No. 09-1554

In the Supreme Court of the United States

REX SHELBY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioner's interlocutory appeal of the district court's denial of his motion to dismiss pending charges based on issue preclusion under the Double Jeopardy Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-17a) is reported at 604 F.3d 881. A prior opinion of the court of appeals is reported at 521 F.3d 367.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2010. A petition for rehearing was denied on May 17, 2010 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on June 21, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 2005, a grand jury sitting in the Southern District of Texas returned a seventh superseding indictment charging petitioner with conspiracy to commit wire fraud and securities fraud, in violation of

18 U.S.C. 371; securities fraud, in violation of 15 U.S.C. 78j(b), 15 U.S.C. 78ff, and 17 C.F.R. 240.10b-5; and four counts of insider trading, in violation of 15 U.S.C. 78j(b), 15 U.S.C. 78ff, and 17 C.F.R. 240.10b-5. Petitioner moved to dismiss the bulk of those charges based on the collateral estoppel component of the Double Jeopardy Clause. The district court denied the motion, and the court of appeals affirmed. This Court denied petitioner's petition for a writ of certiorari, but the Court granted a petition filed by one of his co-defendants. In July 2009, following this Court's decision in the co-defendant's case, petitioner again moved to dismiss the charges against him under the Double Jeopardy Clause. The district court denied the motion. Petitioner appealed, and the government moved to dismiss the appeal. The court of appeals granted the government's motion, dismissed the appeal, and remanded the case for trial. Pet. App. 2a-17a.

1. Petitioner, along with co-defendants F. Scott Yeager and Joseph Hirko, were executives at Enron Broadband Services (EBS), a unit of Enron Corporation engaged in the telecommunications business. In late 1998, EBS sought to develop an advanced "intelligent" communications network and the software necessary to run the network. According to the charges against them, petitioner and his co-defendants purposely sought to deceive the public and to drive up the price of Enron stock by making false statements about EBS's progress and financial condition while at the same time enriching themselves by selling millions of dollars of Enron stock. Pet App. 3a; 521 F.3d at 370.

2. In November 2004, a fifth superseding indictment charged petitioner with conspiracy to commit wire fraud and securities fraud, in violation of 18 U.S.C. 371; securi-

ties fraud, in violation of 15 U.S.C. 78j(b), 15 U.S.C. 78ff, and 17 C.F.R. 240.10b-5; four counts of wire fraud, in violation of 18 U.S.C. 1343 (Supp. II 2002); eight counts of insider trading, in violation of 15 U.S.C. 78j(b), 15 U.S.C. 78ff, and 17 C.F.R. 240.10b-5; and six counts of money laundering, in violation of 18 U.S.C. 1957 (2000). Yeager and Hirko were also charged in the indictment with conspiracy, securities fraud, wire fraud, insider trading, and money laundering. Pet. App. 3a; 521 F.3d at 369-370 & n.2.

After a trial in the United States District Court for the Southern District of Texas, the jury found petitioner not guilty on four of the insider trading counts but failed to reach a verdict on the four other counts. The four insider trading counts on which the jury acquitted related to sales of Enron stock made in the summer of 2000 while the four insider trading counts on which the jury did not reach a verdict related to sales of Enron stock made between January and March 2000. The jury was also unable to reach verdicts on the other counts charged against petitioner. The jury also returned mixed verdicts against Yeager and Hirko, finding them not guilty on some counts but deadlocking on other counts. The district court granted judgments of acquittal for petitioner on the wire fraud and money laundering counts. The court declared a mistrial on the other counts. Pet. App. 3a-4a; 521 F.3d at 370, 372, 375, 376-377.

3. Thereafter, in November 2005, the grand jury returned the seventh superseding indictment, which essentially deleted the counts on which petitioner was acquitted and re-alleged the counts on which the jury had deadlocked. The first two counts of the seventh superseding indictment, which charged petitioner with con-

spiracy to commit wire and securities fraud as well as securities fraud, rested on essentially the same facts as the counts of the fifth superseding indictment charging petitioner with those offenses. The seventh superseding indictment also re-alleged the four insider trading counts from the fifth superseding indictment on which the jury had deadlocked. Pet. App. 3a-4a; 521 F.3d at 370.

