No. 13-291

In the Supreme Court of the United States

DANIEL E. CARPENTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the denial of a criminal defendant's motion for a judgment of acquittal is subject to immediate interlocutory appeal under the collateral-order doctrine when the district court has granted the defendant's alternative motion for a new trial.

2. Whether the government's interlocutory appeal of a district court order granting a new trial entitles a defendant to cross-appeal the denial of his motion for a judgment of acquittal.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. The opinion and order of the district court (Pet. App. 3a-43a) is reported at 808 F. Supp. 2d 366. A prior decision of the court of appeals (Pet. App. 44a-84a) is reported at 494 F.3d 13.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on May 3, 2013. On July 23, 2013, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including September 3, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was found guilty of 14 counts of wire fraud, in violation of 18 U.S.C. 1343, and five counts of mail fraud, in violation of 18 U.S.C. 1341. Pet. App. 47a. The district court denied petitioner's motion for a judgment of acquittal but granted his motion for a new trial. *Id.* at 49a-50a. The government appealed the district court's grant of a new trial, and petitioner cross-appealed the denial of his motion for a judgment of acquittal. The court of appeals affirmed the grant of a new trial and dismissed the cross-appeal for lack of jurisdiction. *Id.* at 44a-84a.

Following a retrial, a jury found petitioner guilty of the same 14 counts of wire fraud and five counts of mail fraud. The district court again denied petitioner's motion for a judgment of acquittal but granted his motion for a new trial. Pet. App. 3a-43a. The government appealed the district court's grant of a second new trial, and petitioner cross-appealed the denial of his motion for a judgment of acquittal. In May 2013, the court of appeals dismissed petitioner's cross-appeal for lack of jurisdiction. *Id.* at 1a-2a. In September 2013, petitioner filed the instant petition seeking this Court's review of that dismissal. In November 2013, the court of appeals reversed the district court's grant of a new trial, reinstated petitioner's convictions, and remanded the case for "prompt" sentencing. 2013 WL 6153701, at *10 (Nov. 25, 2013).

1. Section 1031 of the Internal Revenue Code, Title 26 U.S.C., allows a person to defer the capital gains tax on the sale of commercial property if he uses the proceeds of the sale to purchase replacement property

within 180 days. I.R.C. 1031(a)(3). To be eligible for the tax deferral, the seller cannot take possession of the proceeds during the 180-day window. Accordingly, Section 1031 "intermediaries" offer their services to hold the proceeds in escrow until the seller is ready to purchase replacement property. Pet. App. 4a-5a.

Petitioner served as chairman of Benistar Property Exchange Trust Company (BPETCO), one such Section 1031 intermediary. Pet. App. 4a. BPETCO's written agreements with its clients provided that the proceeds from their initial property sales would go directly to BPETCO. *Id.* at 13a-19a. BPETCO was to hold those funds in a Merrill Lynch Ready Asset Money Market Account paying three percent interest (if the client wanted access to the funds on 48 hours' notice) or a Merrill Lynch Investment Account paying six percent interest (if the client was willing to wait 30 days for the funds). *Ibid.* BPETCO was to release the funds—either to the client or to the seller of replacement property—only on the client's written direction. *Id.* at 16a-17a.

Petitioner had little direct contact with clients but approved all written materials that BPETCO gave the clients. Pet. App. 4a, 7a, 27a; 11-2131 Gov't C.A. Br. 6-7 (Gov't C.A. Br.). Petitioner was primarily responsible for receiving, holding, and disbursing client funds. Pet. App. 4a, 20a; Gov't C.A. Br. 6, 10-11. In that capacity, he used the funds, without the clients' knowledge, for high-risk trading in stock options. Pet. App. 20a-21a, 24a-26a; Gov't C.A. Br. 10-12. His apparent intent was to return the funds and specified interest to the clients while keeping the trading profits, which he hoped would exceed $1 million. Pet. App. 38a; Gov't C.A. Br. 13.

Petitioner first opened accounts at Merrill Lynch, which warned him orally and in writing that his stock option trading was extremely risky. Pet. App. 20a-21a, 45a-46a; Gov't C.A. Br. 10-11. Merrill Lynch's brokers specifically counseled petitioner on the dangers of his investment strategy when, in 2000, the stock market began a downturn. Pet. App. 20a-21a, 46a; Gov't C.A. Br. 11-12. Petitioner continued the same high-risk trading activity and, after he had lost $4 million, Merrill Lynch terminated his trading privileges. Pet. App. 21a, 46a; Gov't C.A. Br. 12.

