No. 10-____

IN THE
Supreme Court of the United States

REX SHELBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether this Court's decision last Term in *Yeager v. United States* was so inconsequential as to raise no "colorable question" as to the correctness of the Fifth Circuit's decision it reversed or to provide no "basis to conclude that" it "created an intervening change or 'correction' in the applicable law"?

2) As the Fifth Circuit held in conflict with decisions of the Tenth Circuit and this Court, whether an appeal from the denial of double jeopardy relief following a judgment of acquittal may be not "colorable" so as to destroy appellate jurisdiction, or whether appellate jurisdiction is a function of the category of order appealed?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were Rex Shelby, Defendant-Appellant, and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Rex Shelby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 604 F.3d 881 and reprinted at App. 1a. The order of the United States District Court for the Southern District of Texas is not reported but is reprinted at App. 18a.

JURISDICTION

The judgment of the Fifth Circuit was entered on April 23, 2010. A petition for rehearing en banc was denied on May 17, 2010. App. 19a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

This case arises from the Fifth Circuit's refusal to recognize the effect of this Court's decision last Term in *United States v. Yeager*. Rex Shelby, Scott Yeager, and a third former Enron Broadband Services executive were tried and acquitted on multiple charges stemming from the allegation that they conspired to mislead the public about the

functionality of the company's software under development while they profited from the resultant inflation of the stock price. In Shelby's case, the jury acquitted him of all counts of insider trading in connection with a series of stock sales in June 2000. Given the record and points in actual controversy, the only rational explanation for the acquittals was that Shelby was not aware of and did not participate in any scheme to mislead the public. The jury failed to render a verdict on like counts as to sales from a few months earlier or to the conspiracy or securities fraud counts against him. When the Government obtained further indictments, proposing to retry the three men on related charges on which the same jury had failed to arrive at a verdict, all three sought issue preclusion relief under the Double Jeopardy Clause.

The Fifth Circuit concluded that Shelby and his co-defendants were obliged to show, as part of the determination of what the jury actually decided by its acquittals, why a rational jury would not have acquitted on the hung counts. Unsurprisingly, none of the Defendants were able to satisfy this standard, as any explanation for the actual verdict that would give rise to issue preclusion invariably conflicted with the jury's failure to answer the hung counts. The attempted reconciliation with the unanswered counts was most extreme in the case of Shelby's co-defendant, Scott Yeager. The Fifth Circuit was unable to arrive at any conceivable explanation, no matter how bizarre, for the jury's failure to acquit Yeager on the remaining charges. Nonetheless, applying its standard of presumed rationality underlying the failure to arrive at a verdict, the Fifth Circuit denied Yeager relief.

In Shelby's case, the Fifth Circuit's test yielded a highly improbable explanation for the unanswered counts in the face of the jury's acquittal: that the jury might have believed that Shelby was actively participating in a scheme to mislead the public about the existence or functionality of software under development in order to "pump up" the stock price in early 2000, but did not "use" that knowledge as "a factor" in his June 2000 sales of his shares netting him more than $5 million. Thus, the Fifth Circuit speculated that the jury might have viewed his "use" of the knowledge in connection with earlier trades as an explanation for its failure to acquit. *United States v. Yeager*, 521 F.3d 367, 373-73 (5th Cir. 2008). No one has plausibly argued or explained, before or after the verdict in this case, how someone allegedly participating in a scheme to commit a large and infamous public stock fraud, such as the Enron scandal, could act without "use" of his knowledge of that fact when he sells shares netting $5 million.

In November 2008, this Court granted certiorari as to Yeager and denied certiorari as to Shelby. Shelby's retrial was abated pending the Court's decision. On June 18, 2009, the Court reversed, rejecting the Fifth Circuit's issue preclusion test as "too burdensome" for defendants and making clear that (1) hung counts are a "nonevent" in the issue preclusion calculus, and (2) the determination of what the jury actually decided must be practically constrained and confined to "the points in controversy" from the original trial. *United States v. Yeager*, 129 S. Ct. 2360 (2009). This rule is applicable to all cases pending in the federal system and fully available to Shelby under any

understanding of the law of the case doctrine. Nevertheless, the district court denied Shelby relief, continuing to reason that this Court's decision in *Yeager* had not foreclosed speculation into the cause for the jury's failure to answer the remaining counts. App. 18a, 23-24a.

