No. 08-364

IN THE
Supreme Court of the United States

MCWANE, INC., ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR THE CROSS-PETITIONERS

LAWRENCE S. LUSTBERG
KEVIN MCNULTY
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
JASON J. MENDRO
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Cross-Petitioners
[Additional Counsel Listed on Inside Cover]

G. DOUGLAS JONES
HASKELL SLAUGHTER YOUNG
& REDIKER LLC
1400 Park Place Tower
2001 Park Place North
Birmingham, AL 35203
(205) 251-1000

HENRY J. DEPIPPO
NIXON PEABODY LLP
1100 Clinton Square
P.O. Box 31051
Rochester, NY 14604
(585) 263-1243

FOURNIER J. GALE, III
J. ALAN TRUITT
CHRISTOPHER J. WILLIAMS
MAYNARD COOPER & GALE PC
2400 Regions Harbert Plaza
1901 6th Avenue North
Birmingham, AL 35203
(205) 254-1000

JACK W. SELDEN
DAVID E. ROTH
SCOTT BURNETT SMITH
BRADLEY ARANT ROSE & WHITE
LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8000

JUDSON W. STARR
JOSEPH G. BLOCK
BRIAN L. FLACK
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
(202) 344-4000

RULE 29.6 STATEMENT

The corporate disclosure statement included in the conditional cross-petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REPLY BRIEF FOR THE CROSS-PETITIONERS

The court of appeals unambiguously concluded that the government "did not present *any* evidence" —much less legally sufficient evidence—under the *correct* analysis of the jurisdictional element of the Clean Water Act. 08-223 Pet. App. 27a–28a (emphasis added). Despite this clear finding, the court refused to order judgments of acquittal because it believed that a retrial would comport with the Double Jeopardy Clause if the evidence was sufficient under the *erroneous* interpretation of the Act that the government aggressively pressed upon the trial court over the defendants' repeated and vociferous objections. The court of appeals was wrong to believe that permitting a retrial in these circumstances is remotely consistent with basic double jeopardy protections, this Court's cases, or rudimentary principles of fairness. The Eleventh Circuit's error, on a legal issue that has divided the circuits, warrants this Court's review.

The government's opposition purports to address a number of questions, but nowhere does it directly confront the question that the cross-petition presents: whether the Double Jeopardy Clause bars retrial when the government failed to produce sufficient evidence under the *correct* definition of the elements of the offense. To elide that question, the government attempts a veritable "*tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini." *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 222 (1979) (Rehnquist, J., dissenting).

The government, however, is no Houdini. All of its sleights-of-hand are transparent and unsuccessful.

First, the government repeatedly suggests that the law somehow, surprisingly "changed" between the trial and the appeal of this case. But the government cannot benefit here from the fact that, before *Rapanos v. United States*, 547 U.S. 715 (2006), it had persuaded a handful of *lower* courts to ignore this Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001). Those lower court rulings were never the law. This Court's "construction of a statute is an authoritative statement of what the statute meant *before* as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994) (emphasis added); *see* Pet. 8 & 15. Tellingly, the government does not once address *Rivers*.[1]

Second, the government asserts that there is no substantive constitutional right that requires an appellate court to rule on sufficiency claims. On this view, *Burks v. United States*, 437 U.S. 1 (1978), is purely a procedural rule akin to *res judicata*: a second trial is barred only if a court has affirmatively elected to assess sufficiency and has declared the

---

[1] Indeed, the government's notion that it is, even now, entitled to benefit from the errors it intentionally foisted on some lower courts rings particularly hollow in this case, which was tried *after* the Fifth Circuit had rejected the government's attempt to ignore *SWANNC*, *see United States v. Needham (In re Needham)*, 354 F.3d 340, 345 (5th Cir. 2003), and thus the conflict that this Court addressed in *Rapanos* already existed.

evidence insufficient. It is unclear why the government believes this supposed "rule" helps its case, since the Eleventh Circuit did declare in this case that the government presented *no evidence* under the correct legal standard. 08-223 Pet. App. 27a–28a. But in any event, the government's cramped understanding of constitutional protections is surely wrong. A claim of insufficiency of the evidence is a substantive legal claim that *must* be addressed and correctly resolved when properly presented, not only on direct appeal but even in federal habeas corpus. *See Jackson v. Virginia*, 443 U.S. 307, 318 (1979). And if the government presented "no evidence" on an element of the crime, as the Eleventh Circuit found here, *Burks* squarely forbids a second trial for the same offense.