The seventh superseding indictment also charged Hirko with most of the counts against him in the fifth superseding indictment on which the jury had been unable to reach verdicts. An eighth superseding indictment charged Yeager with some, but not all, of the counts against him in the fifth superseding indictment on which the jury had deadlocked. Pet. App. 3a; 521 F.3d at 370.

4. Petitioner moved to dismiss the securities fraud count and the four insider trading counts based on the collateral estoppel component of the Double Jeopardy Clause. He argued that the government was collaterally estopped from further prosecution of those counts because facts essential to conviction on those counts had been resolved in his favor by the jury's acquittals at the prior trial. Specifically, petitioner argued that the securities fraud count and the four insider trading counts were barred by collateral estoppel because the jury at the prior trial had necessarily decided that he did not act with the requisite intent to defraud when it found him not guilty on the other four insider trading counts. Pet. App. 4a; 521 F.3d at 370.

The district court denied petitioner's motion to dismiss. 447 F. Supp. 2d 750. The court found that it could not, "in all practicality, determine what particular issue the jury necessarily decided in acquitting [petitioner] of

four counts of insider trading." *Id.* at 761. The court explained that "the record contain[ed] no clear indication" that the jury's acquittals on the insider trading counts at the prior trial were, as petitioner claimed, "based on a finding that [he] lacked knowledge or an intent to defraud." *Ibid.* "Rather," the court explained, "the jury could have found that the government failed to prove beyond a reasonable doubt that [petitioner] actually used material non-public information that he had in his possession at the time that he made those trades, or that the government failed to establish that [he] employed or devised a scheme to defraud during that time period." *Ibid.* The court observed that the government's evidence that petitioner had acquired material, nonpublic information when he made the stock sales was stronger for the counts on which the jury had hung than for the counts on which it had acquitted. *Id.* at 761-762.

The district court also denied Yeager's and Hirko's motions to the dismiss their indictments on collateral estoppel grounds. See *United States* v. *Yeager*, 446 F. Supp. 2d 719 (S.D. Tex. 2006); *United States* v. *Hirko*, 447 F. Supp. 2d 734 (S.D. Tex. 2006).

5. The court of appeals affirmed. The court held that the acquittals at the prior trial did not collaterally estop the government from retrying any of the defendants on any of the counts on which the jury was unable to reach verdicts, although the court rejected the claims of each defendant for different reasons. *Yeager*, 521 F.3d 367.

a. The court of appeals concluded petitioner had failed to show that the jury, in acquitting him on four insider trading counts, necessarily made a factual determination that would bar a retrial on the other four insider trading counts and the securities fraud count. 521

F.3d at 372-375. The court observed that the four insider trading acquittals at the prior trial involved sales of Enron stock during the summer of 2000, while the four insider trading counts on which the jury hung involved sales between January and March 2000. *Id.* at 372. After an "extensive" examination of the record, *ibid.*, the court found that the acquittals could have been based on the jury's determination that petitioner "did not 'use' undisclosed, material information when he made the sales" during the summer of 2000 but instead made those sales because of discomfort with the stock market. *Ibid.* That determination, the court explained, would not bar a retrial on the insider trading sales between January and March, because it would not preclude a finding that petitioner made *those* trades because he possessed insider information. *Id.* at 373. The court also concluded that the four insider trading acquittals did not bar a retrial on the securities fraud count, because "'[u]sing' insider information in making trades in not an element of securities fraud." *Id.* at 374.

b. The court of appeals concluded that Hirko had failed to show that the jury's finding that he was not guilty of the money laundering counts and two insider trading counts necessarily rested on a jury determination that he was not guilty of the securities and wire fraud counts and the five other insider trading counts. 521 F.3d at 375-376. The court reasoned that, based on the jury instructions, the jury could have acquitted Hirko on the money laundering counts because it was unable to decide whether the government had proved that he had committed securities fraud, wire fraud, and insider trading. *Id.* at 376.