The district court acknowledged however that the motion to dismiss was not frivolous and issued a stay of any trial pending appeal. A motions panel of the Fifth Circuit held that Shelby's attempt to have the *Yeager* standard applied to him is without subject matter jurisdiction and dismissed without receipt of merits briefing or the record of the original trial, solidifying a circuit split in the process. Oddly, the motions panel posed the subject matter jurisdiction question as merits-driven inquiry based on a determination of whether "the [Supreme] Court's intervening decision in *Yeager II* raises a colorable issue as to the correctness of *Yeager I* [the Fifth Circuit opinion]," App. 11a, and answered that "there is no basis to conclude that *Yeager II* created an intervening change or 'correction' in the applicable law." App. 14a. This is an odd view of the Court's decision in *Yeager*, given that it reversed the Fifth Circuit and did not purport to do so on the basis of factual error. Indeed, this Court remanded *Yeager* with instructions for the Fifth Circuit to apply the newly articulated legal standard to the considerable trial record. All Shelby seeks is application of that standard to his case.

The Fifth Circuit's eccentric treatment of the issue may be explained by its implication that this Court's decision to accept certiorari in Yeager's case while denying it in Shelby's constituted a

prejudgment of the outcome under the standard that was to be announced thereafter. At this stage the only jurisdictional question before the Fifth Circuit should have been whether Shelby's appeal was one asserting a double jeopardy claim following a final judgment of acquittal.

REASONS FOR GRANTING THE PETITION

1. The Fifth Circuit's refusal even to accept appellate jurisdiction over this matter creates or expands a conflict among the circuits and represents a rejection of this Court's decision in *Yeager*. By elevating the burden on the acquitted defendant and forcing the defendant to account for arguments and inferences that are both absurd and beyond the actual trial record, the Fifth Circuit continues to elevate the burden beyond the simple, "practical" approach first articulated in *Ashe* and strengthened in *Yeager*.

2. To be clear, there is subject matter jurisdiction over this appeal. This Court has long held that the collateral order doctrine applies to double jeopardy appeals as a category of appealable interlocutory orders so long as they involve an actual attachment of jeopardy, and is not applied by analyzing the merits of an individual appeal in advance of briefing. *Behrens v. Pelletier*, 516 U.S. 299, 311-12 (1996); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). Pretrial orders denying a defendant's motion to dismiss an indictment on Double Jeopardy issue preclusion grounds are final decisions subject to appeal under 28 U.S.C. § 1291. *Abney v. United States*, 431 U.S. 651, 662 (1977).

3. Here, the Fifth Circuit, at the Government's urging, read a few sentences of *dicta* from *Richardson v. United States*, 468 U.S. 317 (1984), to require that Shelby prove the merits of his case before jurisdiction would attach, and erred in the supposition of the merits in any event. Because the Fifth Circuit's interpretation of *Richardson* creates a general merits-based subject matter jurisdiction threshold and conflicts with *Abney*, *Behrens*, *Digital Equipment*, and the decisions of multiple circuits, this Court should grant certiorari.

4. While the Fifth Circuit's jurisdictional ruling is in error, that error is grounded in an implausible reading of this Court's decision in *Yeager* as announcing no new or different law on the merits even as compared to the Fifth Circuit's reversed opinion in the same case. The Court may therefore prefer to simply grant certiorari and remand this matter with instructions to decide this case on the merits in light of that decision, as it has done in the past. *E.g.*, *San Paulo State of the Federations Rep. of Brazil v. American Tobacco*, 535 U.S. 229 (2002) (summarily granting certiorari, vacating Fifth Circuit's judicial recusal standard, and remanding without merits briefing). Or, if this Court finds the logic of the Fifth Circuit's issue preclusion analysis as to Shelby too impractical, reverse and render judgment.