Petitioner then opened an account with Paine Webber with a similar plan and similar results. Pet. App. 21a; Gov't C.A. Br. 12. He engaged in high-risk options trading, despite warnings from Paine Webber, and his trading privileges were terminated after he sustained heavy losses. Pet. App. 21a, 46a; Gov't C.A. Br. 12.

Although petitioner initially repaid outgoing clients with incoming client funds, the trading losses became so great that BPETCO was forced to close without repaying some clients. Pet. App. 47a; Gov't C.A. Br. 12-13. Throughout the period when BPETCO was experiencing heavy losses, the company—with petitioner's knowledge—continued to represent to clients that they would receive the promised returns on their money. 2013 WL 6153701, at *3, *8.

2. A grand jury in the United States District Court for the District of Massachusetts returned a superseding indictment charging petitioner with fourteen counts of wire fraud, in violation of 18 U.S.C. 1343, and five counts of mail fraud, in violation of 18 U.S.C. 1341. 1:04-cr-10029-GAO Docket entry No. 34 (Docket entry No.) (Sept. 24, 2004). The indictment alleged

that petitioner had schemed to defraud BPETCO's clients by representing that their money would be held in low-yield "escrow" accounts when in fact he intended to use it to "engage in aggressive, high risk trading in the options market, with the goal of leveraging the funds into a substantial profit for himself." *Id.* at 7-8.

Petitioner pleaded not guilty and the case proceeded to a jury trial at which BPETCO's clients, petitioner's brokers, and petitioner's BPETCO colleague, Martin Paley, testified to the facts described above. Pet. App. 47a-48a & n.2. In closing argument, the government focused on the options trading petitioner conducted after he had received warnings from brokers, contrasting that conduct with the nature of a Section 1031 transaction and the purposes for which BPETCO's clients had entrusted BPETCO with their money. *Id.* at 49a. In that context, the government stated that petitioner had "gambl[ed]" with client funds, and it used gambling metaphors to describe and explain his conduct. *Ibid.*

The jury found petitioner guilty on all counts. Docket entry No. 149. Petitioner thereafter filed a motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29, Docket entry No. 160, and a separate motion for a new trial under Federal Rule of Criminal Procedure 33, Docket entry No. 158. The motion for a judgment of acquittal argued, *inter alia*, that the government had introduced insufficient evidence to disprove petitioner's good faith and to show that petitioner caused the specific mailings and wires charged in the indictment. Docket entry No. 160, at 2-4, 14-15. The Rule 33 motion contended that a new trial was warranted because, *inter alia*, the govern-

ment made improper closing arguments. Docket entry No. 158, at 25-37.

The district court denied petitioner's motion for a judgment of acquittal. Docket entry No. 192, at 1-15. The court found sufficient evidence for the jury to conclude that petitioner "knew that the material information that [client] funds would be used in options trading was withheld from the exchangors" and to conclude that petitioner "had a specific intent to defraud." *Id.* at 11. The court also found, in light of petitioner's role at BPETCO and his approval of materially misleading promotional materials and transaction documents, that sufficient evidence supported the jury's conclusion that petitioner "reasonably foresaw that the mails or interstate wire communications facilities would be used in the consummation of" his fraud scheme. *Id.* at 13-14.

Turning to the motion for a new trial, the district court found that the government's repeated use of gambling references in closing argument, though not "wholly inapt," may have "diverted the jury from its consideration of the crimes charged and may thus have induced a verdict based on the jury's disapproval of the 'gambling,' rather than because the jury was satisfied beyond a reasonable doubt that the elements of the offenses charged had been proven." Docket entry No. 192, at 26, 28. The court determined that "the jury would certainly have been warranted in concluding beyond a reasonable doubt that [petitioner] acted with intent to defraud, but a contrary conclusion also would have been rationally possible on the evidence." *Id.* at 28. The court therefore could not say "with confidence that the government's improper closing arguments did not taint the verdict." *Ibid.* On

that basis, the court set aside petitioner's convictions and granted him a new trial. *Id.* at 28-29.