Finally, the government contends that there is no circuit "conflict" even though it readily concedes that in some circuits an appellant who presents a meritorious challenge to the sufficiency of the government's proofs will avoid retrial on double jeopardy grounds, while in other circuits he will be sent back to the district court to face the very real risk of conviction at a second trial, where the government may supply evidence that it failed to muster at the first trial. This genuine conflict warrants the Court's review.

I. THIS COURT'S PRECEDENTS PRECLUDE THE GOVERNMENT'S ARGUMENTS

The government concedes that the Constitution bars retrial after an appellate court reverses a conviction based on insufficiency of the evidence. Opp. 7; *Burks*, 437 U.S. at 18. Yet the government maintains that after reversing an invalid conviction

an appellate court may *always* remand for retrial by simply ignoring insufficiency claims. No court can have "discretion," however, to ignore a properly presented claim that the prosecution presented constitutionally insufficient evidence to support a conviction—a claim that is cognizable even on habeas review of state convictions. *See Jackson*, 443 U.S. at 320–21.

The government's interpretation of *Burks* is also illogical on its own terms, would render the double jeopardy protections recognized in *Burks* a virtual nullity, and is inconsistent with *Tibbs v. Florida*, 457 U.S. 31 (1982). Tibbs argued that this Court's decision not to extend double jeopardy protections to reversals based on the *weight* of the evidence would "undermine the *Burks* rule by encouraging appellate judges to base reversals on the weight, rather than the sufficiency, of the evidence." *Id.* at 44. If the government's view were correct, this Court would have replied that there is no right *at all* to have the sufficiency argument addressed on appeal. It certainly would have had no reason to discuss federal constitutional "restraints on the power of appellate courts to mask reversals based on legally insufficient evidence as reversals grounded on the weight of the evidence." *Id.* at 45 (citing *Jackson*).

The two cases on which the government principally relies—*Richardson v. United States*, 468 U.S. 317 (1984), and *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984)—actually demonstrate how far the government needs to stretch in its effort to avoid *Burks*. The defendant in *Richardson* was seeking an *extension* of *Burks*. Although this Court has held since the earliest days of the Republic that a defendant may be tried a second time if his first

trial *never even concluded*—because a mistrial was declared (*see United States v. Perez*, 9 Wheat. 579 (1824))—Richardson contended that no retrial could occur in such a case unless the evidence that had been adduced before the mistrial was sufficient to support a conviction. This Court was "entirely unwilling to uproot [its] settled line of authority [governing mistrials] by extending the reasoning of *Burks*," even if such an extension might be logical, because it found that the mistrial context uniquely called for applying "Justice Holmes' aphorism that 'a page of history is worth a volume of logic.'" *Richardson*, 468 U.S. at 325–26.[2]

Lydon is even farther afield. It involved an unusual Massachusetts procedure allowing *defendants* charged with minor crimes to *opt* for two trials—first a bench trial and, if convicted, a *de novo* trial by jury. 466 U.S. at 296–97. The Court had no occasion to address the duty of appellate courts to decide a properly presented claim of insufficiency of evidence, much less the effect of a reversal on appeal, because there was no right to appeal following a bench trial under this unique state procedure. Since the government, unsurprisingly, can point to no centuries-old practice treating controlling opinions like *Burks*

---

[2] This Court has not expanded the application of the continuing jeopardy principle since *Richardson*, especially not to a case where a judgment of conviction was entered and then reversed on appeal. And lower courts have therefore interpreted *Richardson* narrowly. *See, e.g.*, *United States v. Wood*, 958 F.2d 963, 970 (10th Cir. 1992) ("*Richardson*'s failure to elaborate on what events terminate jeopardy or when the continuing jeopardy principle is applicable makes us reluctant to mechanically apply its holding to a different set of facts.").

as optional admonitions, or to any indication that the federal appellate process contains some outlandish quirk that this Court could not have anticipated in *Burks* itself, its reliance on *Richardson* and *Lydon* in defense of the judgment below is, at best, fanciful.

The government argues nonetheless that federal appellate courts are free to avoid review of sufficiency of evidence claims for any reason, or for no reason at all. It identifies no other criminal appellate issue that a court may decline to reach even though a favorable ruling would change the outcome of the appeal. If sufficiency of evidence is merely an optional claim, presumably a court could decline to address it even if it is the only claim on appeal.[3] This Court's precedents admit of no such rule.