I. The Fifth Circuit's Decision Misreads This Court's Holding in *Yeager* Regardless of Any Jurisdictional Error or Conflict.

While the Fifth Circuit appears to have acknowledged that any ruling in *Yeager* that

substantively altered the standard applicable to Shelby's issue preclusion argument would be retroactively available to him under longstanding law of the case rules,[1] it concludes that this Court's decision in *Yeager* did not materially disagree with the Fifth Circuit's legal standard in that case. App. at 11a, 14a. Thus, to the Fifth Circuit, *Yeager* posed no intervening change in the law. Noticeably, the Fifth Circuit's motions panel did not include any judge who had participated in the earlier appeal and its decision came in advance of briefing or receipt of the record.

A decision by this Court is retroactively applicable to all cases pending in the federal system prior to final judgment. *Griffith v. Kentucky,* 479 U.S. 314 (1987). Failure to apply a "newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 713.

Likewise, a prior decision on appeal in any case is open to subsequent challenge under the law of the case rules where an intervening decision of this

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[1] As the Fifth Circuit has itself put it: "we are free to reconsider the correctness of a panel decision . . . if the Supreme Court has handed down an intervening decision that implicitly or explicitly overrules one of our prior decisions. *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1103 (5th Cir. 1997). A leading treatise describes this setting — where there has been an intervening change in law — as the "most obvious justification[]" for departing from the law of the case and cites intervening decisions by a "court higher in the hierarchy of a single court system" as being among "the easiest cases." 18B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 4478 (2002).

Court, like *Yeager*, calls its holding into question. *See, e.g., Castro v. United States*, 540 U.S. 375, 384 (2003). This is particularly true of cases, like Shelby's, that have not yet reached a final judgment on remand. *United States v. U.S. Smelting & Refin'g Co.*, 339 U.S. 186, 198 (1950); *Spigella v. Hull*, 481 F.3d 961, 964-65 (7th Cir. 2007); 18B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 4478 (2002) ("[t]here is a particularly strong tendency to 'get it right' during all trial-court proceedings before the first final trial-court judgment.").

There is little cause for doubting that the Fifth Circuit applied the same issue preclusion standard to Yeager and Shelby in its original decision. *See Yeager*, 521 F.3d 367. Both men were tried together before the same jury on the same substantive theory of culpability, and the Fifth Circuit decision handed down a consolidated decision as to both men. Likewise, there is little controversy over the outcome following this Court's review of that standard in its decision in *Yeager*. Nonetheless, in order to avoid any jurisdictional basis for evaluating the effect of this Court's decision in *Yeager* on Shelby's substantive double jeopardy claim, the Fifth Circuit appears to have given significant weight to this Court's decision to grant review and hear argument only as to Yeager, implying that the Court would have granted and reversed as to Shelby if it perceived the same error. App. at 6a. Thereafter, in peremptorily addressing the presupposed merits for purposes of evaluating appellate jurisdiction, the Fifth Circuit found its prior holding as to Shelby would be unaffected by application of this Court's holding in *Yeager*, because it regards this Court's

decision as leaving the legal standard effectively unchanged. It erred in both respects.

A. This Court's Decision to Grant Certiorari as to Yeager Does Not Amount to a Decision on the Merits as to Shelby.

While the Fifth Circuit did not explicitly declare that its peremptory dismissal and jurisdictional determination was driven by this Court's decision to grant review only as to Yeager, both the district court and the Fifth Circuit emphasized this fact in such a way as to make clear that they regarded the outcome as essentially foreclosed by this Court's decision to deny certiorari as to Shelby. App. 6a, 8a, 28a ("they didn't take his case though, did they?").

This Court is not a court of general error correction. The decision to grant or deny certiorari involves a host of considerations apart from the existence of error in any given case. *Singleton v. Comm'r,* 439 U.S. 940, 942 (1978) (Stevens, J., on denial of pet. for cert.). As the Court observed in *Griffin*:

> As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Thus, it is the nature of judicial review that precludes us from "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases

> subsequently to flow by unaffected by that new rule."

