No. 13-291

IN THE

Supreme Court of the United States

DANIEL E. CARPENTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the prosecution, consistent with the protections of the Double Jeopardy Clause, can effectively foreclose the termination of "original jeopardy" by obtaining a guilty verdict through advancing improper arguments and, once a new trial is granted, retry the accused before he can obtain appellate review of the sufficiency of the evidence at the initial trial.

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of approximately 10,000, and up to 40,000 with affiliates. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL's interest in this case continues from its first filing as amicus curiae in 2007. NACDL seeks to ensure timely access to the appellate courts for criminal defendants faced with potential deprivation of their rights under the Double Jeopardy Clause of the Fifth Amendment.[2] Specifically, at issue is whether the federal appellate courts have jurisdiction immediately to review a defendant's cross-appeal of the denial of a motion for acquittal on sufficiency grounds once he has been granted retrial on the basis of non-evidentiary prosecutorial error.

NACDL ask this Court to review the First Circuit's decision and to clarify that immediate appellate review is available under these relatively common pro-

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[1] Pursuant to Supreme Court Rule 37.2(a), amicus curiae certifies that counsel of record for both parties received timely notice of amicus curiae's intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

[2] NACDL filed as amicus curiae in 2007 after the First Circuit denied Mr. Carpenter's cross-appeal of the denial of his motion for judgment of acquittal following his first trial.

cedural circumstances. Without such a guarantee, a defendant whose conviction has been tainted by the prosecutor's use of improper arguments, to use the facts at hand, will risk forfeiting his double jeopardy rights by moving for a new trial. This result is unfair to the accused and therefore unacceptable to NACDL's members.

SUMMARY OF THE ARGUMENT

The decision below holds that a defendant can never have a valid double jeopardy claim when his conviction has been vacated for legal error, and, therefore, that interlocutory review of any sufficiency claims is not available under the collateral order doctrine. Pet. App. 67a. This decision represents an unwarranted and improvident extension of this Court's holding in *Richardson* v. *United States,* 468 U.S. 317 (1984), is inconsistent with the double jeopardy principles previously espoused by this Court, and stands in contrast to several other federal appellate courts' rulings. See, *e.g.*, *United States* v. *Haddock*, 961 F.2d 933, 934 (10th Cir. 1992); *United States* v. *Simpson*, 910 F.2d 154, 159 (4th Cir. 1990); *Vogel* v. *Pennsylvania*, 790 F.2d 368, 376 (3d Cir. 1986). Accordingly, we urge the Court to grant certiorari and reverse the decision below.

ARGUMENT

Petitioner Daniel Carpenter has twice been tried for the same counts of mail and wire fraud. Pet. App. 3a. After each of his trials, Mr. Carpenter filed two motions: one for a new trial under Fed. R. Crim. P. 33(b)(2), based, both times, on non-evidentiary prosecutorial misconduct, and one for judgment of acquittal under Fed. R. Crim. P. 29(c), arguing that the evidence presented was insufficient to warrant a convic-

tion. Pet. App. 3a, 23a, 30a. Both times, the district court granted the new trial motion, but denied the motion for acquittal. Pet. App. 4a. In response to the district court's decisions after each trial, the prosecution appealed the new trial ruling, and Mr. Carpenter filed a cross-appeal seeking review of the district court's denial of his motion for acquittal. Mr. Carpenter contended that retrial would violate the Double Jeopardy Clause because the evidence presented against him at the first trial was insufficient. Pet. App. 2a, 44a. And now, for the second time, the First Circuit has ruled that it lacks jurisdiction altogether to entertain even Mr. Carpenter's double jeopardy challenge. Pet. App. 1a–2a.

In denying appellate jurisdiction, the First Circuit found that Mr. Carpenter had not justified interlocutory appeal under the collateral order doctrine. The collateral order doctrine permits appellate review of certain claims prior to final judgment. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Among them are claims implicating the Double Jeopardy Clause because, as this Court has recognized, "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." *Abney* v. *United States*, 431 U.S. 651, 660 (1977).

