No. 17-5165

IN THE SUPREME COURT OF THE UNITED STATES

PEDRO SERRANO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

KENNETH A. BLANCO
Acting Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's double jeopardy claim on appeal, which asserted that insufficient evidence supported his conviction at his first trial, has been mooted by the granting of his motion for a new trial, his acquittal at trial, and his discharge from federal custody.

2. Whether petitioner was entitled to interlocutory review of his double jeopardy claim.

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-5165

PEDRO SERRANO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 856 F.3d 210. The opinion and order of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 14a-16a) is not published in the Federal Supplement but is available at 2017 WL 590321. The opinion and order of the district court denying petitioner's motion for a judgment of acquittal and granting his motion for a new trial (Pet. App. 17a-29a) is reported at 224 F. Supp. 3d 248.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2017. The petition for a writ of certiorari was filed on July 11, 2017. 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 Southern District of New York, petitioner was convicted on one count of unlawful possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 3a. The court denied petitioner's motion under Federal Rule of Criminal Procedure 29 for a judgment of acquittal based on insufficient evidence, but granted petitioner's motion under Rule 33 for a new trial. Pet. App. 17a-29a. The court subsequently denied petitioner's motion to dismiss the indictment on double jeopardy grounds. Id. at 14a-16a. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Id. at 1a-13a. After the filing of this petition, petitioner was retried on the charged offense, acquitted, and discharged from federal custody. D. Ct. Doc. 150 (Aug. 11, 2017).

1. On November 2, 2015, police executed a search warrant on petitioner's residence. Pet. C.A. App. 133, 183. In a bedroom, at the back of the closet, officers uncovered a plastic box. Id. at 155, 228-229. The box contained .45-caliber hollow-point

bullets, .357-caliber hollow-point and non-hollow-point bullets, 9-millimter hollow-point bullets, .38-caliber hollow-point bullets, and 20-gauge shotgun cartridges. Id. at 163-168. Petitioner was charged with one count of unlawful possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 17a. Petitioner went to trial on that charge. The jury found petitioner guilty. Ibid.

2. Petitioner moved for a judgment of acquittal under Rule 29 and for a new trial under Rule 33. Pet. App. 17a. The district court denied petitioner's motion for a judgment of acquittal, but granted petitioner's motion for a new trial. Ibid.

The district court rejected petitioner's contention that the evidence at trial had been insufficient to show that he knowingly possessed the ammunition found in the bedroom closet. Pet. App. 17a-25a. First, with respect to possession, the court explained that the evidence at trial permitted the jury to find that petitioner exercised dominion and control over the closet and the items therein, including the ammunition. Id. at 19a. The court recounted testimony that petitioner owned the apartment and resided in the bedroom where the ammunition was found. Ibid. The court also observed that the police found clothes matching petitioner's size in the bedroom's closet and petitioner's expired driver's license on the bedroom nightstand. Id. at 20a. Second, with respect to knowledge, the court explained that the evidence

was sufficient to allow the jury to infer that the petitioner either knew or consciously avoided knowing that the ammunition was in his closet. Id. at 23a. The court cited testimony that the ammunition was located inside a large sportsman's dry box that took up "substantial space" in an otherwise small closet, that the closet also contained clothes likely belonging to petitioner, and that no one other than petitioner had lived in the bedroom containing this closet. Id. at 23a, 25a.

The district court concluded, however, that a new trial was required because its instructions on conscious avoidance had been erroneous. Pet. App. 25a-29a. The court reasoned that, "'although the jury may be instructed in proper circumstances that knowledge of a criminal fact may be established where the defendant consciously avoided learning the fact while aware of a high probability of its existence, the court must include a proviso advising the jury that it cannot find knowledge of the fact if the defendant actually believed the contrary.'" Id. at 26a (quoting United States v. Sicignano, 78 F.3d 69, 71 (2d Cir. 1996) (per curiam)). The court's instructions to the jury had omitted that language, and the court viewed the error to have been "amplified" because "[petitioner's] knowledge, or lack thereof, was pivotal to his defense." Id. at 29a.