c. Finally, the court of appeals concluded that Yeager had failed to show that the jury, in acquitting him on

the conspiracy, securities fraud, and four wire fraud counts, necessarily made a factual determination that would bar a retrial on five insider trading counts and eight money laundering counts. 521 F.3d at 376-380. Based on its review of the record, the court initially concluded that "the jury could have acquitted Yeager of securities fraud for two reasons: (1) there were no material misrepresentations or omissions made at the [2000 annual analyst] conference; or (2) Yeager did not knowingly make misrepresentations or omissions because he believed the presentations were truthful." *Id.* at 378. "Under either rationale," the court reasoned, "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public." *Ibid.* The court observed that, in considering the acquittals by themselves, the jury "seemingly made a finding that precludes the Government from now prosecuting him on insider trading and money laundering." *Ibid.*

The court concluded, however, that its precedents required it also to consider the hung counts, along with the acquitted counts, in examining what the jury determined. 521 F.3d at 378-379. The court observed that "if Yeager is correct that the jury found that he did not have insider information, then the jury, acting rationally, would have acquitted him of insider trading and money laundering." *Id.* at 379. Because it was "impossible" to determine why the jury instead hung on those counts, the court concluded that collateral estoppel did not bar a retrial. *Ibid.* The court went on to note that it rejected the government's argument, based on *United States* v. *Powell*, 469 U.S. 57 (1984), that collateral estoppel never applied when a jury acquitted on some

counts but hung on other counts at the same trial. 521 F.3d at 380-381.

6. a. Yeager filed a petition for a writ of certiorari, which this Court granted. *Yeager* v. *United States*, 129 S. Ct. 593 (2008). The Court subsequently held in *Yeager* v. *United States*, 129 S. Ct. 2360 (2009), that the court of appeals had erred in its collateral estoppel analysis by considering the hung counts, along with the acquittals, in determining what issues the jury necessarily decided at Yeager's first trial. *Id.* at 2367-2368. Noting that "the more descriptive term 'issue preclusion' is often used in lieu of 'collateral estoppel,'" *id.* at 2367 n.4 (citation omitted), the Court held that "consideration of hung counts has no place in the issue-preclusion analysis." *Id.* at 2368. "To identify what a jury necessarily determined at trial," the Court explained, "courts should scrutinize a jury's decisions, not its failures to decide." *Ibid.* The Court reversed the judgment against Yeager and remanded for further proceedings. *Id.* at 2369.[1]

b. Hirko filed a petition for a writ of certiorari at the same time as Yeager. In its brief in opposition, the government conceded that, although the court of appeals

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[1] The Court declined to consider the government's alternative argument that Yeager had not shown that the acquittals alone necessarily resolved in his favor an issue of ultimate fact that the government was required to prove in order to convict him of insider trading and money laundering charges. *Yeager*, 129 S. Ct. at 2370. Instead, the court stated that the court of appeals could, if it so chose, address that argument on remand. *Ibid.* On remand, the court of appeals declined to revisit its prior factual analysis that the acquittals, without consideration of the hung counts, precluded prosecution of Yeager on the insider trading counts and money laundering counts. The court remanded to the district court with instructions to enter judgments of acquittal for Yeager on all counts of the eighth superseding indictment. *United States* v. *Yeager*, 334 Fed. Appx. 707, 709 (5th Cir. 2009).

did not explicitly state that it was considering the hung counts in deciding what facts the jury necessarily found in acquitting Hirko, the court's opinion was most reasonably read to have done so. See Br. in Opp. at 14-15 n.5, *Hirko* v. *United States*, *Shelby* v. *United States*, *Yeager* v. *United States*, Nos. 08-40, 08-58 and 08-67 (Br. in Opp.). This Court held Hirko's petition for a writ of certiorari pending its decision in *Yeager* and then granted the petition, vacated the judgment, and remanded the case for further consideration in light of that decision. *Hirko* v. *United States*, 129 S. Ct. 2858 (2009).[2]

c. Petitioner also filed a petition for a writ of certiorari at the same time as Yeager. In its brief in opposition, the government noted that, contrary to petitioner's contention, "the court of appeals did not apply the same analysis in rejecting his collateral estoppel claim," but rejected that claim without relying on the hung counts. See Br. in Opp. at 15 n.5. This Court denied petitioner's petition for a writ of certiorari three days after the Court granted Yeager's petition. *Shelby* v. *United States*, 129 S. Ct. 595 (2008). The Court subsequently denied petitioner's request for rehearing. *Shelby* v. *United States*, 129 S. Ct. 977 (2009).

