of his double jeopardy/sufficiency claims at this time. *See also United States v. Simpson*, 910 F.2d 154, 159 (4th Cir. 1990)

(*Burks* requires sufficiency review on appeal before retrial even where defendant's conviction is set aside for trial error).

Likewise, in *Patterson*, the Sixth Circuit held that its "longstanding prudential practice of reviewing the sufficiency of the evidence despite reversing a conviction on other grounds was *not* undermined by the Supreme Court's decision in *Richardson*." *Patterson*, 470 F.3d at 659. The court reiterated that appellate courts should address the sufficiency of the evidence before allowing a defendant to be retried following a vacated conviction—precisely because, if the evidence were found insufficient, retrial would be barred by the Double Jeopardy Clause. *See id.* at 666.

In *Palmer*, also decided after *Richardson*, the Eighth Circuit declared that it is "well-established that *Burks* does not allow an appellate court to reverse for trial error and remand for retrial while ignoring a claim of insufficient evidence." 863 F.2d at 592. Quoting Justice Brennan's concurring opinion in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), the court held that, "'[b]ecause the first trial has plainly ended, retrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the [constitutional standard for sufficiency]. Hence, the [sufficiency] issue cannot be avoided; if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict.'" 863 F.2d at 592 (quoting

*Lydon*, 466 U.S. at 321–22 (Brennan, J., concurring) (additional internal quotation marks omitted)).

Similarly, in *Kelly*, the defendant was convicted of armed robbery. *See* 639 A.2d at 88. On appeal, he was granted a new trial because of erroneous jury instructions but the court declined to address his sufficiency claim. *Id.* On remand, the defendant moved unsuccessfully to dismiss the indictment, arguing that retrial would violate the Fifth Amendment's Double Jeopardy Clause because the evidence at the first trial was insufficient. *Id.* The defendant then filed an interlocutory appeal under *Abney*. The District of Columbia Court of Appeals—the "highest court of a [s]tate" for purposes of certiorari review, 28 U.S.C. § 1257(b)—held, in conflict with the Second Circuit here, that appellate review was not only permitted but *required* by *Abney*, *Burks*, and *Richardson*. *See id.* at 89. The *Kelly* court recognized that, "'if the evidence were insufficient, the Double Jeopardy Clause would bar … retrial.'" *Id.* (quoting *Lyons v. United States*, 606 A.2d 1354, 1361 n.16 (D.C. 1992), and citing *Abney*, 431 U.S. at 662, *Richardson*, 468 U.S. at 325, and *Burks*, 437 U.S. at 18).

The Nebraska Supreme Court adopted a similar view in *Lee*. The court held that the defendant's conviction could not stand because he and a co-defendant had been improperly tried together. *See* 417 N.W.2d at 30. Nevertheless, the court recognized that it had to resolve the defendant's

sufficiency challenge before allowing a second trial. *Id.* Citing *Burks*, the court held that, if the evidence was insufficient, the Double Jeopardy Clause precluded retrial. *See id.*; *see also State v. Noll*, 527 N.W.2d 644, 646–48 (Neb. Ct. App. 1995) (finding it "significant" that *Lee* "was decided 3 years after *Richardson*," and holding that—despite *Richardson—Burks* and *Lee* require sufficiency review of first-trial evidence on interlocutory double jeopardy appeal before second trial may proceed), *overruled on other grounds*, *State v. Anderson*, 605 N.W.2d 124 (Neb. 2000). And the Supreme Court of Connecticut took a similar position in *Fernandez*. 501 A.2d at 1205 (holding that, "[a]lthough we have ordered a new trial [because of erroneous jury instructions], 'we must also address [the defendant's sufficiency] claim, because if we were to rule that the evidence was insufficient, the defendant would be entitled to an acquittal rather than a new trial'") (quoting *Burks*, 437 U.S. at 18).

