No. 15-1539

IN THE
Supreme Court of the United States

BRIAN P. KALEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

AMICI CURIAE BRIEF OF ASSOCIATIONS OF CRIMINAL DEFENSE ATTORNEYS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Florida Association of Criminal Defense Lawyers ("FACDL") is a statewide organization of criminal defense lawyers with 28 chapters, including its Miami chapter founded in 1963. FACDL and FACDL-Miami have appeared in this Court as *amicus curiae*, most recently in *Puerto Rico v. Sanchez Valle*, 15-108; *Luis v. United States*, 14-419; and *Kaley v. United States*, 12-464.

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's *amicus* briefs have been cited by this Court or by concurring or dissenting

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have been timely notified of the undersigned's intent to file this brief; both Petitioner and Respondent have consented to the filing of this brief. Petitioner's blanket written consent is on file with the Clerk of the Court. A letter of consent from Respondent accompanies this brief.

justices in cases such as *Luis v. United States*, 136 S. Ct. 1083, 1095 (2016), *Kaley v. United States*, 134 S. Ct. 1090, 1104, 1112 (2014) (opinion of the Court and Roberts, C.J., dissenting), *Rita v. United States*, 551 U.S. 338, 373 n.3 (2007) (Scalia, J., concurring in the judgment), and *United States v. Booker*, 543 U.S. 220, 266 (2005).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant the petition and adopt Petitioner's argument that *Ashe v. Swenson*, 397 U.S. 436 (1970), required the Eleventh Circuit to review the sufficiency of the *acquitted* count for purposes of collateral estoppel.

Amici suggest that Petitioner should prevail for the additional reason that the Eleventh Circuit should have undertaken a sufficiency review of the *hung* count, notwithstanding this Court's decision in *Richardson v. United States*, 468 U.S. 317 (1984), which allows the government to retry defendants even when they are constitutionally entitled to an acquittal. The Court should grant the petition and cabin *Richardson*, if not overrule it altogether.

Richardson severely narrowed the Court's decision from six years earlier in *Burks v. United States*, 437 U.S. 1 (1978), which held that after a conviction, "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence [from the first trial] legally insufficient." *Id.* at 18. *Burks* recognized an important double jeopardy protection: a defendant entitled to acquittal should not have to run the gauntlet of another trial.

But *Richardson* held that appellate courts have no *duty* to actually undertake such a sufficiency review in the first place, at least where the jury hung on all relevant charges. As predicted by Justice Brennan's dissent, *see* Part I, *infra*, this produced the odd result

that a defendant could receive a *Burks* appellate sufficiency review if all twelve jurors found him *guilty*—but would never receive such review if some jurors actually believed he was *innocent*, resulting in a hung jury.

In the intervening years, *Richardson* has caused even further damage to double jeopardy rights. While a few circuits have stayed true to *Burks* and the importance of obtaining a sufficiency determination before retrial, most circuits have read *Richardson* as authorizing them to impose wooden and oftentimes trivial barriers to appellate consideration of sufficiency claims. *See* Part II, *infra*. In one particularly disturbing line of cases, circuits hold that where a defendant raises multiple meritorious issues on appeal, the court can remand for a retrial without ever deciding if the retrial itself would violate double jeopardy. This completely defeats *Burks* and the Double Jeopardy Clause, which is meant to be applied pragmatically to prevent improper retrials.

The opinion below in Petitioner's case suffers from the same defect in logic: because Petitioner contested multiple elements of his charge at trial, the Eleventh Circuit concluded it was unnecessary to resolve his sufficiency claim before remanding for a new trial. *See* Pet. App. 6 n.1. The decision below is yet another example of a circuit relying on overly technical rules, stemming from *Richardson*, to avoid resolving sufficiency claims.

The Court should grant the petition and hold that a circuit court *must* resolve a defendant's claim that the government submitted insufficient evidence of one or more elements at trial and that the Double Jeopardy Clause therefore bars retrial of those elements. *Richardson*—the root source of this aberrant area of law—should be overruled, or at least cabined to its facts. Most importantly, the Court should reject *Richardson*'s and the circuits' hypertechnical distinctions that allow them to dodge sufficiency claims based on the number of elements contested at trial or the number of claims raised on appeal.