Even though Mr. Carpenter will be exposed to double jeopardy if his retrial is permitted to go forward when insufficient evidence to convict was introduced in his earlier trials, the First Circuit found Mr. Carpenter did not have a "viable double jeopardy claim" and therefore interlocutory appeal under *Abney* was unavailable. Pet. App. 67a. The court based its decision on an extension of this Court's holding in *Richardson* that "jeopardy does not terminate when the

jury is discharged because it is unable to agree" so retrial does not offend the Double Jeopardy Clause. 468 U.S. at 326. From this, the First Circuit extrapolated without justification that even a conviction by the jury does not terminate jeopardy when it is subsequently vacated because of *any* trial error. Pet. App. 67a.

I. *RICHARDSON* DOES NOT APPLY WHEN THE JURY REACHES A VERDICT AFTER THE PROSECUTION HAD A FULL OPPORTUNITY TO PRESENT ITS CASE

The decision below, relying on the First Circuit's earlier decision in *United States* v. *Porter*, 807 F.2d 21 (1st Cir. 1986), improperly extends the holding in *Richardson* to an entirely different set of facts – the vacatur of a conviction on grounds of non-evidentiary prosecutorial error. In *Porter*, the First Circuit held that because the reversal of the defendant's conviction for trial error (improper admission of an exculpatory statement) did not terminate his original jeopardy, the defendant did not have a viable double jeopardy claim, and the appellate court therefore need not review the sufficiency of the evidence presented at the first trial as a prerequisite to retrial. *Porter*, 807 F.2d at 23–24. In so holding, the First Circuit concluded that the principles upon which the Court relied in *Richardson* were "equally applicable here." *Id.* at 23.

Specifically, the *Porter* court opined that "[j]ust as society has a strong interest in retrying a defendant after his jury cannot agree on a verdict, so it also has a strong interest in providing the government with a full and fair opportunity to prosecute a defendant whose conviction is reversed due to a trial error." *Id.* Further, the court indicated that its expansion of the *Richardson* holding would mitigate any concern that

reversal for trial error would result in the guilty going unpunished. *Id.* (quoting *Burks* v. *United States*, 437 U.S. 1, 15 (1978)).

However, this Court's decision in *Burks* instructs that even if trial error might otherwise result in a new trial, where the evidence presented by the prosecution at the first trial was so lacking that the case should not even have been *submitted* to the jury, it would negate the protections of the Double Jeopardy Clause to subject a defendant to a second trial for the same offense. 437 U.S. at 15–18. *Porter's* contrary reasoning, which accords greater weight to a society's interest in providing the prosecution with another opportunity to prosecute a defendant whose conviction is reversed as the result of trial error, is inapposite when the trial error in no way impacted the prosecution's evidentiary strategy or impeded the prosecution's ability to present its best case. On these facts, "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.

Equally unpersuasive is the notion that society would pay too high a price were every accused granted immunity from further prosecution because of any defect in the proceedings sufficient to constitute reversible error. *Porter*, 807 F.2d at 23. That concern is not implicated where, as here, the defendant *will* be retried if the appellate court ultimately determines to uphold the decision that the evidence presented at the first trial was sufficient to sustain the verdict. The evidence presented against Mr. Carpenter was either sufficient or it was not. If it was sufficient, then society's interest in retrying the accused will be satisfied. If it was not sufficient, then the prosecution will have had its one full and fair oppor-

tunity to present its best case, and no legitimate interest could possibly be served by subjecting the accused to the rigors of a second trial for the same offense.

II. *YEAGER* CONFIRMS THAT *RICHARDSON* SHOULD NOT BE APPLIED CATEGORICALLY

As discussed above, the First Circuit's justification for extending *Richardson's* holding to bar immediate appellate review in the case of all retrials granted on the basis of trial error does not apply in a case like Mr. Carpenter's where the trial error in no way impacted the prosecution's opportunity to present its full case. Furthermore, implicit in the *Richardson* decision is the Court's recognition that some events, other than an acquittal or unreversed conviction, do terminate original jurisdiction. *Richardson*, 468 U.S. at 325 ("[T]he Double Jeopardy Clause by its terms applies only if there has been *some event, such as an acquittal*, which terminates the original jeopardy." (emphasis added)). Distinguishing between events that do or do not terminate original jurisdiction has proven difficult for courts and as a result added uncertainty to the scope of appellate jurisdiction of interlocutory appeals.[3]