479 U.S. at 323 (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971)) (citation omitted). Thus, any decision by this Court is available to Shelby or any other Defendant at a subsequent stage of their proceedings, even where this Court has previously denied review. *E.g.*, *United States v. Matthews*, 312 F.3d 652 (5th Cir. 2002) (applying rule in *Apprendi* to defendant on second appeal presenting the same issue despite this Court's denial of certiorari as to the same defendant one month prior to grant in *Apprendi*); *see also Lisle v. Comm'r*, 541 F.3d 595 (5th Cir. 2008) (recalling mandate and correcting decision as to one of two co-appellants after this Court's reversal as to another).

In this case, the Court granted review in *Yeager* to address the proper issue preclusion standard to be applied in a case of partial verdicts. Having announced that standard (which plainly differs from the standard adopted by the Fifth Circuit), it did not attempt to apply it even *as to Yeager*. Rather, it left the merits determination to the Fifth Circuit on remand. To imply that a majority of the Court had already made a merits determination as to Shelby at the certiorari stage, as the Fifth Circuit hints and the district court openly suggested, App. 28a, 35-36a, 42a, defies reason.

B. This Court's Decision in *Yeager* Set a Standard Materially Different from the One the Fifth Circuit Applied to Yeager and Shelby.

The Fifth Circuit's motions panel suggests that this Court's decision in *Yeager* did not announce a rule of law different from the one applied by the Fifth Circuit to Yeager and Shelby. This conclusion is difficult to square with this Court's decision. Collectively, this Court's decisions in *Ashe* and *Yeager* confine the issue preclusion analysis inquiry into what the jury determined to the points *actually* in controversy at trial and require a realistic assessment of the record. *See Ashe v. Swenson*, 397 U.S. 436, 444 (1970). The *Ashe* review is a matter of legal, logical analysis into the elements of the acquitted counts focusing on what was actively contested at trial. A court reviews the entire record (but, after *Yeager*, not unanswered counts) to determine what points or issues were actually in controversy. Then, given the verdict and questions presented to the jury, the reviewing court determines what fact disputes the jury had to resolve to reach that verdict. *See id.*; *Yeager*, 129 S. Ct. at 2367. While an understanding of the entire record is necessary to identify those issues, that review should not be difficult in this case given the limited points in controversy.

The notion that *Yeager* did not amount to an intervening change of law so as to at least require its consideration on the merits to pending cases is difficult to fathom. This is particularly true of Shelby who was a Defendant in the same case and an appellant in the same appeal. While there were

differences in the pattern of acquittals between the two defendants, the scheme the Government alleged was the same and the legal issue confronting both was and is identical: does the determination of what the original jury decided involve explanation of the hung counts or speculation into the jury's thinking beyond an examination of the factual issues actually contested in the first trial. The result as to both men was driven by a standard — since rejected — that previously produced an admittedly irrational answer as to Yeager and a wholly improbable one as to Shelby.

C. The Fifth Circuit's Original Attempt to Rationalize Shelby's Acquittals Fails Under This Court's Double Jeopardy Standards, Particularly After *Yeager*.

If this Court's decision in *Yeager* established anything, it was that the Government's right to try the same factual allegations across overlapping theories of conviction is not on par with the defendant's right to repose following a final judgment of acquittal. Shelby's jury decided *something* when it acquitted him and the other Defendants. And yet, the Fifth Circuit's decision not only denies Shelby preclusive relief from that judgment, it refuses even to reach the merits of that question following this Court's decision just last Term reversing its legal standard in the same case. This was the error underlying the Fifth Circuit's view of the merits and jurisdiction.

1. The only realistic explanation of the acquittals was that the jury rejected the Government's theory that Shelby was participating in a scheme to inflate the stock price.