All these post-*Richardson* decisions thus recognize, contrary to the Second Circuit's position, that appellate courts are at least permitted, and perhaps required, to address—before retrial—a defendant's properly preserved claim that the evidence at the first trial was legally insufficient to support the jury's guilty verdict. They further recognize that the need for sufficiency review does not disappear simply because the trial was infected with reversible trial error.

Other federal and state judges have also endorsed this view, underscoring the confusion *Richardson* has generated. *See United States v. Jimenez–Recio*, 258 F.3d 1069, 1075 n.2 (9th Cir. 2001) (B. Fletcher, J., concurring) (concluding that *Richardson* "held only that the Double Jeopardy Clause does not bar a retrial after the first trial ends in a hung jury," and is "inapposite" where the jury returns a guilty verdict that is vacated for legal error), *rev'd on other grounds*, 537 U.S. 270 (2003); *State v. Padua*, 869 A.2d 192, 226 (Conn. 2005) (Borden, J., joined by Norcott and Katz, JJ., concurring and dissenting) (noting "a split of authority" but finding "no justification for extending the rule [of *Richardson*] beyond the context of mistrials"); *Queen*, 877 S.W.2d at 758–59 (Baird, J., joined by Miller, J., dissenting from denial of rehearing) (concluding that majority's reliance on *Richardson* was "sorely misplaced" because *Richardson* "concerned a *mistrial* resulting from a hung jury" and that *Burks*, not *Richardson*, governs "a challenge to the sufficiency of the evidence following a *conviction* and the granting of a new trial") (footnotes omitted).

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In sum, the lower courts are sharply divided (at least eight-to-five) over how *Richardson* and *Burks* apply when a jury returns a guilty verdict that is set aside for a new trial. Allowing this decades-old conflict to persist would be intolerable. The scope of double jeopardy protection, "a vital safeguard in our

society," *Green*, 355 U.S. at 198, and the availability of appellate review, should not depend on the happenstance of where the defendant is prosecuted. *See, e.g.*, *American Freedom Def. Initiative v. Kings County, Wash.*, 136 S. Ct. 1022, 1025 (2016) (Thomas, J., joined by Alito, J., dissenting from denial of certiorari) (scope of constitutional protection should not depend on "geographical happenstance"). Accordingly, this Court should grant certiorari.

## II.

### This case presents an ideal vehicle to resolve the conflict.

This case provides a particularly suitable vehicle to resolve the widespread division and uncertainty over the meaning of *Richardson*.

First, the issue presented is a pure question of law concerning the jurisdiction of appellate courts and the scope of double jeopardy protection. The question arises on a clean record, untainted by any factual complications or procedural infirmities. And the court below held that *Richardson* eliminates any possible jeopardy issue when a guilty verdict is set aside for a new trial, regardless of the insufficiency of the evidence. App. 10a. That is precisely the question that divides the lower courts.

Second, the issue is crucial to petitioner and similarly situated individuals. If the Court resolves the question presented in petitioner's favor,

the court of appeals would have jurisdiction to determine whether the evidence at the first trial was insufficient, in which case further prosecution would be barred. *See Burks*, 437 U.S. at 18.

Third, this case lacks the vehicle problems that may have led the Court to decline prior invitations to clarify *Richardson.* In *Carpenter*, for example, as both the First Circuit and the Solicitor General noted, petitioner neglected to file a specific motion to dismiss on double jeopardy grounds; instead, he appealed only the denial of his acquittal motion under Rule 29.[9] Here, in contrast, petitioner did file a motion to dismiss on double jeopardy grounds, as well as a motion for acquittal under Rule 29, and he timely appealed the denial of both motions.