Until the Court reconsiders *Richardson* and its overly narrow reading of *Burks* and the Double Jeopardy Clause, defendants will continue to face retrials even when they were constitutionally entitled to acquittal. After failing to present sufficient evidence during a full trial, the government should not be given a second bite at the apple, newly armed with knowledge of the defense strategy at the first trial.

ARGUMENT

I. *Richardson* Is Inconsistent With Historical Double Jeopardy Principles.

By safeguarding final judgments, the Double Jeopardy Clause establishes a fundamental protection for individuals tried for criminal offenses. *United States v. Scott*, 437 U.S. 82, 92 (1978). The Clause ensures that the government is not given "another opportunity to supply evidence which it failed to muster in the first proceeding" after learning the defense's strategy.

Burks, 437 U.S. at 11. "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense," because doing so would entail "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 *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court confirmed that the Double Jeopardy Clause "is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Id.* at 444. In other words, a court's review "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id.* (quotation marks omitted).

The Court continued its practical approach to double jeopardy in *Burks v. United States*, 437 U.S. 1 (1978), which held that, after a conviction, the Double Jeopardy Clause prevents retrial on any element that the appellate court finds to have been insufficiently proven at the first trial. *Id.* at 18. The "prosecution cannot complain of prejudice [when] it has been given one fair opportunity to offer whatever proof it could assemble," yet "the government's case was so lacking that it should not have even been *submitted* to the jury." *Id.* at 16 (emphasis in original).

However, in *Richardson*, the Court deviated from this pragmatic framework and adopted a bright line

double jeopardy rule at the expense of case-by-case inquiries. *See* 468 U.S. at 325-26. In *Richardson*, the jury hung on several counts alleging narcotics violations, and the defendant moved to bar retrial on those hung counts. He argued the government had presented insufficient evidence on the hung counts, thereby requiring acquittal as a matter of law under the Due Process Clause. He argued that because he was entitled to an acquittal, a retrial would violate *Burks* and double jeopardy by giving the government a second bite at the apple after failing in its first attempt. *Id.* at 318, 322-23.

The Court disagreed, holding that a hung jury does not trigger double jeopardy, thus permitting retrial. *Id.* at 325-26. Critically, this rule applied *even if* the government had presented insufficient evidence at the first trial, which would otherwise require acquittal as a matter of law. "Regardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial." *Id.* at 326.

The majority also rejected Richardson's claim that *Burks* required the appellate court to review the sufficiency of the evidence before allowing a retrial. While an *actual* appellate finding of insufficient evidence would bar retrial under *Burks*, *Richardson* concluded that appellate courts were not required to address sufficiency of the evidence for hung counts in the first place. "*Burks* simply does not require that an appellate court rule on the sufficiency of the evidence because retrial might be barred by the Double Jeopardy Clause." *Id.* at 323. In fact, *Richardson* held that such a claim would no longer even be "colorable," and therefore could

not be appealed interlocutorily before the retrial. *Id.* at 326 n.6. Thus, *Richardson* permitted the government to retry defendants who might be constitutionally entitled to acquittal, without ever receiving an appellate ruling on sufficiency of the evidence.

Justice Brennan, joined by Justice Marshall, dissented and foreshadowed the anomalous results that would follow from the majority's decision. *Id.* at 326-32 (Brennan, J., concurring in part and dissenting in part). As Justice Brennan explained, a "defendant who is constitutionally *entitled to an acquittal* but who fails to receive one—because he happens to be tried before an irrational or lawless factfinder or because his jury cannot agree on a verdict—is worse off than a defendant tried before a factfinder who demands constitutionally sufficient evidence." *Id.* at 327. Justice Brennan also argued that the majority's holding would undermine double jeopardy protections by not requiring appellate courts to address the sufficiency of the evidence before ordering a retrial, thus rendering *Burks*'s ruling a dead letter in cases with a hung jury. *Id.* at 331-32.