Shelby's appeal is not only within the collateral order jurisdiction of *Abney*, it is also meritorious. Given that Shelby readily admitted the details of his trades, the only issue actively contested was whether he was a participant in a conspiracy to hide the nonexistence or hopeless dysfunctionality of his company's software. Shelby, as well as Yeager and Joe Hirko, the third technology defendant, took the stand and testified vehemently that the software was functional and there was no scheme to mislead anyone concerning its development. The Government, largely relying on witnesses who were themselves avoiding criminal charges, struggled to argue otherwise, and the jury acquitted Shelby with respect to his sales in June 2000 despite their massive size and acquitted his two colleagues of some but not all the counts against them. This was not a case of a mixed verdict where the jury voted to convict in part and acquit in part. Rather, this is a case of a partial verdict where the jury acquitted as to every charge it reached. The Fifth Circuit's original opinion conjured a supposedly separate fact question not posed at trial: if Shelby knew of and participated in the fraud did he also use that knowledge when he traded? The question of "use" of knowledge of a fraud was not, on this trial record, separate from the question of the participation and existence of the conspiracy in the first instance. No lawyer would seriously argue that his client was

engaged in massive fraud but managed not to "use" that knowledge when he allegedly profited from it. Indeed no one made any such argument at this trial. Rather, it is a product of speculation of the very sort rejected in *Yeager*.

The 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. When the jury acquitted Shelby of his insider trading counts, it found that he did not "use" inside information, because he never had it. In other words, in the issue preclusion analysis, it is as though Shelby had been tried only for the trades the jury reached. The Government's effort to start over, using the same factual theory of culpability after the acquittal, simply cannot stand after this Court's decision in *Yeager*.

2. The Fifth Circuit theory of selective "use" of the knowledge of the fraud was compelled by the standard *Yeager* rejected.

Here, by relying exclusively on its prior decision, the Fifth Circuit found that the jury could have acquitted Shelby of his later-in-time insider trading counts and not his earlier counts, because those earlier sales took place well after his options vested. In other words, the jury might have believed that Shelby "used" his knowledge of the alleged conspiracy and fraud to sell his earlier shares and managed to put it out of his mind or ignore it later in June when he netted $5 million in sales. The court supports this supposition by assuming that the jury believed

Shelby selectively when he said he sold because he was uncomfortable being in the stock market at all. The Fifth Circuit noted that the stock price had risen above the strike price by November 1999 — a few months after the 1999 Options vested but a few months before Shelby exercised them and sold the resulting stock.[2] In its reasoning, the court ventures into facts and argument that were not before the jury and that contradict undisputed evidence that was.

The Fifth Circuit found the distinction between the timing of the acquitted and hung counts "obvious" and reasoned that the jury could have made the distinction "on its own." *Yeager*, 521 F.3d at 373 n.11. The notion that the jury believed Shelby was participating in stock fraud in March while profiting innocently in June is thus not only absurd but wholly speculative. A court cannot follow the *Yeager-Ashe* framework for a practical analysis and ground it on such remote conjecture about what a jury might have come up with "on its own."

This Court should grant certiorari and reverse or summarily remand with instructions to reconsider in light of the Court's substantive holding in *Yeager*.

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[2] The jury did hear uncontested testimony on the economics of exercising options and trading the resulting stock. *See* Tr. 6747-48. Thus, it is highly unlikely the jurors would have reasoned that Shelby could have sold when he would not have made any money.

II. The Fifth Circuit's opinion created a conflict among circuits and thwarts *Abney* by finding no jurisdiction over an order denying a motion to dismiss on double jeopardy grounds.

The Fifth Circuit committed a "drive-by jurisdictional ruling" against Shelby, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998), and its decision in this case undermines this Court's collateral order jurisprudence by finding subject matter jurisdiction lacking over an order denying double jeopardy relief to a defendant who has been acquitted by a final judgment, and does so by deflating the Court's substantive holding in *Yeager* scarcely after its ink has dried. The appeal here lies squarely within this Court's holding in *Abney* and the appellate jurisdiction it recognizes. The Fifth Circuit's attempt to recast the subject matter jurisdiction question into one of "colorability" or "frivolity" creates a conflict with the Tenth Circuit and other circuits by misreading *Richardson*.