Moreover, unlike the situation in *Carpenter*, the government here did not appeal the district court's decision granting petitioner a new trial. Accordingly, that decision is final. So no danger exists that the court of appeals will reverse the new-trial grant and render the question presented

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[9] *See* 494 F.3d at 26 n.9 (finding it "important" that "Carpenter did not file a motion in the trial court arguing that his retrial was barred by the principle of double jeopardy," and that the court of appeals was therefore "not reviewing a double jeopardy ruling by the trial court, or a claim that such a double jeopardy ruling itself falls within the collateral order doctrine"); Brief for the United States in Opposition at 12 n.4, *Carpenter v. United States*, 552 U.S. 1230 (2008) (No. 07-515) (arguing that *Richardson*'s jurisdictional holding did not apply because Carpenter "did not move the district court to preclude a retrial on double jeopardy grounds, nor did he raise an independent double jeopardy ground in the court of appeals").

moot, as ultimately occurred following the second trial in *Carpenter*. *See* Brief for the United States in Opposition at 12, *Carpenter v. United States*, 134 S. Ct. 901 (2014) (No. 13-291) (arguing that the petition was "effectively moot" and "no longer an appropriate vehicle" because, after the petition was filed, the First Circuit reversed the grant of a new trial and reinstated Carpenter's convictions, ensuring that "no additional trial will take place").

Finally on this point, no further percolation is necessary. The split over *Richardson*'s scope has persisted for decades and shows no sign of ebbing. While the government speculated in 2008—nearly a decade ago—that the Fourth Circuit might someday "revisit" its decision in *Greene*, *see* Brief for the United States in Opposition at 17, *Carpenter*, 134 S. Ct. 901 (2014) (No. 13-291), that wishful thinking has not proven prescient. And only this Court can say definitively whether *Richardson* extends to vacated-conviction cases. Accordingly, there is no reason to believe that the division and confusion among the lower courts will resolve itself.

## III.

## The Second Circuit erred by extending *Richardson* to preclude appellate review in this context.

Lastly, certiorari is warranted because the Second Circuit's decision represents an improvident and unwarranted extension of *Richardson*, and undermines the protections of the Double Jeopardy Clause.

**A. The Second Circuit misconstrued *Richardson*.**

The Second Circuit held that, under *Richardson*, petitioner has no colorable jeopardy claim to appeal, even if he is correct that the evidence at his first trial was insufficient. App. 10a. The court said, "[J]ust as the declaration of a mistrial does not terminate jeopardy, so also a jury verdict that is set aside for a new trial prior to the entry of a judgment of conviction does not terminate jeopardy." *Id.*

This *ipse dixit* does not withstand scrutiny. First, the premise is false: the declaration of a mistrial sometimes *does* terminate jeopardy. *See, e.g.*, *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982) (mistrial terminates jeopardy and bars retrial if caused by misconduct designed to goad defendant into seeking mistrial); *Arizona v. Washington*, 434 U.S. 497, 505, 514 (1978) (mistrial declared over defense objection and without "manifest necessity" terminates jeopardy and bars retrial). Thus, no final judgment is necessary for jeopardy to terminate. *See Oregon*, 456 U.S. at 673; *Arizona*, 434 U.S. at 505, 514; *see also Ball v. United States*, 163 U.S. 662, 671 (1896) (verdict of acquittal, "although not followed by any judgment," terminates jeopardy).[10]

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[10] Nor is petitioner's double jeopardy appeal somehow improper because it requires the court of appeals to review the sufficiency of the evidence at the first trial. As *Richardson* itself held, a double jeopardy appeal is not jurisdictionally barred simply because it requires "the appellate court to canvass the sufficiency of the evidence at the first trial." *Richardson*, 468 U.S. at 322.

Second, the Second Circuit overlooked *Richardson*'s central point: that a guilty verdict and a hung jury are fundamentally different for jeopardy purposes. *Richardson* made clear that its holding applied "[w]here, as here, there has been *only a mistrial resulting from a hung jury*." 468 U.S. at 323 (emphasis added). And, unsurprisingly, this Court has never applied *Richardson* outside the hung-jury context.[11] The *Richardson* Court's reasoning focused on the particular "sources and logic" of nearly 200 years of "case law dealing with the application of the prohibition against placing a defendant twice in jeopardy *following a mistrial because of a hung jury*." 468 U.S. at 323 (emphasis added) (citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824) (Story, J.)). As the *Richardson* Court recognized, those "sources and logic" do not apply where, as here, a defendant has withstood a complete trial through verdict. *See* 468 U.S. at 324 ("We 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