In any event, the court below *did* reach and decide the sufficiency of evidence issue. The Eleventh Circuit even went so far as to state that the government failed to adduce evidence sufficient to prove that cross-petitioners violated the CWA as that Act is correctly construed:

> Wagoner (the EPA investigator [and the government's expert witness]) . . . did not testify as to any "significant nexus" between Avondale Creek and the Black Warrior River. The government *did not present any evidence*, through Wagoner or

[3] Perhaps the government believes that sufficiency claims must be considered only if they are tendered as the *sole* claim on appeal. That would be utterly nonsensical: the more error the government commits at trial—even error having no possible bearing on its failure to present sufficient proofs—the greater the likelihood that the government would win a second bite at the apple.

> otherwise, about the possible chemical, physical, or biological effect that Avondale Creek may have on the Black Warrior River, and there was also *no evidence presented* of any actual harm suffered by the Black Warrior River.

08-223 Pet. App. 27a–28a (emphases added). This direct ruling squarely presents the double jeopardy question, even on the government's view.

II. THE DIVISION OF AUTHORITY AMONG THE CIRCUITS IS DEEP

Despite its best efforts to the contrary, the government succeeds only in highlighting the disarray plaguing the circuit courts on how the double jeopardy protections recognized in *Burks* must be applied. The government openly concedes that the circuits enforce those protections inconsistently: "several circuits have adopted a policy that they will review insufficiency claims even when they reverse convictions for instructional or other trial errors." Opp. 21. This inconsistent application of protection against the government "honing its trial strategies and perfecting its evidence through successive attempts at conviction," *Tibbs*, 457 U.S. at 41, lies at the heart of the question presented. In fact, the government concedes a *three-way* circuit split: the circuits that review sufficiency claims despite other grounds for reversal are divided over whether such review is constitutionally required or merely prudential. *Compare* Opp. 21–22 *with id*. at 22 n.7.[4]

---

[4] Even if there were some ground for supposing that the duty of courts of appeals to review, and correctly adjudicate, insuffi-

[Footnote continued on next page]

The government also argues that no circuit would bar a retrial here because "an intervening change of law" accounted for its failure of proof. Opp. 16. The government is wrong on both conclusion and premise.

As to the conclusion, even the government concedes that the Tenth Circuit holds that the Constitution *requires* review of sufficiency claims, albeit (according to the government) "without any analysis." Opp. 22 n.7. Moreover, the Tenth Circuit also expressly rejects the government's view that sufficiency should be judged against an incorrect definition of the offense. The government dismisses a solid line of Tenth Circuit authority on the ground that each panel "misconstrued" the Tenth Circuit's earlier decision in *United States v. Wacker*, 72 F.3d 1453 (10th Cir. 1995). Opp. 20. But *Wacker*, which involved 18 U.S.C. § 924(c), in fact *barred* retrial on all counts where the proofs were insufficient under the standard set forth in *Bailey v. United States*, 516 U.S. 137 (1995)—even though, before this Court decided *Bailey*, the courts of appeals had accepted the government's expansive view of the statute. It permitted retrial *only* on count seven, where the court "[could] not say how a jury might decide this issue [of

---

[Footnote continued from previous page]
ciency claims is a matter of supervisory authority rather than constitutional right, this Court will review inconsistent assertions of supervisory authority by courts of appeals where, as here, a uniform national rule of procedure is needed to ensure that similarly situated parties are treated in the same manner. *See, e.g.*, *Ortega-Rodriguez v. United States,* 507 U.S. 234 (1993).

'use'] if properly instructed under the law as defined by *Bailey*." 72 F.3d at 1463–65.

Wacker "held that outright reversal is required only where there is no evidence that could support a defendant's conviction under the *proper* legal standard." *United States v. Simpson*, 94 F.3d 1373, 1379 (10th Cir. 1996) (emphasis added). The government's suggestion that the *Simpson* panel misunderstood the decision a year earlier in *Wacker*, even though *Simpson* directly cited *Wacker* on the very point at issue, would come as some surprise to Judge Ebel, who authored *both* opinions. Thus, the circuit conflict is real and not susceptible to intra-circuit repair.[5] The government's attempts to distinguish the other conflicting cases cited in the cross-petition, are similarly off the mark.

The government, for good measure, is also wrong on its premise: there was no "change" in the law. *See Rivers*, 511 U.S. at 312–13. The government engaged in a calculated strategy of disregarding its losses in this Court, and would suffer no injustice if cross-petitioners' constitutional rights were enforced.

---

[5] *United States v. Pearl*, 324 F.3d 1210 (10th Cir. 2003), also does not create an intra-circuit conflict. The government speculates that when *Pearl* observed, in dicta, that double jeopardy bars retrial where "the government produces *no* evidence at trial," Opp. 21 (quoting *Pearl*), it meant where "the evidence was not sufficient under *any* standard," *id*. at 21. But *Pearl*'s citation here was *United States v. Smith*, 82 F.3d 1564 (10th Cir. 1996), one of the cases that the government concedes *supports* the rule that "double jeopardy principles" bar retrial unless "the evidence would have been sufficient to support a conviction for carrying a firearm under a *proper* instruction." 82 F.3d at 1567 (emphasis added).