7. Following this Court's decision in *Yeager*, petitioner filed a new motion to dismiss on double jeopardy grounds. He argued that *Yeager* had clarified the law regarding issue preclusion analysis, justifying reevalua-

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[2] In the interim between the filing of his petition for a writ of certiorari and this Court's decision in *Yeager*, Hirko pleaded guilty to one wire fraud count in the seventh superseding indictment. On remand from this Court, the court of appeals granted the parties' joint motion to reinstate the judgment and remanded the case to the district court to allow Hirko's sentencing to proceed.

tion of his double jeopardy claims and dismissal of all of the charges against him. Pet. App. 8a-9a.

The district court denied the motion. Pet. App. 41a-43a. The court concluded that "the Supreme Court's decision in Mr. Yeager's case [does not] help Mr. Shelby with respect to the motion to dismiss on grounds of issue preclusion." *Id.* at 25a. The court declined, however, to find that the motion was frivolous. *Id.* at 43a.

8. Petitioner filed an interlocutory appeal, which the government moved to dismiss. The court of appeals dismissed the appeal and remanded the case for trial. Pet. App. 2a-17a.

Relying on *Richardson* v. *United States*, 468 U.S. 317 (1984), the court of appeals ruled, as a preliminary matter, that "a colorable, non-frivolous claim is a prerequisite to our jurisdiction under 28 U.S.C. § 1291 to hear a pretrial double jeopardy appeal." Pet. App. 11a. The court of appeals then concluded that this Court's intervening decision in *Yeager* did not raise "a colorable issue" as to the correctness of the court of appeals' prior decision rejecting petitioner's double jeopardy claim. *Ibid.*

First, the court of appeals rejected petitioner's argument that *Yeager* changed the law governing issue preclusion under the Double Jeopardy Clause by imposing a new requirement that, in determining what the jury necessarily decided, a court must restrict its analysis to the "points in controversy" at the former trial. Pet. App. 11a-14a. The court concluded that *Yeager* did not impose any such requirement but "reached only the 'narrow legal question' of whether a court may consider the effect of hung counts in evaluating what the jury necessarily determined." *Id.* at 13a (quoting *Yeager*, 129 S. Ct. at 2370). The court of appeals noted that this Court

stated in *Yeager* that the inquiry into what the jury had decided could take into account not just "the points in controversy" in the former trial but also "the testimony given by the parties" and "the questions submitted to the jury for their consideration." *Ibid.* (quoting *Yeager*, 129 S. Ct. at 2368). The court of appeals observed that, when rejecting petitioner's initial motion to dismiss on double jeopardy grounds, it and the district court had considered "precisely" those factors in determining what the jury had decided. *Ibid.*

Second, the court of appeals found "no merit" in petitioner's argument that it and the district court had also considered the hung counts in determining what the jury had decided. Pet. App. 14a-15a. The court of appeals noted that its conclusions and the district court's conclusions "as to the * * * acquitted counts [did] not depend on any reference to the * * * hung counts." *Id.* at 14a. Instead, the court of appeals explained, those conclusions turned on the evidence presented by the government and petitioner's own testimony. *Id.* at 15a.