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[11] The Court has cited *Richardson* only three times since it was decided in 1984. *See Yeager v. United States*, 557 U.S. 110, 118, 123 (2009) (apparent inconsistency between jury's verdict of acquittal on some counts and its failure to return a verdict on other counts did not affect the preclusive force of the acquittals under the Double Jeopardy Clause); *Smith v. Massachusetts*, 543 U.S. 462, 467 (2005) (mid-trial grant of acquittal terminated jeopardy and precluded judge from reconsidering the acquittal later in the trial); *Sattazahn*, 537 U.S. at 109 (double jeopardy protections were not triggered when jury deadlocked at first capital sentencing proceeding).

convict *following a jury verdict of guilty*, to a situation where the jury is unable to agree on a verdict.") (emphasis added). *See also* 6 Wayne R. LaFave *et al.*, *Criminal Procedure* § 25.4(c) (4th ed. Dec. 2016 update) ("In authorizing retrial after mistrial, *Richardson* itself distinguished hung jury mistrials from reversal of conviction cases, pointing to the presence of a verdict in the latter.") (footnote omitted). And this Court recently reiterated that, for double jeopardy purposes, a hung jury and a guilty verdict are not equivalent, even if the verdict is later vacated. *See Bravo–Fernandez v. United States*, 137 S. Ct. 352, 366 (2016) ("[W]hen a jury hangs, there is *no decision*"; "A verdict of guilt, by contrast, *is* a jury decision, even if subsequently vacated[.]").

Simply put, nothing in *Richardson* warrants extending it to vacated-conviction cases.

### B. Extending *Richardson* beyond the hung-jury context undermines the protections of the Double Jeopardy Clause.

The Second Circuit's decision to extend *Richardson* beyond the hung-jury situation also undermines the Double Jeopardy Clause's central purpose of denying the prosecution "the proverbial 'second bite at the apple.'" *Burks*, 437 U.S. at 17.[12] That purpose is implicated just as strongly after a guilty verdict

[12] The government here has already indicated that it will take full advantage of this "second bite." *See* App. 30a (letter advising defense counsel that

based on insufficient evidence as after an acquittal, regardless whether the verdict is set aside for trial error. A complete trial ending in a guilty verdict has always been treated differently, both legally and historically, from a trial that yields no verdict. A hung jury constitutes an "unforeseeable circumstance[] that arise[s] during a trial making its completion impossible," and that deprives the prosecution of "one complete opportunity" to prove its case and obtain "a verdict from the jury." *Richardson*, 468 U.S. at 324–26. When a jury returns a guilty verdict, the prosecution has *had* its "one complete opportunity" to presents its case and obtain "a verdict."

Moreover, a guilty verdict, unlike a hung jury, "actually represents a resolution … of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). If, as petitioner contends here, the government failed to present a constitutionally sufficient case for guilt during a completed trial that went to verdict, then jeopardy *did* terminate when the jury erroneously convicted on insufficient evidence, *see Burks*, 437 U.S. at 10–11, 17–18, and no legitimate societal interest remains to be vindicated by allowing a second trial. The prosecution should not be granted a second chance to muster a sufficient case—a windfall—merely

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government intends to introduce "additional evidence" at retrial). This violates the "core" of the Double Jeopardy Clause, which "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction." *Tibbs v. Florida*, 457 U.S. 31, 41 (1982).

because the first trial was *also* so unfair to the defendant that the district court felt compelled to set aside the verdict and order a new trial.[13] *See, e.g.*, *Davis*, 324 P.3d at 928 ("If double jeopardy prohibits a second trial based on the insufficiency of the evidence, then there is no reason that the double jeopardy clause should permit the government a second opportunity to supply the evidence it failed to produce in the first trial in cases where … the State's case was *both* brought upon a fatally defective charge *and* was insufficient as a matter of law.").