3. The government appealed that ruling, contending that petitioner had not objected to the closing argument and that the prosecutor's statements did not amount to plain error. A divided court of appeals affirmed. Declining to apply a plain-error standard and considering the "substantial deference" afforded the district court in granting a new trial, the court found no abuse of the district court's discretion. Pet. App. 63a; see *id.* at 50a-64a.[1] Judge Campbell dissented. He would have remanded the case for further findings under a plain-error standard. *Id.* at 75a-84a.

Petitioner attempted to cross-appeal the denial of his motion for a judgment of acquittal, but the court of appeals unanimously dismissed the cross-appeal for lack of jurisdiction. Pet. App. 64a-73a. The court rejected petitioner's claim that a retrial raised double jeopardy concerns and that he was therefore entitled to appeal under the collateral-order doctrine, which applies only when a failure to permit immediate appeal will "infringe rights which [the] appellant could not effectively vindicate in an appeal after final judgment in the case." *Id.* at 66a (quoting *United States* v. *Kouri-Perez*, 187 F.3d 1, 5 (1st Cir. 1999)). Applying this Court's decision in *Richardson* v. *United States*, 468 U.S. 317 (1984), the court of appeals concluded that petitioner had no right to avoid retrial for his offense, so there was no double-jeopardy-related right

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[1] Judge Lynch filed a concurring opinion, emphasizing that she did not find that the government had argued "improperly," but only that the district court could determine in the interests of justice that the closing might have distracted the jury from considering the charges. Pet. App. 73a-74a.

for him to vindicate on appeal. Pet. App. 67a-68a.[2] The court also explained that petitioner's "sufficiency arguments [were] deeply entwined with the merits of the mail and wire fraud charges that constitute the underlying action," and it found "little comparability between the review" of the new-trial grant and the review that would be necessary to resolve petitioner's sufficiency claims. *Id.* at 72a.

Petitioner filed a petition for a writ of certiorari seeking review of the dismissal of his cross-appeal. That petition raised the same basic questions, made the same set of arguments, and relied on virtually all the same authorities as the petition now before this Court. The Court denied review. 552 U.S. 1230 (2008) (No. 07-515).

4. Just before his retrial, petitioner moved to dismiss the indictment, claiming that the "retrial [would] violate the Double Jeopardy Clause" because he "received the functional equivalent of an acquittal" at the initial trial "on charges that he * * * aided and abetted" Paley in a fraud scheme. Docket entry No. 275, at 1. The district court summarily denied the motion. Docket entry No. 302.

At retrial, as at the initial trial, the government's theory was that BPETCO's promotional materials misled investors into believing that their funds would

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[2] The court of appeals noted that petitioner had not moved to dismiss the indictment on double-jeopardy grounds and that the case therefore did not involve review of "a double jeopardy ruling by the trial court, or a claim that such a double jeopardy ruling itself falls within the collateral order doctrine." Pet. App. 68a n.9. Rather, the court explained, petitioner had urged double-jeopardy considerations in support of his argument that the district court's denial of his motion for acquittal was itself subject to immediate appeal. *Ibid.*

be held safely in escrow accounts and that petitioner knew and intended as much. To support that theory, the government once again introduced the promotional materials and related transaction documents as well as testimony about petitioner's high-risk trading activity. Pet. App. 7a-22a, 24a-26a; Gov't C.A. Br. 6-14. In closing argument, the government stated that the promotional materials falsely "represent[ed] that the money [would] be held for the exchangors' benefit" and would be "held safe and secure." Pet. App. 32a; Gov't C.A. Br. 16. The government also emphasized that petitioner was using the investors' money to try "to make a killing for himself in the options market" while "giv[ing] them a measly 3 or 6 percent." Pet. App. 38a; Gov't C.A. Br. 15-16.

At the end of the retrial, the jury found petitioner guilty on all counts. Docket entry No. 285. Petitioner thereafter filed a motion for a judgment of acquittal under Rule 29 and a motion for a new trial under Rule 33. Docket entry Nos. 309, 311, 312. The motion for a judgment of acquittal argued, *inter alia*, that the government introduced insufficient evidence to prove a scheme to defraud (Docket entry No. 309, at 8-10) or to disprove petitioner's good faith (*id.* at 10-38). The Rule 33 motion contended that a new trial was warranted because, *inter alia*, the government made improper closing arguments. *Id.* at 45-52.