A. The collateral order doctrine is sparingly applied, particularly in criminal cases.

Appeal to the circuit courts lies only from final decisions of the district courts unless an order is a final disposition of a claimed right which is separable from any claim. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949). While the collateral order doctrine is often invoked by hopeful litigants, this Court has strictly limited its application, particularly in criminal cases, in deference to the limited jurisdiction over interlocutory orders granted by Congress. The collateral order doctrine is

stringently applied to only protect orders governing important rights, typically those of a constitutional dimension. *See Will v. Hallock*, 546 U.S. 345, 350 (2006) (surveying cases applying the *Cohen* doctrine to absolute, qualified, presidential and Eleventh Amendment immunity, and double jeopardy); *Digital Equip. Corp.*, 511 U.S. at 869-71 (same).

In criminal cases, the doctrine applies only to three types of interlocutory requests: motions to reduce bail, motions to dismiss on double jeopardy grounds, and motions to dismiss under the Speech or Debate Clause. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (citing *Stack v. Boyle*, 342 U.S. 1 (1951), *Abney*, 431 U.S. 651, and *Helstoski v. Meanor*, 442 U.S. 500 (1979) respectively). In the latter two categories, the collateral order doctrine is particularly apt because the right asserted is the right not to be tried. *Sell v. United States*, 539 U.S. 166, 190-91 (2003) (Scalia, J., dissenting).

This Court has recognized the applicability of the collateral order doctrine to pretrial orders rejecting claims of former jeopardy as they constitute "final decisions" and thus qualify for appellate review under Section 1291. *Abney*, 431 U.S. at 662. In doing so, double jeopardy claims were added to the small class of collateral orders subject to appeal as they challenge the very authority of the Government to hale a defendant into court to face trial. *Id.* at 659. Thus, such claims are in the nature of an immunity defense, that is, a right to not stand trial at all. *See Behrens*, 516 U.S. at 306.

B. At the Government's urging, the Fifth Circuit read *Richardson* as having silently abrogated *Abney*.

This Court's decision in *Richardson* reaffirmed its holding in *Abney* by recognizing a right to immediate appellate review of a denial of double jeopardy relief wherever the proceedings against the defendant have ripened to the point that jeopardy has attached. *Richardson*, 468 U.S. at 322. As Shelby has undeniably stood trial to verdict and been acquitted, his double jeopardy appeal is "colorable" under *Richardson* and there is no basis for dismissal of his appeal on jurisdictional grounds, as the Tenth Circuit and others have recognized.

The Fifth Circuit, however, read two statements of *dicta* from *Richardson* together finding they "strongly suggest" that "a 'colorable' claim is a prerequisite for jurisdiction," App. 10a, and reads the word "colorable" to mean meritorious rather than plausibly stating a claim within the realm of the Double Jeopardy Clause — that is, one with an actual attachment of prior jeopardy. The Fifth Circuit has misread *Richardson* as creating a wholesale, merits-based bar to any double jeopardy appeal. At bottom, the Fifth Circuit's analysis improperly conflates the merits of the appeal with jurisdiction over that appeal. *See Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1900 (2009). But as this Court made clear this past Term: "Jurisdiction over the appeal, however, 'must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order.'" *Id.* (quoting *Behrens*, 516 U.S. at 311).

First, this concept conflicts with a more clear conceptual precedent that collateral order jurisdiction flows from the category of order and is warranted by the importance of the right at issue in the case, not from the merits of an individual case. *See Abney*, 431 U.S. at 661 (the Double Jeopardy Clause protects interests wholly unrelated to the propriety of any subsequent conviction). Consequently, appealability of an order is judged by the category of that order, not the individual qualities of the appeal. *Johnson v. Jones*, 515 U.S. 304, 315 (1995); *Digital Equip. Corp.*, 511 U.S. at 868. Thus, no matter how extraordinary or banal a particular order may be, appellate jurisdiction over it depends on the issue it addresses, and nothing else. *See United States v. MacDonald*, 435 U.S. 850, 857 n.6 (1978). This is true even if the appeal is deemed — rightly or wrongly — to be "frivolous." *Behrens*, 516 U.S. at 311; *see Abney*, 431 U.S. 651 (Court finds appellate jurisdiction but quickly disposes of the merits).