Indeed, far from being deprived of the opportunity or incentive to present sufficient evidence, the government fought quite hard for the right to be relieved of that need. It is disingenuous in the extreme for the government to complain that *the court* "discouraged" the development of evidence required to meet the government's burden. Opp. 14 n.3.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT

The government claims that cross-petitioners would not benefit from a double jeopardy ruling "because the trial evidence was sufficient to support their convictions under any possible interpretation of *Rapanos*." Opp. 22–23. By "any possible interpretation," the government means the two incorrect interpretations to which it clings as it seeks to avoid, once again, the limitations this Court has placed on federal authority under the CWA.

First, the government implausibly contends that the *Rapanos* plurality construes the CWA to regulate virtually all waters in the United States, no matter how remote or insignificant their link to traditionally navigable, interstate waters. This interpretation is wrong for all the reasons stated before. 08-223 Opp. 11–26. The evidence was insufficient because the government failed to show, among other things, proximity between Avondale Creek and interstate navigable waters or, for that matter, that discharges ever flowed to interstate navigable waters.[6] Thus, even

---

[6] Indeed, the government concedes that the Black Warrior River is not an "interstate" waterway. 08-223 Reply 9. It nonetheless contends that it is a water "of the United States" be-

[Footnote continued on next page]

under the plurality test the Double Jeopardy Clause bars retrial.

Second, the argument that this Court should deny review because the evidence satisfied Justice Kennedy's significant nexus test is startling; the Eleventh Circuit, which thoroughly canvassed the record to address the *very same* fact-intensive issue, concluded that the government utterly failed to present *any* such evidence. 08-223 Pet. App. 27a–28a. The government's related assertion about the toxicity of the discharges is once again completely undermined by the record. "The government presented no evidence, through [its EPA expert] or otherwise, of the chemical, physical or biological effect that Avondale Creek's waters had or might have had on the Black Warrior River. Indeed, the district court observed that there was no evidence of any actual harm or injury to the Black Warrior River." *Id.* at 4a.

[Footnote continued from previous page]
cause waters flowing *from* it eventually reach *other* waters that actually are interstate. *Id*. n.5 (noting that the Black Warrior River leads to the Tombigbee River, which leads to the Mobile River, which leads to the Gulf of Mexico). Here again, the government ascribes to the plurality a *Finding Nemo*, all-drains-lead-to-the-ocean approach that the plurality squarely rejected. Whether cross-petitioners conceded the Black Warrior River's *navigability* is irrelevant; the plurality *additionally* requires that even navigable waters be waters of the United States. And because defendants argued that the government failed the plurality test, any waiver assertions are frivolous. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (a party may make all arguments encompassed within its preserved federal claim, even arguments it expressly disavowed below).

In any event, the arguments the government makes now about *Rapanos* would be before the Court if it grants the government's petition. If cross-petitioners prevail on the merits of those arguments, the double jeopardy claim on which the circuits are split will be squarely presented.

CONCLUSION

The question presented in the cross-petition is based on an entrenched and pernicious circuit conflict, and it is far more worthy of review than the government's question. If the Court grants the government's petition, the cross-petition should be granted, and the Court should summarily affirm reversal of the convictions with a remand for dismissal of the indictment.

Respectfully submitted.

LAWRENCE S. LUSTBERG
KEVIN MCNULTY
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
JASON J. MENDRO
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

G. DOUGLAS JONES
HASKELL SLAUGHTER YOUNG
& REDIKER LLC
1400 Park Place Tower
2001 Park Place North
Birmingham, AL 35203
(205) 251-1000

HENRY J. DEPIPPO
NIXON PEABODY LLP
1100 Clinton Square
P.O. Box 31051
Rochester, NY 14604
(585) 263-1243

FOURNIER J. GALE, III
J. ALAN TRUITT
CHRISTOPHER J. WILLIAMS
MAYNARD COOPER & GALE PC
2400 Regions Harbert Plaza
1901 6th Avenue North
Birmingham, AL 35203
(205) 254-1000

JACK W. SELDEN
DAVID E. ROTH
SCOTT BURNETT SMITH
BRADLEY ARANT ROSE & WHITE LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8000

JUDSON W. STARR
JOSEPH G. BLOCK
BRIAN L. FLACK
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
(202) 344-4000

Counsel for Cross-Petitioners

NOVEMBER 10, 2008