The district court denied petitioner's motion for a judgment of acquittal. Pet. App. 23a-30a. The court once again found the evidence sufficient to establish that petitioner "knew of and approved * * * a material false representation" in BPETCO's marketing materials and exchange documents—a representation intended to "induce the exchangors to enter into

* * * property exchange transaction[s]" in the belief "that their funds would be held in stable[]" accounts rather than sunk into "aggressive investment[s]." *Id.* at 24a-26a.

Again, however, the district court granted petitioner's motion for a new trial, concluding that the government's closing argument prejudicially "poisoned the well." Pet. App. 41a-42a. Rejecting all of the arguments that petitioner had raised in this regard, the court came up with three reasons of its own for that conclusion: that the government had "overstate[d]" the falsity of BPETCO's promotional materials and transaction documents, which contained "no explicit representations of safety and security," *id.* at 32a; that the government had relied on "assumptions and generalities" about the inherent attributes of a Section 1031 property exchange and the meaning of the term "escrow," implying that the exchange funds would be "parked" and would "not be subject to any risk whatsoever," *id.* at 34a-35a; and that the government had "chastised [petitioner] for acting selfishly" and thereby "encouraged the jury to convict [him] for a reason unrelated to the wire and mail fraud charges, namely, that he was trying to reap a benefit for himself by investing the exchangors' funds," *id.* at 38a-39a.

5. The government appealed the grant of a new trial. Docket entry No. 378. Petitioner attempted to cross-appeal the denial of his motion for a judgment of acquittal, but did not challenge the district court's denial of his motion to dismiss on double-jeopardy grounds. Docket entry No. 380.

On May 3, 2013, the court of appeals dismissed the cross-appeal for lack of jurisdiction in a brief un-

published order. Pet. App. 1a-2a. The court explained that dismissal was warranted "[f]or the reasons stated in" its decision dismissing petitioner's previous cross-appeal and added that the law-of-the-case doctrine precluded a different result. *Id.* at 2a; see *id.* at 64a-73a. The court considered the possible relevance of *Yeager* v. *United States*, 557 U.S. 110 (2009), a case this Court decided after the dismissal of the earlier cross-appeal, but concluded that *Yeager* "firmly rest[ed]" on this Court's existing precedent and did not "represent[] a dramatic change in the controlling legal authority." Pet. App. 2a.

On September 3, 2013, petitioner filed the instant petition seeking review of the dismissal of the cross-appeal. On November 25, 2013, the court of appeals resolved the pending appeal in the government's favor, reversing the grant of a new trial and reinstating petitioner's convictions. 2013 WL 6153701, at *1-*11. The court scrutinized the government's closing argument and concluded that "[n]one of the comments that the district court relied upon as the basis for ordering a new trial [was] actually improper"; rather, those comments were permissible descriptions of the evidence or statements of the government's theory of the case. *Id.* at *6, *8. The court also rejected petitioner's alternative argument that several other purported trial errors—including different comments in the government's closing argument than the ones on which the district court had focused—warranted a new trial. See *id.* at *8-*10. Accordingly, the court remanded the case to the district court for "prompt sentencing." *Id.* at *11.

ARGUMENT

1. Petitioner contends that, although the district court granted his request for a new trial, he is entitled to interlocutory appellate review of his argument, which the district court rejected, that the evidence at his second trial was not sufficient to sustain his convictions. The primary reason he gives in support of that contention is that he will otherwise face another trial in the district court, which, he asserts, implicates double-jeopardy concerns. See, *e.g.*, Pet. 2-5, 14-15.

This case is no longer an appropriate vehicle for addressing those jurisdictional questions. After the filing of the petition, the court of appeals reversed the district court's grant of a new trial, reinstated petitioner's convictions, and remanded the case for "prompt sentencing." 2013 WL 6153701, at *1-*11 (Nov. 25, 2013). Accordingly, no additional trial will take place. Once the district court "prompt[ly]" sentences petitioner and enters judgment, petitioner will have the opportunity to present his sufficiency challenge (along with any other appropriate arguments) on appeal from a "final decision[]" pursuant to 28 U.S.C. 1291. See Pet. App. 72a-73a.