At bottom, Justice Brennan objected to the Court's deviation from its prior, "common-sense approach" to double jeopardy claims. *Id.* at 328. He argued that rather than adopting a blanket rule for all cases with hung counts, each case should be evaluated on its facts in light of the "fundamental policies" of double jeopardy, namely the risk of "enhancing the possibility that even though innocent [a defendant] may be found guilty.'" *Id.* (quotation marks omitted). Those concerns are directly implicated where "the prosecution has failed to present

constitutionally sufficient evidence" and then seeks a retrial, because the defendant will face the possibility of being found guilty even though he was constitutionally entitled to an acquittal. *Id.* at 330.

In the intervening years, the circuits have praised the "logical and legal merit" of Justice Brennan's dissent, *United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir. 1989), and have recognized the "apparent inconsistency between *Richardson* and other strains of Double Jeopardy jurisprudence," *United States v. Shinault*, 147 F.3d 1266, 1275 (10th Cir. 1998). But, as discussed next, this has not stopped the circuits from applying *Richardson* broadly, leading to outcomes that continue to erode important double jeopardy protections by giving the government an improper second chance to shore up its insufficiently proven case.

II. Many Circuits Have Relied On *Richardson* To Create Illogical And Wooden Distinctions To Avoid Resolving Sufficiency Claims.

Richardson prevented a defendant from appealing solely on the sufficiency of the evidence of a *hung* count.[2] This limited the possibility of appellate review of

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[2] Several circuits have also interpreted *Richardson* to bar any review of the sufficiency at the first trial even after the *retrial* ends. *See United States v. Achobe*, 560 F.3d 259, 268 (5th Cir. 2008); *United States v. Julien*, 318 F.3d 316, 321-22 (1st Cir. 2003); *United States v. Willis*, 102 F.3d 1078, 1081 (10th Cir. 1996); *United States v. Coleman*, 862 F.2d 455, 460 (3d Cir. 1988); *United States v. Saldiva-Sandoval*, 254 F. App'x 985, 986 (4th Cir. 2007).

sufficiency to those cases where the defendant was actually *convicted*. However, the circuit courts have "read[] the implications of *Richardson* broadly," and have now expanded its rationale even to cases where there was a conviction. *Patterson v. Haskins*, 470 F.3d 645, 659 (6th Cir. 2006).

One line of cases in particular illustrates the injustice and unintended consequences of *Richardson*. Relying on overly technical distinctions about the number of claims that a defendant has raised on appeal, the majority of circuits (with two in disagreement) have held that there is no constitutional obligation for an appellate court to review the sufficiency of the evidence before vacating a conviction and remanding for a new trial. This arises when a convicted defendant raises multiple meritorious claims on appeal, one of which is sufficiency of the evidence. Citing *Richardson*, these circuits have held that they can reverse on one of the *other* grounds of alleged error and remand for a new trial *without* ever addressing the defendant's sufficiency claim, even though it would bar retrial altogether under *Burks*.

The result is that convicted defendants face a harrowing choice on appeal: raise multiple grounds of error to maximize the odds of a reversal; or raise only the sufficiency claim on appeal, forcing the appellate court to rule whether the Double Jeopardy Clause bars a retrial altogether. Not only does this choice make a hash of double jeopardy protections, but it also punishes defendants whose trials were infected with numerous errors.

1. That was precisely the scenario in *United States v. Porter*, 807 F.2d 21 (1st Cir. 1986), in which the First Circuit relied on *Richardson* to hold that there is no duty to review the defendant's sufficiency-of-the-evidence double jeopardy claim where his conviction is vacated and remanded for retrial because of an evidentiary error. *Id.* at 24. The court recognized that *Richardson* "focused on the circumstances surrounding a hung jury," rather than a conviction, but nonetheless "the reasoning of *Richardson* controls the instant appeal" because there is "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.* at 23. Of course, the government had *already* been given a "full and fair opportunity" to convict the defendant—and had allegedly failed to proffer sufficient evidence.