3. Petitioner subsequently filed a motion to dismiss the indictment. In his motion, petitioner renewed his argument that

the evidence at his first trial was legally insufficient and contended that the Double Jeopardy Clause precluded a retrial. The district court denied the motion. Pet. App. 14a-16a. The court explained that "'retrial on the same charges is not constitutionally barred where it results from a reversal of conviction based on the defendant's own successful demonstration of trial error on appeal.'" Id. at 14a-15a (citation omitted). "'In such circumstances'," the court reasoned, "'the law views the retrial as a facet of the original jeopardy.'" Id. at 15a. (citation and ellipsis omitted).

4. Petitioner appealed both the district court's denial of his Rule 29 motion and its denial of his double jeopardy motion. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1a-13a.

The court of appeals first determined that it lacked jurisdiction over petitioner's appeal from the district court's denial of his motion to dismiss the indictment on double jeopardy grounds. Pet. App. 8a-12a. The court of appeals acknowledged that although appellate jurisdiction is typically limited to review of "final decisions of the district courts," id. at 8a (quoting 28 U.S.C. 1291), "an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds may be appealed under the collateral order doctrine" if the claim is "'at least colorable,'" id. at 8a-9a (quoting Richardson v. United States,

468 U.S. 317, 322 (1984)).[1] The court held, however, that petitioner's claim was not colorable. Id. at 10a. The court explained that "[w]hen a 'trial has ended in a conviction, the double jeopardy guarantee imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside unless the conviction has been reversed because of insufficiency of the evidence.'" Ibid. (quoting United States v. DiFrancesco, 449 U.S. 117, 131 (1980)) (bracket and ellipsis omitted). The court accordingly found that because petitioner "was not acquitted, and his guilty verdict was set aside for reasons unrelated to the sufficiency of the evidence," "no event ha[d] occurred to terminate [petitioner's] jeopardy from his original trial." Ibid.

The court of appeals also determined that it lacked jurisdiction over petitioner's appeal from the district court's denial of his Rule 29 motion for judgment of acquittal based on insufficient evidence. Pet. App. 12a-13a. The court of appeals relied on circuit precedent establishing that the "'denial of a Rule 29 motion does not fall within the narrow scope of the

---

[1] The collateral order doctrine authorizes appellate review of an interlocutory order that "'(1) conclusively determine[s] the disputed question, (2) resolve[s] an important issue completely separate from the merits of the action, and (3) [is] effectively unreviewable on appeal from a final judgment.'" Pet. App. 8a (quoting Schwartz v. City of New York, 57 F.3d 236, 237 (2d Cir. 1995), cert. denied, 516 U.S. 1113 (1996)).

collateral order doctrine.'" Ibid. (quoting United States v. Ferguson, 246 F.3d 129, 138 (2d Cir. 2001)).

5. After the filing of this petition,[2] petitioner was retried on the charged offense. Petitioner was acquitted and discharged from federal custody. D. Ct. Doc. 150.

ARGUMENT

Petitioner contends (Pet. 27-29) that, after the district court granted his request for a new trial, he was entitled to interlocutory appellate review of his claim that the requested retrial was barred on double jeopardy grounds by the asserted insufficiency of the evidence at his first trial. That claim is moot, and the petition should be denied for that reason. In any event, the court of appeals' decision is correct and does not conflict with any decision of any other court of appeals. Further review is not warranted.

1. This case is an unsuitable vehicle for considering the question presented because petitioner's double jeopardy claim is moot. After the filing of the petition, petitioner was retried, and a jury acquitted him of the charged offense. Petitioner is no longer in federal custody. Resolution of his claim that retrial was barred will thus have no prospective effect in this case.

---

[2] Petitioner also filed an application for a stay pending the disposition of the petition for a writ of certiorari, which was denied by Justice Ginsburg on July 17, 2017.