Second, because the words are both often used in case law with ambiguity, the Fifth Circuit's use of the word "colorable" is nebulous, as is the case with "jurisdiction." *See Steel Co.*, 523 U.S. at 90 ("Jurisdiction is a word of many, too many, meanings.") (citation omitted). While this Court often uses "colorable" to mean "plausible," other sources simultaneously define it with the opposite meaning. *See* BLACK'S LAW DICTIONARY 259 (7th ed. 1999) (alternately defining "colorable" as appearing to be valid and "counterfeit"). Such a broad range of meaning leads to the ambiguous use of the term. The opinion below fails to define it at all, but seems to equate it with "frivolousness" — the threshold

necessary for a defendant to obtain a stay of trial while his or her interlocutory double jeopardy appeal proceeds. *See United States v. Dunbar*, 611 F.2d 985 (5th Cir. 1980) (en banc).

Both *Richardson* and the precedent from which it draws the idea of a "colorable" double jeopardy claim use the term in the sense of whether the procedural circumstances give rise to a double jeopardy circumstance at all, not whether the merits of the appeal itself are plausible. *Richardson*, 468 U.S. at 322 (citing *MacDonald*, 435 U.S. at 862 ("a double jeopardy claim . . . requires at least a colorable showing that a defendant once before has been in jeopardy. . . ."). That nuance was lost on the motions panel below. There is no question Shelby — who survived a three-and-a-half month trial without any finding of guilt and with multiple, final acquittals — has been in jeopardy.

The Fifth Circuit's misreading of *Richardson* and *MacDonald* also directly conflicts with the Tenth Circuit's decision in *United States v. Wood*, 950 F.2d 638, 641-42 (10th Cir. 1991) (distinguishing jurisdiction under *Abney* from any finding that a claim is "colorable" or "frivolous"), as the Fifth Circuit acknowledged. App. 10-11a. And while the Fifth Circuit viewed itself as joining a "majority" of circuits that treat Richardson as creating a merits-based jurisdictional threshold, *id.*, it misread those decisions, citing them as double jeopardy appeals. In fact, the cases the Fifth Circuit cites concerned appeals in circumstances that did not involve the former jeopardy embraced by *Abney, Richardson*, and this case. For example, the Eleventh Circuit's decision in *United States v. Bobo*, 419 F.3d 1264

(11th Cir. 2005), reads *Richardson* like Shelby and the Tenth Circuit do — as confirming collateral order jurisdiction whenever there has been "a jeopardy terminating event." *Id.* at 1267. Thus, the Fifth Circuit has created conflict not only with the Tenth Circuit but with the Eleventh Circuit as well. The remaining cases cited by the Fifth Circuit do not involve former jeopardy at all as they all involve former *civil* proceedings — another context involving no actual attachment of jeopardy. *See United States v. Bhatia*, 545 F.3d 757 (9th Cir. 2008); *United States v. Hickey*, 367 F.3d 888 (9th Cir. 2004); *United States v. Andrews*, 146 F.3d 933 (D.C. Cir. 1998) (in addition movant never "suffered jeopardy" as he was not even named in prior SEC civil action). Notably, the Eighth Circuit, which the Fifth also cited as part of its "majority," recognized that the colorability threshold for collateral order jurisdiction requires only a showing of previous jeopardy and the threat of repeated jeopardy. *United States v. Abboud*, 273 F.3d 763, 766 (8th Cir. 2001). Thus, the Fifth Circuit is alone in creating a conflict and fashioning a rule conditioning appellate jurisdiction over the merits beyond examining whether a jeopardy terminating event has occurred.

The motions panel opinion below proclaims itself to be joining a "majority" with the Eighth, Ninth, and D.C. Circuits that, on closer examination, did not exist until the Fifth Circuit declared it so in a published, *per curiam* decision. This Court should grant certiorari and put an end to this gross misreading of *Richardson*.

CONCLUSION

The petition for writ of certiorari should be granted, and this Court should vacate the judgment below and remand for a determination of this matter in light of *United States v. Yeager*. Alternatively, this Court should apply the logical analysis of *Ashe* and *Yeager* to reverse and render judgment in Shelby's favor.

Respectfully submitted,

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