The Fifth Circuit held the same in *United States v. Miller*, 952 F.2d 866 (5th Cir. 1992), which ruled that under *Richardson*'s narrow reading of *Burks*, an appellate reversal of a conviction due to error in the jury instructions did not obligate the circuit to review the defendant's separate claim that the government had produced insufficient evidence. *Id.* at 872. *Miller* reached this conclusion despite sympathizing with "Justice Brennan in dissent [who] complained of the Court's narrow reading of *Burks*. . . . [and] that the Court's holding in *Burks* . . . could be undermined by appellate court refusals to rule on insufficiency of the evidence claims." *Id.*

Echoing the Fifth Circuit's decision in *Miller*, the Sixth Circuit recognized "the force of Justice Brennan's

argument in dissent," but nevertheless concluded that "*Richardson* had effectively rejected the argument that the Double Jeopardy Clause *compels* an appellate court to review the sufficiency of the evidence offered at trial." *Patterson*, 470 F.3d at 657-58 (quotation marks omitted); *see also Patterson v. Haskins*, 316 F.3d 596, 611 (6th Cir. 2003) (prior decision expressly refusing to consider the sufficiency of the evidence after remanding for a retrial on other grounds).

The Seventh Circuit has likewise "recognize[d] the logical and legal merit" of Justice Brennan's dissent, but nonetheless held that "we are not convinced, in light of *Richardson*, that the Double Jeopardy Clause compels an appellate court to review the sufficiency of the evidence offered at trial anytime a defendant raises the question." *Douglas*, 874 F.2d at 1150.

Recently, the First Circuit went a step further, relying on *Richardson* not only to reject a double-jeopardy-based obligation to review the sufficiency of the evidence, but also concluding that there is also no "due process or non-constitutional" theory that would require such an inquiry. *United States v. Julien*, 318 F.3d 316, 321-22 (1st Cir. 2003).

2. By finding no constitutional obligation to review the sufficiency of the evidence when remanding for a new trial on other grounds, these circuits have created several perverse results, all directly traceable to *Richardson*.

First, by cherry picking grounds for reversal and avoiding a sufficiency review, the appellate courts are

forcing defendants to face a retrial that *Burks* and the Double Jeopardy Clause would bar altogether.

Second, when filing an appeal, a convicted defendant must choose either to raise multiple grounds for reversal, or instead focus just on sufficiency of the evidence. The former maximizes the chances of a reversal (but would require a retrial), while the latter is the only way to ensure the circuit court actually resolves the defendant's double jeopardy claim that retrial itself is forbidden. Defendants whose trials were infected by multiple errors are thus put in a worse position than defendants whose only possible argument is based on the sufficiency of the evidence.

Although several circuits have suggested that they should try to resolve sufficiency-of-the-evidence claims before retrial,[3] *Amici* argue that meaningful double jeopardy review should not depend on a non-binding prudential practice. In fact, the prudential rule may cause as much harm as good, because there remains uncertainty as to what issues the appellate court will ultimately decide to resolve, and thus defendants are still in the undesirable position of having to choose between focusing on just double jeopardy, or raising all meritorious claims of error.

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[3] *See Miller*, 952 F.2d at 874; *Patterson*, 470 F.3d at 656; *Hoffler v. Bezio*, 726 F.3d 144, 162 (2d Cir. 2013).

Third, these circuit rulings risk wasting significant judicial resources by remanding for an entire new trial that could be unnecessary.

3. In the face of the decisions above, two courts of appeals have stayed true to the double jeopardy principles announced in *Burks* and have required appellate review of the sufficiency of the evidence even when reversing the conviction on other grounds.