The court concluded that petitioner had "failed to cite any intervening change or correction in the law effected by *Yeager*[] that has relevance to his double jeopardy claim, which a panel of this court has already considered and squarely rejected." Pet. App. 15a-16a. On the contrary, the court noted, petitioner's invocation of *Yeager* "appear[ed] largely to be pretext for revisiting the reasoning and outcome of [the] prior panel decision." *Id.* at 16a. Because petitioner had "not raised a colorable claim," the court ruled that it was "without jurisdiction to consider his appeal from the district court's denial of his motion." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-15) that this Court's decision in *Yeager* v. *United States*, 129 S. Ct. 2360 (2009), constituted an intervening change in the law that required the district court and the court of appeals to reconsider their previous rejections of his issue preclusion claim. Petitioner also contends (Pet. 16-21) that court of appeals erred in ruling that it lacked jurisdiction to consider his pretrial double jeopardy appeal because his argument based on *Yeager* was not colorable. Those contentions lack merit and do not warrant this Court's review.

1. Petitioner's contention that he is entitled to reconsideration of his issue preclusion claim rests on the premise that *Yeager* changed the standard for evaluating such claims and held that a court may consider only "what was actively contested" when determining what the jury necessarily decided at the former trial. Pet. 11. As the court of appeals correctly concluded, that premise is mistaken. *Yeager* addressed a "narrow legal question," 129 S. Ct. at 2370, holding only that "consideration of hung counts has no place in the issue-preclusion analysis." *Id.* at 2368. Contrary to petitioner's claim, *Yeager* did not alter the well-settled standard for evaluating issue preclusion claims set forth in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), which the Court in *Yeager* viewed as "controlling." 129 S. Ct. at 2367. "To decipher what a jury has necessarily decided," the Court explained in *Yeager*, "courts should 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Ibid.* (quoting *Ashe*, 397

U.S. at 444). Thus, the Court in *Yeager* did not limit the inquiry regarding what the jury decided to matters "actively contested at trial." Pet. 11. Instead, the Court reaffirmed its holding in *Ashe* that the inquiry encompasses the entire "record of [the] prior proceeding," and merely decided that "[a] hung count is not a 'relevant' part of the 'record of [the] prior proceeding.'" *Yeager*, 129 S. Ct. at 2367 (quoting *Ashe*, 397 U.S. at 444 (second pair of brackets in original)).

There is no merit in petitioner's claim (Pet. 11-12) that the court of appeals applied a materially different test when it rejected his issue preclusion claim in his prior appeal. In the prior appeal, the court of appeals applied the standard drawn from *Ashe* and circuit precedent, 521 F.3d at 371, engaging in "an extensive examination of the record." *Id.* at 372. Although the court considered hung counts in evaluating Yeager's issue preclusion claim, *id.* at 378-380, the court found no need to consider hung counts in evaluating petitioner's claim. *Id.* at 372-373. Rather, the court rejected petitioner's claim that the jury, in acquitting him on four insider trading counts, must have found that he did not participate in the fraudulent scheme or act with the requisite intent to defraud, because the record showed that "[t]he jury could have found that [petitioner] did not use insider information when he conducted the trades that underlie [the counts on which he was acquitted]." *Id.* at 373; see 447 F. Supp. 2d at 761 (district court noting that "the record indicates that [petitioner] hotly disputed several issues at trial, including the intent to defraud, scheme to defraud, and use elements of the offense"). In other words, the court of appeals simply concluded, based on its review of "the record of [the] prior proceeding," that "a rational jury could have grounded its ver-

dict upon an issue other than that which the defendant seeks to foreclose from consideration." *Yeager*, 129 S. Ct. at 2367 (quoting *Ashe*, 397 U.S. at 444).

Accordingly, the court of appeals correctly concluded that *Yeager* has no bearing on petitioner's issue preclusion claim because the court did not rely on hung counts when it rejected the claim the first time. Pet. App. 14a-15a. And the court therefore correctly determined that petitioner's renewed issue preclusion claim was "frivolous." *Id.* at 11a.