Additionally, "the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." *Burks*, 437 U.S. at 16. All petitioner seeks is the same opportunity afforded to Burks and every other defendant who has been found guilty by a jury: to have an appellate court review whether the proof was legally sufficient before being subjected to a second trial that would be barred under the Double Jeopardy Clause if the answer is no. And, of course, the government has no legitimate interest in preventing appellate review of a conviction based on insufficient evidence.

[13] *Lydon* does not compel a different conclusion. That case arose in the unique context of Massachusetts's two-tier trial system, which alters the double-jeopardy analysis. *See Richardson*, 468 U.S. at 328 n.1 (Brennan, J., concurring in part and dissenting in part) (discussing *Lydon*).

This is especially so where, as here, the prosecution itself invited the error requiring a new trial—by persuading the district court to instruct the jury, over objection, in a manner so contrary to Second Circuit precedent that a second trial was necessary in the interest of justice. It is undeniable that every appellate court in the country, including the Second Circuit, would have afforded petitioner appellate review of his sufficiency claim (and his claim of instructional error) if the district court had denied his motion for a new trial and he had proceeded to sentencing and appealed from a final judgment. *See, e.g.*, *Hoffler*, 726 F.3d at 161–62 (noting that the circuits "are unanimous in concluding that [sufficiency] review [after final judgment] is warranted, at a minimum, as a matter of prudent policy"). Depriving petitioner of appellate review—simply because the trial court, rather than the appellate court, found prejudicial trial error—would be a "bizarre result," *Padua*, 869 A.2d at 227 (Borden, J., joined by Norcott and Katz, JJ., concurring and dissenting); unfair, *see Ex parte Queen*, 833 S.W.2d 207, 209 (Tex. App. 1992) (Oliver-Parrott, C.J., concurring) ("There is no reason that [a defendant] should be penalized by denial of a review of the sufficiency of the evidence simply because he obtained a post-verdict reversal from the trial as opposed to the appellate court."), *aff'd*, 877 S.W.2d 752 (Tex. Crim. App. 1994); and inconsistent with this Court's precedents, *see Burks*, 437 U.S. at 17–18 (defendant does not waive right to judgment of acquittal based on

evidentiary insufficiency by moving for a new trial "as one of his remedies, or even as the sole remedy").

### C. Petitioner has alleged a colorable jeopardy-terminating event.

The Second Circuit implied that, because the district court found the evidence sufficient, petitioner's original jeopardy never "terminated." *See* App. 10a. But *Richardson* requires only a colorable jeopardy-terminating "*event*," 468 U.S. at 325 (emphasis added), not a jeopardy-terminating *ruling*. *See id.* at 321–22 (holding that appellate jurisdiction existed even though the district court found the evidence sufficient). A trial court's declaration of a mistrial, for example, can constitute a jeopardy-terminating event, and therefore may be reviewed on interlocutory appeal, even if the trial court finds in the first instance that jeopardy never terminated because "manifest necessity" existed. *See, e.g.*, *Arizona*, 434 U.S. at 514 (holding that "reviewing courts have an obligation to satisfy themselves … that the trial judge exercised sound discretion in granting a mistrial"). If the appellate court determines that a mistrial was improperly declared, double jeopardy bars a second trial. *See id.*; *see also, e.g.*, *United States v. Stevens*, 177 F.3d 579, 581, 583, 584–89 (6th Cir. 1999) (holding, on interlocutory appeal, that mistrial

was improper and barred retrial); *United States v. Ramirez*, 884 F.2d 1524, 1529–30 (1st Cir. 1989) (same).