The United States Constitution requires that "'an actual controversy * * * be extant at all stages of review.'" Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 669 (2016) (citations omitted). Therefore, where intervening circumstances make it "impossible for a court to grant any effectual relief whatever to the prevailing party," the appeal is moot, and must be dismissed for want of Article III jurisdiction. Knox v. Service Emps. Int'l Union, 567 U.S. 298, 307 (2012) (citations and internal quotation marks omitted). The circumstances in this case make it impossible for the Court to grant petitioner any effectual relief. The Court cannot prevent a second trial, which has already occurred; grant petitioner an acquittal, which the second jury has already done; or free petitioner from federal custody, which he is no longer in. Petitioner's claim is moot and the petition should be denied.

2. Even if the question presented were not moot, it would not warrant certiorari.

a. Petitioner was not entitled to interlocutory review of his double jeopardy claim. A district court's denial of a motion to dismiss on double jeopardy grounds is immediately appealable only if the claim is "at least 'colorable.'" Richardson v. United States, 468 U.S. 317, 322 (1984) (quoting United States v. MacDonald, 485 U.S. 850, 862 (1978)). Petitioner's double jeopardy claim was not immediately appealable for at least two reasons.

First, this Court's holding in Abney v. United States, 431 U.S. 651 (1977), that the denial of a pretrial motion to dismiss an indictment on double jeopardy grounds is subject to an interlocutory appeal, turned on the fact "[t]he elements of that 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 on which petitioner sought to appeal -- "that the evidence at the first trial was insufficient," Pet. App. 11 -- went directly to the merits.

Second, where a defendant has been found guilty and then is 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). By contrast, when a defendant's conviction is set aside based on "an error in the proceedings 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).

The Court accordingly held in Richardson v. United States, supra, that the Double Jeopardy Clause does not bar retrial after a mistrial, despite a defendant's request for a judgment of acquittal. 468 U.S. at 318. The Court explained 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 Mun. Court v. Lydon, 466 U.S. 294 (1984)), and that, 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 concluded, "[r]egardless of the sufficiency of the evidence at [the defendant's] first trial, he ha[d] no valid double jeopardy claim to prevent his retrial." Id. at 326. The Court also made clear that future double jeopardy claims of a similar nature would no longer be "colorable" and thus would not be appealable before final judgment. Id. at 326 n.6.

Contrary to petitioner's contention (Pet. 27-29), the court of appeals correctly applied Richardson's reasoning to the facts of this case. Although the defendant in Richardson sought sufficiency review after the trial court declared a mistrial based on a hung jury, and petitioner here pursues review after the grant of a motion for a new trial, that distinction does not warrant a different result. 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; see also 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.") (footnote omitted).[3]

b. Petitioner asserts (Pet. 11-24) that the decision below "deepens a longstanding conflict among the courts of appeals and the state high courts" regarding interlocutory review of double jeopardy claims premised on sufficiency of the evidence. That is incorrect.

There is a consensus among the courts of appeals and state high courts that where -- as here -- a jury's guilty verdict is

[3] Contrary to petitioner's claims, this Court's recent decision in Bravo-Fernandez v. United States, 137 S. Ct. 352 (2016), does not support his argument. That decision, consistent with the court of appeals' decision here, held that when a judgment is vacated due to legal error, the Double Jeopardy Clause does not foreclose a retrial. Id. at 364 ("Vacatur was compelled for the sole reason that the First Circuit found the jury charge erroneous to the extent that it encompassed gratuities. Therefore, the general rule of 'allowing a new trial to rectify trial error' applied.") (quoting Burks v. United States, 437 U.S. 1, 14 (1978) (citation omitted)).