As the court of appeals noted, petitioner's invocation of *Yeager* to support his renewed issue preclusion claim appears "largely to be pretext for revisiting the reasoning and outcome of [the] prior panel decision." Pet. App. 16a; see, *e.g.*, Pet. 14 (arguing that "[t]he only 'realistic' explanation for the acquittals is that the jury agreed that the Defendants were not participating in a scheme to 'pump and dump' stock based on misrepresentations about the functionality of the software"). As petitioner acknowledges (Pet. 9), however, this Court is not a court of general error correction. Petitioner's fact-bound challenge to the court of appeals' reading of the record of the prior proceeding is thus no more worthy of this Court's review now than it was when this Court denied petitioner's initial petition for a writ of certiorari. See *Shelby* v. *United States*, 129 S. Ct. 595 (2008).

2. Contrary to petitioner's contention (Pet. 16-21) the court of appeals also correctly held that it lacked jurisdiction to consider his pretrial double jeopardy appeal on the merits. In *Abney* v. *United States*, 431 U.S. 651, 662 (1977), this Court held that the denial of the defendant's pretrial motion to dismiss on double jeopardy grounds was immediately appealable as a collateral order under 28 U.S.C. 1291. The Court observed that the

Double Jeopardy Clause protects the right not to be "twice put to trial for the same offense," *Abney*, 431 U.S. at 657, 661, and that right "would be lost if the accused were forced to 'run the gaunlet' a second time before an appeal could be taken." *Id.* at 662. Shortly thereafter, in *United States* v. *MacDonald*, 435 U.S. 850 (1978), the Court observed that an appealable double jeopardy claim "requires at least a colorable showing that the defendant once before has been in jeopardy of federal conviction on the same or a related offense." *Id.* at 862.

Subsequently, in *Richardson* v. *United States*, 468 U.S. 317 (1984), the Court elaborated on its observation in *McDonald*, explaining that "the appealability of a double jeopardy claim depends upon its being at least 'colorable.'" *id.* at 322 (quoting *McDonald*, 435 U.S. at 862). The Court explained in *Richardson* that "[a] colorable claim, of course, presupposes that there is some possible validity to a claim." *Id.* at 326 n.6. When "no set of facts will support the assertion of a claim of double jeopardy," the Court noted, the claim is not "colorable." *Ibid.*

Read together, *Richardson* and *McDonald* establish that whether a double jeopardy claim is interlocutorily appealable turns on whether the claim is colorable. And a showing of former jeopardy is a necessary, but not sufficient, condition for a claim to be colorable. *McDonald*, 435 U.S. at 862. More generally, the claim must have some "possible validity." *Richardson*, 468 U.S. at 326 n.6.

The court of appeals correctly concluded that it lacked jurisdiction to consider petitioner's appeal from the denial of his second motion to dismiss because his issue preclusion claim was not "colorable." See Pet. App. 15a-16a. The issue preclusion claim raised by peti-

tioner in the district court following this Court's denial of his petition for a writ of certiorari was precisely the same claim that the court of appeals, after an extensive review of the record, had squarely rejected in *Yeager*, 521 F.3d at 372-375, without reference to the hung counts. For the reasons discussed above, the court of appeals correctly concluded that this Court's decision in *Yeager* did not change the law in any way that was relevant to petitioner's issue preclusion claim. Pet. App. 15a-16a. Thus, there was no "possible validity" to petitioner's claim, and the court of appeals correctly ruled that it lacked jurisdiction to consider petitioner's appeal from the district court's denial of his second motion to dismiss on double jeopardy grounds. *Id.* at 16a.

Petitioner argues (Pet. 18-21) that the court of appeals misread the word "colorable" to require that a claim have some possible merit; instead, petitioner contends, a claim is "colorable," and a defendant may take an interlocutory appeal, whenever the defendant can establish "an actual attachment of prior jeopardy." Pet. 18. The court of appeals, however, correctly based its interpretation of the requirement that a claim be colorable on this Court's statement in *Richardson* that a colorable claim "presupposes that there is some possible validity to a claim." Pet. App. 9a (quoting *Richardson*, 468 U.S. at 326 n.6). Petitioner simply ignores that statement in *Richardson*. Moreover, after rejecting the defendant's double jeopardy claim on the merits, the Court in *Richardson* explained that "[s]ince no set of facts will support the assertion of a claim of double jeopardy like petitioner's in the future, there is no possibility that a defendant's double jeopardy rights will be violated by a new trial, and there is little need to interpose the delay of appellate review before a second trial can

begin." 468 U.S. at 326 n.6. Thus, *Richardson* refutes petitioner's contention that a double jeopardy claim is colorable whenever the defendant "has been in jeopardy" before. Pet. 20.[3]