In *United States v. Haddock*, 961 F.2d 933, 934 (10th Cir. 1992), the *en banc* Tenth Circuit reversed a panel decision that had refused to address the sufficiency of the evidence before remanding on another ground. The full court stated that "we have consistently held that when we reverse on appeal because of a procedural error at trial and remand for a new trial, we nevertheless must address the defendant's claim that evidence presented at trial on the reversed count was insufficient," because "if evidence indeed was insufficient, retrial is barred by double jeopardy principles." *Id.*

The Third Circuit has similarly held that "when a defendant raises an insufficiency of evidence contention that the trial court finds unnecessary to address, a court subsequently presented with a double jeopardy argument *must address* and resolve that issue." *Vogel v. Pennsylvania*, 790 F.2d 368, 376 (3d Cir. 1986) (emphasis added).

By requiring the appellate court to address the sufficiency claim *first*, the Third and Tenth Circuits provide a bulwark against the significant double jeopardy risks entailed by improper retrials. As the

Sixth Circuit held in a pre-*Richardson* case: "Where the sufficiency of the evidence is properly before us, *we consider that issue first* because it is determinative of whether the appellant may be retried." *United States v. Aarons*, 718 F.2d 188, 189 n.1 (6th Cir. 1983). Tellingly, the Sixth Circuit later found *Aarons* to be inconsistent with *Richardson*. *See Patterson*, 470 F.3d at 657.

The split in the circuits on this troubling issue highlights the need for the Court to address and rein in *Richardson* and its approval of rigid and overly technical double jeopardy distinctions. "Given the importance of [this] question and the frequency with which it recently has arisen, the Court ought to resolve the issue . . . ." Sarah O. Wang, Note, *Insufficient Attention to Insufficient Evidence: Some Double Jeopardy Implications*, 79 VA. L. REV. 1381, 1383 (1993).

As discussed next, the Eleventh Circuit's decision in Petitioner's case was grounded in the same faulty logic as the cases above that relied on trivial distinctions to avoid resolving the sufficiency of the evidence before ordering a retrial.

III. The Court Should Grant Review And Require Circuits To Address Double Jeopardy Claims Before Remanding For Retrial.

Petitioner should win his case for two separate reasons. The Court should adopt his argument that the collateral estoppel rules in *Ashe v. Swenson*, 397 U.S. 436 (1970), trigger a sufficiency analysis on the *acquitted* count to determine which element(s) the jury

"necessarily decided" against the government, *see* Pet. 21-25. But even if the Court disagrees, Petitioner still must prevail because the Eleventh Circuit should have reviewed the sufficiency of the hung count, notwithstanding *Richardson*. This Court should grant the petition and require circuit courts to conduct a separate review on sufficiency for any *hung or convicted* count before remanding for a retrial, regardless of how many elements the defendant challenged at trial or how many issues he raises on appeal.

1. Although Petitioner was not convicted, he lost his opportunity for appellate review on sufficiency for the same reason given by the circuits in Part II: he raised more than one potentially meritorious argument, which counterintuitively relieved the circuit court from an obligation to review the sufficiency of *any* element or count.

In his interlocutory appeal, Petitioner argued that the Eleventh Circuit should review whether the government had introduced sufficient evidence on the money laundering charge's scienter requirement (the "knowledge element"). If the government had not done so, then *Burks* would prohibit the government from retrying the knowledge element as part of any other crimes—including the separate charges alleging transportation of stolen property, on which the jury had hung.

But despite this direct connection between double jeopardy and the sufficiency of the evidence on the knowledge element, the Eleventh Circuit refused to

resolve Petitioner's sufficiency claim. *See* Pet. App. 6 n.1. The court recognized that insufficient evidence would require acquittal, but then stated that because Petitioner had challenged numerous elements of the money laundering charge at trial, "we do not know on which element the jury rested and therefore cannot assume that it rested on, let alone decided," the knowledge element against the government. Pet. App. 7 n.1. In other words, because Petitioner had challenged multiple elements, there was no need to consider the sufficiency of any of them.

Although the Eleventh Circuit did not cite *Richardson*, the logic of the court's refusal to address the sufficiency of the evidence is directly in line with the cases in Part II holding that there is no obligation to address the sufficiency of the evidence when a defendant raises multiple errors on appeal. The shared flaw in these courts' decisions is their order of analysis. If the Eleventh Circuit had *first* reviewed the sufficiency of the government's evidence of the knowledge element, then the court would have determined that there was insufficient evidence, effectively ending the case—just like the courts in Part II could render moot any other claims if they addressed sufficiency first. *See Burks*, 437 U.S. at 18.

