No. 17–5165

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Edward S. Zas
Counsel of Record

Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
Edward_Zas@fd.org
(212) 417-8742

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondent argues that, because petitioner has been retried, acquitted, and released from federal custody, the Court should deny the petition as moot. Petitioner agrees that the case is moot. But the appropriate course of action under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and its progeny is for the Court to grant the petition, vacate the Second Circuit's judgment, and remand (GVR) with instructions to vacate the district court's opinion and order of February 14, 2017, which denied petitioner's motion to dismiss under the Double Jeopardy Clause (Pet. App. 14a–16a). Vacatur deprives the lower courts' decisions "of precedential effect," *O'Connor v. Donaldson*, 422 U.S. 563, 577–78 n.12 (1975), "clears the path for future litigation" of the important issue presented, and "eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40; *see also Claiborne v. United States*, 551 U.S. 87, 87–88 (2007) (entering a *Munsingwear* order in a criminal case and vacating the judgment below because petitioner died after oral argument but before decision).

ARGUMENT

The Court should grant the petition, vacate the Second Circuit's judgment, and remand for vacatur of the district court's double jeopardy decision.

The Court has the authority to vacate "any judgment, decree, or order of a court lawfully brought before it for review" and to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. This authority extends to cases that become moot before the Court has an opportunity to review the lower court's decision. *Camreta v. Greene*, 563 U.S. 692, 712 (2011); *see also U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994) ("*Bancorp*").

When a petitioner is deprived of the opportunity to obtain review of an adverse judgment by the "vagaries of circumstance," *Bancorp*, 513 U.S. at 25, the proper course is "to reverse or vacate the judgment below and remand" with appropriate instructions, *id.* at 22 (quoting *Munsingwear*, 340 U.S. at 39). Vacatur in such circumstances properly "eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40. It "rightly 'strips the decision below of its binding effect,' and 'clears the path for future relitigation'" of important legal questions, *Camreta*, 563 U.S. at 713 (quoting *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988), and *Munsingwear*, 340 U.S. at 40).

The *Munsingwear* doctrine is not restricted to civil cases, for it has been applied by the Court in criminal cases as well. *See Claiborne*, 551 U.S. at 87–88. Indeed, the vacatur statute does not distinguish between the civil and criminal contexts, extending to "*any* judgment, decree, or order," 28 U.S.C. § 2106 (emphasis added), with no carve-out for criminal cases. The courts of appeals have also invoked the doctrine in criminal cases. *See*, *e.g.*, *United States v. Pool*, 659 F.3d 761, 761–62 (9th Cir. 2011) (en banc) (dismissing appeal as moot, and vacating panel opinion and "the district court's and magistrate judge's orders" under *Munsingwear*); *United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001) (en banc) (per curiam) (dismissing appeal as moot following presidential pardon and, because mootness did not result "from any voluntary acts of settlement or withdrawal by [defendant]," vacating "all opinions, judgments, and verdicts of this court and the District Court relating to the … charge"); *United States v. Miller*, 685 F.2d 123, 124 (5th Cir. 1982) (per curiam) (holding that criminal appeal had "become moot," vacating panel opinion and district court judgment, and remanding with instructions to dismiss case under *Munsingwear*); *United States v. Mora*, 135 F.3d 1351, 1358 & n.4 (10th Cir. 1998) (reversing defendant's conviction under Speedy Trial Act and vacating all other district court rulings under *Munsingwear*); *United States v. Ghandtchi (In re Ghandtchi)*, 705 F.2d 1315, 1315–16 (11th Cir. 1983) (vacating, under *Munsingwear,* district court's

ruling on its jurisdiction to review a magistrate's bail decision in extradition case when extraditee was taken back into custody).

Vacatur is particularly warranted here. While vacatur is an equitable doctrine, equity decrees that "vacatur *must* be granted where mootness results from the unilateral action of the party who prevailed in the lower court." *Bancorp*, 513 U.S. at 23 (emphasis added).

In this case, the government prevailed below by successfully opposing petitioner's double jeopardy claim in both the Second Circuit and the district court. And its unilateral action in retrying petitioner, over his double jeopardy objection, caused his certiorari petition to become moot. Specifically, the government, over petitioner's objection and multiple requests for a stay pending certiorari—including a request for a stay from this Court—forced him to stand trial a second time before his petition could be considered. While the retrial resulted in petitioner's acquittal, he was nevertheless "forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Abney v. United States*, 431 U.S. 651, 662 (1977) (footnote omitted). Thus, it was the government's action, not petitioner's, that rendered his certiorari petition moot.

Lastly, vacatur is justified because the Second Circuit held below, resolving a question of first impression in that court, that *Richardson v. United States,* 468 U.S. 317 (1984), extends beyond the hung-jury context to

vacated-conviction cases. As the petition demonstrates, the correctness of that decision is, to say the least, highly doubtful. Yet, absent vacatur, the court's unreviewed decision will have "binding effect" in the Second Circuit, *Deakins*, 484 U.S. at 200, and will "spawn[] … legal consequences." *Munsingwear*, 340 U.S. at 41. Accordingly, vacatur is warranted. *See also Trump v. International Refugee Assistance Project*, — S. Ct. —, 2017 WL 4518553, at *1 (Oct. 10, 2017) (following the "established practice" of vacating lower court's judgment where case becomes moot before Court issues decision); *cf. Alabama v. Davis*, 446 U.S. 903, 903–04 (1980), and *id.* at 904 (Stevens, J., dissenting) (issuing GVR order and remanding with instructions to vacate district court's order even though, according to the dissent, there was "no realistic possibility" that the order could "'spawn[] any legal consequences'").

CONCLUSION

If the Court agrees with the parties that this case is moot, the Court should grant the petition, vacate the judgment below, and remand with instructions to vacate the district court's opinion and order of February 14, 2017. If the Court determines that the case is not moot, it should grant the petition and conduct plenary review.

Respectfully submitted,

_____

Edward S. Zas
Counsel of Record

Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
Edward_Zas@fd.org
(212) 417-8742

Counsel for Petitioner