None of the decisions of this Court cited by petitioner (Pet. 18-19) support his contention that the court of appeals erred in holding that a double jeopardy claim is immediately appealable only if the claim has some possible validity. *MacDonald* did not directly concern the appealability of a double jeopardy claim. Rather, the Court held in *McDonald* that a court of appeals lacked jurisdiction to entertain a defendant's interlocutory appeal from the denial of a pretrial motion to dismiss an indictment for a violation of the Sixth Amendment right to a speedy trial. 435 U.S. at 857. As discussed above, to the extent *MacDonald* sheds light on the immediate appealability of double jeopardy claims, it supports the court of appeals' holding that a defendant may take an interlocutory appeal only if his claim is colorable. See p. 15, *supra*.

The other decisions of this Court on which petitioner relies also did not involve the appealability of double jeopardy claims. In *Arthur Anderson LLP* v. *Carlisle*, 129 S. Ct. 1896, 1900-1901 (2009), the Court held, based on the plain language of the Federal Arbitration Act,

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[3] Indeed, petitioner himself elsewhere appears to acknowledge that the existence of prior jeopardy is not sufficient to establish that a double jeopardy claim is colorable. See Pet. 21 (suggesting that the colorability of a double jeopardy claim depends upon whether "there has been 'a jeopardy terminating event'" (quoting *United States* v. *Bobo*, 419 F.3d 1264, 1267 (11th Cir. 2005)). A claim is colorable only if the defendant can make plausible showings of both prior jeopardy and a jeopardy terminating event because both are necessary—although not sufficient—to satisfy the requirement that the claim have "some possible validity." *Richardson*, 468 U.S. at 326 n.6.

Ch. 213, 413 Stat. 883, that an appellate court has jurisdiction over an appeal from an order refusing a stay of any action referable to arbitration under the Act. In *Behrens* v. *Pelletier*, 516 U.S. 299, 306-307 (1996), the Court held that a defendant's immediate appeal of an unfavorable qualified immunity ruling on a motion to dismiss in a civil *Bivens* action did not deprive the court of appeals of jurisdiction over a second appeal based on qualified immunity following the denial of summary judgment. In *Johnson* v. *Jones*, 515 U.S. 304, 319-320 (1995), the Court held that a defendant who is entitled to invoke a qualified immunity defense in a civil action may not appeal a district court's summary judgment order insofar as the order determines whether or not the pretrial record sets forth a "genuine" issue of material fact for trial. And in *Digital Equipment Corp.* v. *Destktop Direct, Inc.*, 511 U.S. 863, 865 (1994), the Court held that an order in a civil case vacating a dismissal predicated on the parties' settlement agreement was not an appealable collateral order.

Petitioner also errs in contending (Pet. 20-21) that the decision below conflicts with decisions of other courts of appeals. As petitioner notes (Pet. 20), the Tenth Circuit in *United States* v. *Wood*, 950 F.2d 638, 642 (1991) (per curiam), distinguished between its "jurisdictional authority to hear an appeal" and its "supervisory power summarily to dismiss frivolous appeals," stating that "[t]he summary determination of whether a defendant has raised a colorable claim [was] not necessary to [its] jurisdiction." As the court of appeals noted (Pet. App. 10a), however, it is difficult to square the Tenth Circuit's statement in *Wood* with this Court's statement in *Richardson* that "the appealability of a double jeopardy claim depends upon its being at least

'colorable.'" 468 U.S. at 322. Moreover, the Tenth Circuit's statement in *Wood* was not necessary to the court's decision because the court held that the defendant's claims were colorable in any event. See 950 F.2d at 642. And, in a subsequent case, the Tenth Circuit made clear that it considers colorability to be a jurisdictional requirement, dismissing a defendant's appeal on a double jeopardy claim after finding that the claim was not colorable. *United States* v. *McAleer*, 138 F.3d 852, 857, cert. denied, 525 U.S. 854 (1998).