The petition has therefore been overtaken by events. Without the possibility of an additional trial, petitioner no longer has any argument that an interlocutory appeal on the sufficiency of the evidence is necessary for him to avoid what he describes as "the public embarassment, opprobrium, and immense personal hardship" of such a proceeding. Pet. 14. And even if this Court were to take up this case and rule in petitioner's favor—despite the fact that the recent First Circuit decision has removed the central pillar of petitioner's jurisdictional arguments, see, *e.g.*, Pet. 14-

15; *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995) (explaining that the collateral-order doctrine encompasses only issues "effectively unreviewable on appeal from the final judgment")—he could gain nothing from that exercise. By the time this Court could hear the case, even if it were inclined to remand for interlocutory appellate review of his sufficiency challenge, the district court's post-sentencing judgment would almost certainly already have been entered, and no interlocutory review would be possible. Indeed, by that time a Section 1291 appeal on the sufficiency issue may already be underway.

Under those circumstances, the question whether the court of appeals may or must review the sufficiency issue on interlocutory appeal lacks any practical import, cf. *Padilla* v. *Hanft*, 547 U.S. 1062, 1062-1063 (2006) (Kennedy, J., concurring) (explaining that review is not warranted where effect of resolving the question presented "would be hypothetical"), and could well be moot well before the Court could resolve this case on the merits, see generally *Knox* v. *SEIU*, 132 S. Ct. 2277, 2287 (2012) (case becomes moot when "it is impossible for a court to grant any effectual relief whatever to the prevailing party") (citation and internal quotation marks omitted).

2. In any event, petitioner's claim (now effectively moot) that he was entitled to interlocutory review of his sufficiency claim to avoid a retrial lacks merit. The court of appeals correctly applied this Court's decision in *Richardson*, and its jurisdictional holding does not conflict with a decision of this Court or another court of appeals.

a. Petitioner argues (Pet. 15-27) that double-jeopardy principles entitle him to interlocutory review

of his sufficiency challenge under the collateral-order doctrine. To qualify for immediate appeal under that doctrine, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will* v. *Hallock*, 546 U.S. 345, 350 (2006) (citation omitted; brackets in original).

Petitioner does not cite any decision holding that the denial of a motion to acquit is subject to immediate appellate review pursuant to that test. To the contrary, several courts of appeals have, like the court below, concluded that defendants are not entitled to interlocutory review of the sufficiency of the government's evidence under the collateral-order doctrine. See Pet. App. 66a-68a; *United States* v. *Eberhart*, 388 F.3d 1043, 1051-1052 (7th Cir. 2004), rev'd on other grounds, 546 U.S. 12 (2005) (per curiam), cert. denied, 549 U.S. 903 (2006), and 551 U.S. 1132 (2007); *United States* v. *Ferguson*, 246 F.3d 129, 137-138 (2d Cir. 2001); *United States* v. *Wood*, 958 F.2d 963, 967-971 (10th Cir. 1992).

Petitioner does, however, argue (Pet. 16-17) that the denial of a motion to acquit is analogous to the denial of a non-frivolous motion to dismiss proceedings based on the Double Jeopardy Clause, which is immediately appealable as a collateral order. See *Abney* v. *United States*, 431 U.S. 651, 660-661 (1977) ("[T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence."). That analogy is mistaken. First, as the Court explained in *Abney*, "[t]he elements of [a double

jeopardy] claim are completely independent of [the defendant's] guilt or innocence." *Id.* at 660. A defendant who raises such a claim "makes no challenge whatsoever to the merits of the charge against him," arguing only that he has already been subjected to jeopardy for the same offense. *Id.* at 659. Here, in contrast, the issue as to which petitioner sought to cross-appeal—that "the government failed to present sufficient evidence * * * to permit a reasonable jury to convict him," Pet. App. 64a; see *id.* at 1a-2a, 71a-72a—went directly to the merits.

Second, where a defendant has been found guilty and then granted a new trial, no double-jeopardy problem arises because the initial jeopardy has not terminated. Under the Double Jeopardy Clause, acquittal of a substantive criminal charge bars retrial because it finally disposes of the case and terminates the defendant's jeopardy. See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). This is so whether it is the jury, *United States* v. *Ball*, 163 U.S. 662, 671 (1896), the trial judge at a bench trial, *Smalis* v. *Pennsylvania*, 476 U.S. 140, 144 (1986), the district court on a motion for acquittal, *Burks* v. *United States*, 437 U.S. 1, 10-11 (1978), or an appellate court, *id.* at 18, that finds the evidence insufficient to sustain a conviction. By contrast, when a defendant's conviction is set aside based on "an error in the proceeding leading to conviction," *United States* v. *Tateo*, 377 U.S. 463, 465 (1964), the defendant remains in "continuing jeopardy" because the "criminal proceedings against [him] have not run their full course," *Price* v. *Georgia*, 398 U.S. 323, 326 (1970).