set aside because of an error unrelated to the sufficiency of the evidence at trial, the defendant's retrial does not violate the Double Jeopardy Clause because the defendant's original jeopardy has not terminated. See, e.g., United States v. Carpenter, 494 F.3d 13, 26 (1st Cir. 2007), cert. denied, 552 U.S. 1230 (2008); United States v. Ferguson, 246 F.3d 129, 138 (2d Cir. 2001); United States v. McAleer, 138 F.3d 852, 856-857 (10th Cir.), cert. denied, 525 U.S. 854 (1998); United States v. Gutierrez-Zamarano, 23 F.3d 235, 238 (9th Cir. 1994); Satter v. Leapley, 977 F.2d 1259, 1263 (8th Cir. 1992); United States v. Ganos, 961 F.2d 1284, 1285 (7th Cir. 1992) (per curiam); Evans v. Court of Common Pleas, 959 F.2d 1227, 1236-1237 (3d Cir. 1992), cert. dismissed, 506 U.S. 1089 (1993); United States v. Miller, 952 F.2d 866, 871-872 & n.5 (5th Cir.), cert. denied, 505 U.S. 1220 (1992); Ex parte Queen, 877 S.W.2d 752, 754-755 (Tex. Crim. App. 1994), cert. denied, 513 U.S. 1115 (1995).

The assertedly conflicting decisions cited by petitioner do not adopt an approach under which petitioner's interlocutory appeal in this case would have been entertained. They instead primarily reflect a practice of reviewing a sufficiency challenge raised on appeal from a final judgment, rather than simply disposing of such an appeal on alternate grounds that would provide lesser relief. Courts following that practice appear to do so because of the potential for inefficiency involved in retrial, and

not because of a belief that the Constitution and this Court's precedents require review. See, e.g., Patterson v. Haskins, 470 F.3d 645, 655–660 (6th Cir. 2006) (concluding, in case where appeals court erroneously failed to follow its own rule to review sufficiency challenges before ordering retrial, that error did not subject defendant to unconstitutional retrial; "what activates the Burks [double jeopardy] rule is not the abstract possibility that the evidence was insufficient, but the appellate court's declaration to that effect. Absent such a declaration, jeopardy continues, and the defendant can be tried once again on the same charges."), cert. denied 522 U.S. 816 (2007); United States v. Simpson, 910 F.2d 154, 159 (4th Cir. 1990). That practice governing appellate review of final judgments has no bearing on the question whether a court of appeals has jurisdiction to review a district court's interlocutory order denying a double jeopardy claim premised on assertions of evidentiary insufficiency.[4]

---

[4] To the extent that Palmer v. Grammer, 863 F.2d 588, 592 (8th Cir. 1988) -- cited with Patterson in the petition -- suggests this practice was constitutionally compelled, the Eighth Circuit's subsequent decision in Satter v. Leapley, 977 F.2d 1259 (8th Cir. 1992), clarifies any confusion. Satter acknowledged that "[t]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." 977 F.2d at 1263. Absent a reviewing court's determination that "the prosecution produced insufficient evidence at [the defendant's] first trial," the court held, "double jeopardy is not implicated." Ibid. As a consequence, a reviewing court decision that orders "the reversal

The two decisions cited by petitioner that did not involve appeals from final judgment involved unique procedural circumstances. United States v. Greene, 834 F.2d 86 (4th Cir. 1987), reviewed and 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. 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. To the extent that the court viewed its consideration of the defendant's argument in double jeopardy terms, its discussion of jurisdiction was confined to the cross-appeal context in which the arguments arose. See ibid. This case, in contrast, involves neither such a cross appeal scenario nor any tacit acknowledgement by the government that review in such a context may encompass a sufficiency claim.

Similarly, in Kelly v. United States, 639 A.2d 86 (D.C. 1994), the District of Columbia Court of Appeals vacated the defendant's conviction due to an erroneous jury instruction, but neglected, in

---

of [the defendant's] conviction for trial error simply continues the jeopardy that was begun in his first trial." Ibid.

contravention of that court's established practice, to address his sufficiency of the evidence claim. Id. at 88-89. On remand, the defendant filed an interlocutory appeal asserting a double jeopardy claim. With the government's acquiescence, the D.C. Court of Appeals asserted jurisdiction to address the defendant's sufficiency claim. Id. at 89. In any event, that decision, like other decisions from courts other than the federal courts of appeals, has no bearing on the interpretation of the statutes governing appeals from federal district courts. See Abney, 431 U.S. at 656 (explaining that the "right of appeal, as we presently know it in criminal cases, is purely a creature of statute").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

KENNETH A. BLANCO
Acting Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

OCTOBER 2017