As the court of appeals noted (Pet. App. 10a-11a), other courts of appeals have also concluded that a colorable claim is a prerequisite to jurisdiction. See *United States* v. *Bhatia*, 545 F.3d 757, 758 (9th Cir. 2008) ("Because his claims of res judicata and collateral estoppel are not colorable, we dismiss this interlocutory appeal for lack of jurisdiction."), cert. denied, 130 S. Ct. 127 (2009); *United States* v. *Bobo*, 419 F.3d 1264, 1267 (11th Cir. 2005) ("[O]nly 'colorable' double jeopardy claims can be reviewed prior to final judgment."); *United States* v. *Hickey*, 367 F.3d 888, 891 (9th Cir. 2004) ("Both the Supreme Court and this court, however, have held that we have interlocutory appellate jurisdiction to reach the merits only of 'colorable' double jeopardy claims."), amended 400 F.3d 658 (9th Cir.), cert. denied, 546 U.S. 872 (2005); *United States* v. *Abboud*, 273 F.3d 763, 769 (8th Cir. 2001) ("The Abbouds have not raised colorable claims of double jeopardy * * * . For these reasons we lack jurisdiction over these interlocutory appeals, and they are dismissed."); *United States* v. *Andrews*, 146 F.3d 933, 937 (D.C. Cir. 1998) ("[T]he Supreme Court held in *Richardson* v. *United States* that a claim of double jeopardy must be at least 'colorable' to confer interlocutory jurisdiction on an appellate court.").

Petitioner incorrectly argues (Pet. 20-21) that those decisions endorse his view that a double jeopardy claim is colorable, and thus immediately appealable, whenever a defendant has been subject to former jeopardy. On the contrary, in *Bobo*, the Eleventh Circuit stated, consistent with the decision below, that "frivolous claims and arguments that have already been squarely decided by precedent do not afford appellate courts jurisdiction to review interlocutory orders." 419 F.3d at 1267 (citing *Richardson*, 468 U.S. at 322). Likewise, in both *Bhatia* and *Hickey*, the Ninth Circuit stated, consistent with the decision below, that the colorability and immediate appealability of a double jeopardy claim turn on whether the claim has "some possible validity." *Bhatia*, 545 F.3d at 759 (citation omitted); *Hickey*, 367 F.3d at 891 (citation omitted). And, although the D.C. Circuit concluded in *Andrews* that a defendant's claim was not colorable because he was never previously in jeopardy, nothing in the decision suggests that the existence of former jeopardy is alone sufficient to render a claim colorable. See 146 F.3d at 937-938. Finally, the Eighth Circuit's statement in *Abboud* that "[a] colorable claim requires a showing of previous jeopardy *and* the threat of repeated jeopardy," 273 F.3d at 766 (emphasis added), refutes, rather than supports, petitioner's contention that a showing of previous jeopardy is alone sufficient. The Eight Circuit's statement is simply a different way of expressing *Richardson*'s requirement that a double jeopardy claim must have some possible validity to qualify as colorable.

In any event, this Court's review would not be warranted even if petitioner were correct that the court of appeals erred in holding that it lacked jurisdiction to review his double jeopardy claim because that claim is

frivolous. The court of appeals correctly concluded that petitioner's claim lacks merit, so he would not be entitled to any relief even assuming that the court erroneously labeled its decision a dismissal for lack of jurisdiction rather than a ruling on the merits. Because petitioner would not be entitled to any relief even if this Court resolved the jurisdictional issue in his favor, this case is not an appropriate vehicle to consider that issue.

Finally, given the unique context in which they arise, the issues presented by petitioner are not of broad or recurring importance. Based on an intervening decision by this Court involving a co-defendant, petitioner is seeking to take a second interlocutory appeal after the court of appeals squarely and correctly rejected his issue preclusion claim in his first interlocutory appeal. Because those unusual circumstances are unlikely to recur in a future case, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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