In *Richardson* v. *United States*, 468 U.S. 317 (1984), this Court held that the Double Jeopardy

Clause does not bar retrial after a mistrial, despite a defendant's request for a judgment of acquittal. After finding the defendant's double-jeopardy claim sufficiently colorable to support appeal under *Abney*, see *id.* at 322, this Court rejected it on the merits. The Court ruled that only an "event, such as an acquittal, which terminates the original jeopardy" implicates the Double Jeopardy Clause, *id.* at 325 (citing *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294 (1984))—and although an "appellate court's finding of insufficient evidence" constituted such an event, a trial court's declaration of a mistrial did not. *Id.* at 325-326. Consequently, the Court explained, *"[r]egardless of the sufficiency of the evidence at petitioner's first trial*, he ha[d] no valid double jeopardy claim to prevent his retrial." *Id.* at 326 (emphasis added). The Court also concluded that future double-jeopardy claims based on similar facts would no longer be "colorable" and thus would not be appealable before final judgment. *Id.* at 326 n.6.[3]

Contrary to petitioner's contention (Pet. 21-27), the court of appeals correctly applied *Richardson*. Although the defendant in *Richardson* sought sufficiency review after the court declared a mistrial based on a hung jury and petitioner here pursues review after the grant of a motion for new trial, that distinction does not warrant a different result. Petitioner's contention that the jury's *finding of guilt* "terminates the original jeopardy" in a way that a hung jury does

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[3] Because petitioner did not raise an independent double-jeopardy claim in the court of appeals, *Richardson*'s holding that the double-jeopardy claim in that case was sufficiently colorable to support appellate jurisdiction (before this Court resolved the issue) has no application here.

not is untenable. See 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3918.5, at 496-497 (2d ed. 1992) ("Although some courts had ruled before the *Richardson* case that appeal could be taken after conviction and before retrial to challenge the sufficiency of the evidence at the first trial, those decisions must be regarded as overruled. It does not make sense to establish a greater right to appeal after a jury has convicted than exists after the jury has failed to agree."); see also, *e.g.*, *United States* v. *McAleer*, 138 F.3d 852, 856-857 (10th Cir.), cert. denied, 525 U.S. 854 (1998); *United States* v. *Ganos*, 961 F.2d 1284, 1285 (7th Cir. 1992) (per curiam); *United States* v. *Miller*, 952 F.2d 866, 871-872 & n.5 (5th Cir.), cert. denied, 505 U.S. 1220 (1992). Although jeopardy can terminate without an express acquittal, such as where a guilty verdict is returned only on a lesser charge with the effect of implicitly acquitting the defendant on the greater charge, *Price*, 398 U.S. at 329, a finding of guilt that is vacated does not terminate jeopardy on that count, *ibid.* As in *Richardson*, jeopardy did not terminate in petitioner's case because no acquittal, either express or implicit, occurred at any stage of the proceedings. See *Lydon*, 466 U.S. at 309.[4]

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[4] Petitioner asserts that *Yeager* v. *United States*, 557 U.S. 110 (2009), "precludes the First Circuit's broad reading of *Richardson*." Pet. 4; see Pet. 24-25. That is incorrect. *Yeager* did not suggest that a jury's *finding of guilt* terminates jeopardy if the district court later grants a new trial for procedural reasons unrelated to evidentiary sufficiency. Instead, it decided, under *Ashe* v. *Swenson*, 397 U.S. 436 (1970), that "the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's *acquittal* in a prior trial." 557 U.S. at 119 (emphasis added). And it reaffirmed *Richardson*'s holding that "whenever the [Government] seeks a second trial after its