The Eleventh Circuit's logic defeats the Double Jeopardy Clause's purpose of preventing improper retrials, and it also puts Petitioner in the exact same untenable position as defendants in the majority of circuits discussed in Part II. At trial, he could contest multiple elements, increasing his odds of an acquittal but

minimizing the odds that the appellate court would address his double jeopardy claim; or he could contest only one element at trial and therefore ensure the appellate court would address the sufficiency of that element.

2. To remedy this Catch-22, the Court should reverse *Richardson*, which has led to this entire area of double jeopardy law, where circuits are ordering retrials without ever determining whether the retrial itself is forbidden by the Double Jeopardy Clause. Circuit courts should be *required* to address any properly raised double jeopardy claim that retrial is barred on the grounds that the government's evidence at the first trial was constitutionally insufficient. The government would then be prohibited from retrying any element on which the prosecution failed to introduce sufficient evidence.

Reversing *Richardson* would recognize the importance under the Double Jeopardy Clause of "obtain[ing] review of a sufficiency claim *prior to retrial*," and ensure the government is not given repeated bites at the apple. *Richardson*, 468 U.S. at 331 (Brennan, J., concurring in part and dissenting in part) (emphasis added).

But even if the Court does not overrule *Richardson* altogether, the Court should still make clear that it does not apply to those cases—like Petitioner's—where there was actually a jeopardy-terminating event (*e.g.*, a conviction, or an acquittal on a charge that overlaps with an unresolved charge). In *Richardson*, the defendant (unlike Petitioner) never raised a collateral estoppel

claim and never argued that he had been acquitted on any charge that overlapped with the hung charges. *See* 468 U.S. at 318-19; *Wilson v. Czerniak*, 355 F.3d 1151, 1155-56 (9th Cir. 2004) ("*Richardson* involved separate and unrelated offenses and raised no *Blockburger* [overlapping elements] issue . . . ."). That is why *Richardson* concluded there was no "event which terminated jeopardy in [t]his case" and thus there was no right to a sufficiency analysis on appeal. 468 U.S. at 325.

But here, Petitioner *was* acquitted on a charge (money laundering) that contains an overlapping element with the hung charge (transportation of stolen property). Pet. App. 2-3. The acquittal on money laundering is an "event which terminated jeopardy," which should trigger a sufficiency-of-the-evidence inquiry. 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."). The acquittal also signals that there are legitimate concerns about the government's case, and thus there is likely to be an "unacceptably high risk" of subjecting Petitioner to a retrial on a charge for which he is entitled to acquittal as a matter of law. *Tibbs v. Florida*, 457 U.S. 31, 43 (1982). To minimize that risk, the Eleventh Circuit should be required to review the sufficiency of at least the knowledge element.

Reversing or narrowing *Richardson* would mark an important return to this Court's traditional double jeopardy jurisprudence, which disfavors blanket rules and instead analyzes each case "in a practical frame and

viewed with an eye to all the circumstances of the proceedings." *Ashe*, 397 U.S. at 444 (quotation marks omitted). The ultimate goal, of course, is to enforce the policies of the Double Jeopardy Clause, namely its concern that repeated trials "enhance[e] the possibility that even though innocent [the defendant] may be found guilty." *Green*, 355 U.S. at 187-88.

Retrying a defendant even though he is entitled to an acquittal as a matter of law is the paradigmatic example of improperly "enhancing the possibility that even though innocent he may be found guilty." *Id.* Yet, as illustrated by the cases in Part II and the decision below, this is repeatedly happening across the country because of *Richardson*.

* * *

This Court should grant the petition and reaffirm the rule that the "prosecution cannot complain of prejudice [when] it has been given one fair opportunity to offer whatever proof it could assemble" and yet still presented a case "so lacking that it should not have even been *submitted* to the jury." *Burks*, 437 U.S. at 16 (emphasis in original).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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