The same analysis applies to double jeopardy appeals based on evidentiary insufficiency. As with a finding of "manifest necessity," the district court's ruling that the evidence was sufficient is not the final word. The relevant question under *Abney, Burks,* and *Richardson* is not whether petitioner has already secured a ruling that the evidence was insufficient, but whether, *if he prevails on his sufficiency claim on appeal*, jeopardy principles would bar retrial. Under *Burks*, they would. *See, e.g.*, *United States v. Kaiser*, 660 F.2d 724, 730 (9th Cir. 1981) (reviewing allegations of evidentiary insufficiency because, "[*i*]*f true*, these allegations would invoke double jeopardy protections against retrial") (emphasis added) (citing *Hudson v. Louisiana*, 450 U.S. 40 (1981)); 15B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3918.5 (2d ed. Apr. 2017 update) ("Pretrial appeals have been allowed from denials of motions to dismiss based on arguments that, *if correct*, would establish that the defendant has a right 'not to be tried.'") (emphasis added); *see also Greene*, 834 F.2d at 89 ("*If* Greene was entitled to a judgment of acquittal, this right is too important to be denied [interlocutory] review" because of the double jeopardy implications) (emphasis added).

### D. Extending *Richardson* beyond the hung-jury context begets unjust results.

The Second Circuit's extension of *Richardson* also unfairly forces defendants to choose between moving for a new trial and appealing the sufficiency of the evidence. Even courts that have felt bound to apply *Richardson* to vacated-conviction cases recognize that their decisions "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." *Carpenter*, 494 F.3d at 25. As the Court held in *Burks*, that predicament is unacceptable. *See* 437 U.S. at 17 ("It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." (citation omitted)); *see also Sattazahn*, 537 U.S. at 127 (Ginsburg, J., dissenting) (stating that Double Jeopardy Clause should not be interpreted to require defendants to "barter" their "constitutional protection against a second prosecution" against other rights) (quoting *Green*, 355 U.S. at 193); *Richardson*, 468 U.S. at 327 (Brennan, J., concurring in part and dissenting in part).

Further, the Second Circuit's holding leads to one of two possible appellate consequences, each of which is intolerable. First, the court's holding could mean that petitioner is entitled to appellate review of the sufficiency of

the evidence at the first trial only if he is convicted at a second trial and then appeals from a final judgment of conviction. *See United States v. Anderson*, 896 F.2d 1076, 1077 (7th Cir. 1990) (reviewing sufficiency of evidence to support jury's guilty verdict at first trial, which was set aside for trial error, after conviction at second trial). But that result, in addition to unfairly forcing petitioner to "run the gauntlet" a second time before he could appeal, *Abney*, 431 U.S. at 662, would be enormously wasteful. As the Seventh Circuit has noted, "All retrials involve duplicative efforts by judges, juries, prosecutors and defendants, at considerable expense in time and money to all, and in anxiety to the defendant. If in fact insufficient evidence is presented at a first trial, a retrial, on any basis, ordinarily may be expected to be a wasted endeavor." *United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir. 1989).

The alternative potential consequence of the Second Circuit's rule is even starker: petitioner may *never* be entitled to appellate review of the sufficiency of the evidence at the first trial. *See, e.g.*, *United States v. Julien*, 318 F.3d 316, 321 (1st Cir. 2003) (holding that *Richardson* precluded defendant from appealing sufficiency of evidence at first trial, which ended in a mistrial, after conviction at second trial). Nothing in law or logic supports such an unjust outcome.

Both of these scenarios could be avoided if the court of appeals simply reviewed petitioner's double jeopardy/sufficiency claims now, as permitted by *Abney*, *Burks*, and *Richardson*—before he is forced to endure a costly, traumatic, and potentially unconstitutional second trial.

In sum, the court of appeals erroneously held that *Richardson* deprived it of jurisdiction to consider whether the Double Jeopardy Clause bars petitioner's retrial. The court's decision, besides misconstruing *Richardson*, makes a hash of double jeopardy law. It tells a criminal defendant like petitioner, in effect, "that he has a constitutional right not to be tried twice for the same offense, which can be vindicated"—if at all—"only after he has been tried twice for the same offense." *United States v. Richardson*, 702 F.2d 1079, 1086 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd*, 468 U.S. 317 (1984). That result not only defies logic and this Court's precedents, *see, e.g.*, *Abney*, 431 U.S. at 662, but also undermines the central promise of the Double Jeopardy Clause.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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