Finally, petitioner asserts (Pet. 18-21) that the decision below reflects "uncertainty and doctrinal confusion" in the courts of appeals on the scope of *Richardson*. That is incorrect. Virtually none of the decisions that petitioner cites implicates jurisdictional issues at all; those decisions discuss a practice of reviewing a sufficiency challenge raised on appeal from a *final* judgment (rather than simply disposing of such an appeal on alternative grounds). See, *e.g.*, *Patterson* v. *Haskins*, 470 F.3d 645, 659 (6th Cir. 2006), cert. denied, 552 U.S. 816 (2007). And, as petitioner acknowledges (Pet. 18), as a general matter the decisions in question expressly adopt that practice as a prudential matter, not because of a conclusion that it is necessary to avoid a double-jeopardy problem. See, *e.g.*, *Patterson*, 470 F.3d at 657 (6th Cir.); *Miller*, 952 F.2d at 874 (5th Cir.); *United States* v. *Douglas*, 874 F.2d 1145, 1150 (7th Cir.), cert. denied, 493 U.S. 841 (1989); see also, *e.g.*, *United States* v. *Mandel*, 591 F.2d 1347, 1373 (4th Cir.) (holding that "ordinarily an appellate court should not be required" to decide "the sufficiency of evidence if [the issue] has been presented in a case which would have to be reversed in all events for procedural error," and concluding that double-jeopardy principles do not dictate otherwise), overruled en banc on other grounds, 602 F.2d 653 (1979), cert. denied, 445 U.S. 961 (1980). A mere prudential practice has no bearing on the jurisdictional question resolved below: whether "failure to address the col-

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first attempt to obtain a conviction results in a mistrial * * * , the Clause does not prevent the Government from seeking to reprosecute," because "the second trial does not place the defendant in jeopardy 'twice.'" *Id.* at 118 (citing *Richardson*, 468 U.S. at 323).

lateral issue on appeal (here, sufficiency of the evidence) will infringe [double-jeopardy] rights which [petitioner] could not effectively vindicate in an appeal after final judgment." Pet. App. 68a n.9; see *id.* at 1a-2a.[5]

b. Petitioner also argues (Pet. 27-33) that the court of appeals erred in rejecting his claim that double-jeopardy concerns counsel in favor of giving defendants a right to cross-appeal at least when the government files an interlocutory appeal under 18 U.S.C. 3731. No double-jeopardy concerns conceivably remain here in view of the recent First Circuit decision reversing the grant of a new trial to petitioner—but even if they did, review of this issue would still not be warranted.

Explicit statutory authorization is required for the government to appeal in a criminal case. See *United States* v. *Scott*, 437 U.S. 82, 84-85 (1978); *United States* v. *Sanges*, 144 U.S. 310 (1892). Section 3731 permits the government to appeal in a limited set of circumstances, including when the district court

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[5] Although petitioner cites decisions from the Ninth and Tenth Circuits as having ruled "that the court *must* address a sufficiency claim before permitting retrial because of double jeopardy concerns," Pet. 20-21, he does not contend that his interlocutory appeal would have been heard in those circuits. After the decisions on which petitioner relies, the Ninth Circuit has stated that under *Richardson* "appellate courts are not *required* to consider sufficiency issues," *United States* v. *Bishop*, 959 F.2d 820, 829 n.11 (9th Cir. 1992), overruled in part on other grounds as stated in *Boyde* v. *Brown*, 404 F.3d 1159, 1171 n.10 (9th Cir. 2005), and the Tenth Circuit has ruled that the denial of a Rule 29 motion for a judgment of acquittal is not subject to interlocutory appeal when the district court grants a retrial, even when the appeal is construed as advancing a double-jeopardy claim, see *McAleer*, 138 F.3d at 857.

"grant[s] a new trial after verdict or judgment." The statute authorizes only appeals "by the United States." 18 U.S.C. 3731. Numerous courts of appeals have recognized that the statutory text implies no intent to permit a defense appeal or cross-appeal. See, *e.g.*, *United States* v. *Marasco*, 487 F.3d 543, 546 (8th Cir. 2007) ("[T]his statute does not provide for a cross-appeal by the defendant."); *United States* v. *Hamilton*, 46 F.3d 271, 279 n.8 (3d Cir. 1995) (Section 3731 "preclud[es] a defendant from filing a cross-appeal"); *United States* v. *Becker*, 929 F.2d 442, 447 (9th Cir.) ("A defendant may not file a cross appeal to a section 3731 interlocutory appeal."), cert. denied, 502 U.S. 862 (1991); *United States* v. *Margiotta*, 646 F.2d 729, 734 (2d Cir. 1981) (cross-appeal "unavailable in connection with interlocutory appeals pursuant to § 3731"), cert. denied, 461 U.S. 913 (1983); see also *United States* v. *Hsia*, 176 F.3d 517, 526-527 (D.C. Cir. 1999) (refusing to grant defendants "a windfall opportunity to delay proceedings via cross-appeal"), cert. denied, 528 U.S. 1136 (2000).