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[3] Courts have had difficulty identifying the potential termini of original jurisdiction. *See*, *e.g.*, *Burks*, 437 U.S. at 9 ("The Court's holdings in this area . . . can hardly be characterized as models of consistency and clarity."); *United States* v. *Ganos*, 961 F.2d 1284, 1286 (7th Cir. 1992) (Ripple, J., concurring) ("[T]he present state of double jeopardy jurisprudence is hardly a seamless garment."); *United States* v. *Wood*, 958 F.2d 963, 969 (10th Cir. 1992) ("*Richardson* gives us little guidance on what events, other than an acquittal, terminate jeopardy."). After *Richardson*, courts have been wildly inconsistent in their application of this Court's double jeopardy precedents.

However, this Court has recently announced some limits on the continuation of original jurisdiction and reinforced that *Richardson* should not be reflexively applied to other facts. In *Yeager* v. *United States*, 557 U.S. 110, 123 (2009), the Court rejected extension of *Richardson* even to nearly identical facts. In both cases, the defendant having been acquitted on some counts faced reprosecution of others on which the jury had not been able to reach agreement. The prosecution urged the Court to permit retrial as it had in *Richardson*. But the Court declined, finding that the prosecution's position was based on improperly extrapolating from *Richardson's* holding that the "'failure of the jury to reach a verdict . . . is not an event which terminates jeopardy'" to the "altogether different principle that retrial is *always* permitted whenever a jury convicts on some counts and hangs on others." 557 U.S. at 123 (quoting *Richardson*, 468 U.S. at 325). Ultimately, the Court held that *Yeager*, unlike *Richardson*, could not be retried because by acquitting him on some counts the jury had necessarily decided in his favor a fact essential to the other counts. *Id.*

This Court's decision in *Yeager* counsels against the First Circuit's broad application of *Richardson* to find that original jurisdiction continues whenever a conviction is vacated as a result of trial error.

Compare, e.g., *United States* v. *Szado*, 912 F.2d 390, 392 (9th Cir. 1990) ("[A]pplication of the principles of [*Richardson* and *Abney*] directs a conclusion that [the] appeal falls with *Cohen*'s collateral order exception."), *with United States* v. *Miller*, 952 F.2d 866, 872 n.5 (5th Cir. 1992) ("In light of our holding today, future appeals raising similar claims will no longer be colorable and will not be appealable before final judgment in this Circuit.").

III. ROTE EXTENSION OF *RICHARDSON* OFFENDS THE ORIGINAL UNDERSTANDING OF THE COLLATERAL ORDER DOCTRINE

The fact that the First Circuit relies on a technical construction regarding the point at which original jeopardy terminates to deny appellate jurisdiction altogether contradicts this Court's original understanding of the collateral order doctrine. The doctrine was, and is, based upon a "practical rather than a technical construction" of jurisdictional rules. *Cohen*, 337 U.S. 546. By any "practical" standard, a trial has concluded and original jeopardy terminated upon the delivery of a verdict by the jury. The fact that the defendant may be granted a new trial (as an alternative to asking for acquittal due to legal insufficiency of the evidence against him) does not mean that jeopardy continues. Rather, under this Court's decision in *Burks*, even if trial error might otherwise result in a new trial, where the evidence presented by the prosecution at the first trial was so lacking that the case should not even have been submitted to the jury, it would negate the protections of the Double Jeopardy Clause to subject the defendant to a second trial for the same offense. 437 U.S. at 15–18.

* * *

This case presents compelling grounds for intervention by the Court and clarification of this jurisdictional question. It was the prosecutor's error in closing argument that necessitated a new trial, thereby preventing traditional termination of jeopardy through sentencing and entry of final judgment and prompt appellate review of the sufficiency challenge. A formalistic and narrow application of the collateral order doctrine to facilitate this result benefits only the prosecution at the expense of defendants. NACDL

urges the Court to review the decision and to announce a rule of appellate jurisdiction that will allow defendants to challenge prosecutorial trial misconduct without sacrificing their double jeopardy rights.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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