The general principle that a government appeal does not authorize a defendant's cross-appeal extends to the circumstances of this case. In particular, as petitioner acknowledges (Pet. 28), multiple circuits have held, as did the court below, that a government appeal of an order granting a new trial does not entitle a defendant to cross-appeal the denial of his motion for acquittal. See *Eberhart*, 388 F.3d at 1051-1052 (7th Cir.); *Ferguson*, 246 F.3d at 137-138 (2d Cir.); *Wood*, 958 F.2d at 967-971 (10th Cir.); see also *United States* v. *Cahalane*, 560 F.2d 601, 608 (3d Cir. 1977) (holding that defendants could not appeal the denial of their new trial motion when the government appealed the

district court's grant of an acquittal as to certain counts), cert. denied, 434 U.S. 1045 (1978).

Petitioner contends (Pet. 28-30) that the decision below is inconsistent with *United States* v. *Greene*, 834 F.2d 86 (4th Cir. 1987), which rejected a defendant's Rule 29(c) challenge on interlocutory review in conjunction with resolving the government's appeal from the grant of a new trial. But the decision below does not squarely conflict with *Greene*. It appears that in *Greene* the "question as to the appealability of the denial of the Rule 29(c) motion [for an acquittal] * * * was abandoned" by the government, *id.* at 87, after "the district court certified that in view of the government's appeal, there was no just reason for delay in determining the issue raised by the defendant in his Rule 29(c) motion as to the sufficiency of the evidence to convict him," *id.* at 89. Because the court of appeals apparently viewed the district court's certification and the government's waiver of its challenge to the cross-appeal as significant, the decision creates no conflict with the decision below, where neither of those factors existed.[6]

In any event, to the extent that the 26-year-old decision in *Greene* did stand for the rule that petitioner advocates, the Fourth Circuit is not likely to adhere to that rule should it have occasion to revisit the issue.

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[6] Petitioner argues (Pet. 29 n.5) that such factors could not truly have been significant to the court in *Greene* because that court was obliged to satisfy itself of its own jurisdiction. That is anachronistic. Before this Court's decision in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 93 (1998), courts often proceeded on the basis of "hypothetical jurisdiction," *id.* at 94—particularly where, as in *Greene*, they found that "the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Id.* at 93.

Since *Greene*, at least seven courts of appeals have held that a cross-appeal from a Section 3731 appeal is not permitted—four of those in the specific context of sufficiency-of-the-evidence review. In addition, this Court has emphasized the narrowness of the collateral-order doctrine, see, *e.g.*, *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 113 (2009); see also *Greene*, 834 F.2d at 89, and of other possible doctrinal bases for interlocutory appellate jurisdiction, see *Swint*, 514 U.S. at 50-51.[7] Given those changes in the legal landscape, the continuing vitality of *Greene*—an ambiguous decision that lacks any in-depth analysis—is questionable. And review in the context of this case—where petitioner will face no further retrials and will have an opportunity to raise his sufficiency claim on appeal from a final judgment in the ordinary course—would be particularly unwarranted.

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[7] Petitioner devotes a single sentence and footnote (Pet. 30-31 & n.6) to the proposition that interlocutory review would have been proper here as a matter of "pendent appellate jurisdiction." See *Swint*, 514 U.S. at 50-51 (suggesting that a court of appeals "with jurisdiction over one ruling" might have the ability "to review, conjunctively, related rulings that are not themselves independently appealable" if the two rulings are "inextricably intertwined"). But even assuming that such a doctrine applies in criminal cases (see Pet. 31 n.6; *Abney*, 431 U.S. at 662-663), it would not apply in this case. As the court of appeals explained in its decision dismissing petitioner's first cross-appeal, the question whether a new trial was warranted based on statements made by the prosecutor in a closing argument is hardly "inextricably intertwined" with the question whether the evidence presented at trial was sufficient to sustain the jury's verdict. 514 U.S. at 51; see Pet. App. 72a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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