

The Burger Court Opinion Writing Database

Richardson v. United States

468 U.S. 317 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

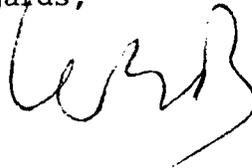
April 26, 1984

Re: 82-2113 - Richardson v. United States

Dear Bill:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'WRB', written in a cursive style.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 25, 1984

No. 82-2113

Richardson v. United States

Dear Bill,

I shall circulate a dissent in due
course.

Sincerely,

Bill

Justice Rehnquist

Copies to the Conference

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

'84 JUN 27 A9:47

~~WB
Please find me
in agreement~~

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: 6/26/84

Recirculated: _____

Richardson v. United States

No. 82-2113

JUSTICE BRENNAN, dissenting.

Petitioner was indicted and tried on two counts of distributing a controlled substance. He claims that the prosecution failed to present constitutionally sufficient

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

116
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SUPREME COURT, U.S.
JUSTICE MARSHALL

'84 JUN 28 A9:38

From: Justice Brennan

Circulated: _____

Recirculated: JUN 27 1984

printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2113

ROBERT D. H. RICHARDSON, PETITIONER
v. UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June —, 1984]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins,
concurring in part and dissenting in part.

Petitioner was indicted and tried on two counts of distributing a controlled substance. He claims that the prosecution failed to present constitutionally sufficient evidence to sustain its case. The jury, perhaps due to the alleged inadequacy of the evidence, was unable to reach a verdict and was therefore dismissed. As a result of today's decision, petitioner will be tried again on the same indictment before a new jury, notwithstanding the fact that, as we must assume, he was entitled to acquittal as a matter of law. It seems to me quite clear that he will thereby "be subject for the same offense to be twice put in jeopardy for life or limb." U. S. Const. Amdt. 5. Yet the Court declares that, despite appearances, petitioner's trial did not really end with the dismissal of the jury and that therefore his imminent retrial is not really a new trial at all. In my judgment, common sense and the Double Jeopardy clause are not so incompatible.

I agree with the Court that petitioner's claim is appealable under 28 U. S. C. § 1291 and that the case therefore turns on whether, if petitioner's sufficiency-of-the-evidence claim is valid, retrial is barred. Relying on cases in which we have held that "retrial following a 'hung jury' does not violate the Double Jeopardy clause," *ante*, at 7, the Court asserts that "the failure of the jury to reach a verdict is not an event

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 25, 1984

No. 82-2113: Richardson v. U.S.

Dear Bill,

Please join me.

Sincerely,



Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 25, 1984

Re: No. 82-2113-Richardson v. United States

Dear Bill:

I await the dissent.

Sincerely,

Jm.

T.M.

Justice Rehnquist

cc: The Conference

*6/20
W...*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 27, 1984

Re: No. 82-2113-Richardson v. United States

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.
T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 1, 1984

Re: No. 82-2113 - Richardson v. United States

Dear Bill:

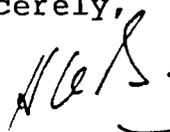
Would you consider dropping a footnote at the end of the third line from the bottom of page 8 of your last circulation to the following effect?

Of course, a trial court's finding of insufficient evidence also is the equivalent of an acquittal, see Hudson v. Louisiana, 450 U.S. 40, 44-45, n. 5 (1981), but Burks was not necessary to establish that principle. See Burks, 437 U.S., at 11, citing Fong Foo v. United States, 369 U.S. 141 (1962); Kepner v. United States, 195 U.S. 100 (1904).

I realize you already have a court for this case, but I would feel easier if a footnote to this effect were inserted. You would then have my vote, provided you satisfy my next observation.

I am troubled by the numeral in the second line of page 7. I know I have never been able to add, subtract, multiply, or divide, but if that numeral is not corrected, I shall threaten you with an erudite footnote similar to footnote 9 of the recent Tully opinion or, heaven forbid, even similar to the infamous footnote 17 of Castaneda v. Partida, 430 U.S. 482, 496 (1977). I am surprised that none of these bright law clerks and Justices around here have not made a like observation since your first circulation of April 24.

Sincerely,



Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 7, 1984

Re: No. 82-2113 -- Richardson v. United States

Dear Bill:

Please join me.

Sincerely,



Justice Rehnquist

cc: The Conference

01 MAY 14 1984

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 27, 1984

82-2113 Richardson v. United States

Dear Bill:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lewis".

Justice Rehnquist

lfp/ss

cc: The Conference

P. 789

[Handwritten scribbles and a large diagonal line crossing through the page]

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: APR 24 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2113

**ROBERT D. H. RICHARDSON, PETITIONER v.
UNITED STATES**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

[April —, 1984]

JUSTICE REHNQUIST delivered the opinion of the Court.

The jury trying petitioner acquitted him of one of several counts, but was unable to agree as to the others. The District Court declared a mistrial as to these counts of the indictment and set them down for retrial. Petitioner moved to bar his retrial, claiming that a second trial would violate the Double Jeopardy Clause of the Fifth Amendment because evidence sufficient to convict on the remaining counts had not been presented by the government at the first trial. The District Court denied this motion, and the Court of Appeals dismissed petitioner's appeal from that ruling for lack of jurisdiction under 28 U. S. C. § 1291 (1982). We now reverse that jurisdictional determination and proceed to address the merits of petitioner's double jeopardy claim. We find the claim unavailing, since it lacks its necessary predicate, there having been no termination of original jeopardy.

Petitioner was indicted in United States District Court for the District of Columbia on two counts of distributing a controlled substance, in violation of 18 U. S. C. § 846, and one count of conspiring to distribute a controlled substance, in violation of 18 U. S. C. § 841(a)(1). Twice—at the close of the government's case-in-chief and before submission of the case to the jury—he moved unsuccessfully for judgment of acquittal on the ground that the government had failed to introduce sufficient evidence to warrant a finding of guilt beyond a rea-

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

RECEIVED
SUPREME COURT OF THE UNITED STATES
JUSTICE WILLIAM H. REHNQUIST

'84 APR 27 P1:11

April 27, 1984

Re: No. 82-2113 Richardson v. United States

Dear John:

I think that the matters which you mention in your letter of April 26th, to the extent that they are practical problems at all, are a necessary consequence of the Court's decision in Abney v. United States, 431 U.S. 651 (1977).

Sincerely,

wm

Justice Stevens

cc: The Conference

STYLISTIC CHANGES THROUGHOUT

p. 6

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

APR 30 1984

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2113

**ROBERT D. H. RICHARDSON, PETITIONER v.
UNITED STATES**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May —, 1984]

JUSTICE REHNQUIST delivered the opinion of the Court.

The jury trying petitioner acquitted him of one of several counts, but was unable to agree as to the others. The District Court declared a mistrial as to these counts of the indictment and set them down for retrial. Petitioner moved to bar his retrial, claiming that a second trial would violate the Double Jeopardy Clause of the Fifth Amendment because evidence sufficient to convict on the remaining counts had not been presented by the government at the first trial. The District Court denied this motion, and the Court of Appeals dismissed petitioner's appeal from that ruling for lack of jurisdiction under 28 U. S. C. § 1291 (1982). We now reverse that jurisdictional determination and proceed to address the merits of petitioner's double jeopardy claim. We find the claim unavailing, since it lacks its necessary predicate, there having been no termination of original jeopardy.

Petitioner was indicted in United States District Court for the District of Columbia on two counts of distributing a controlled substance, in violation of 18 U. S. C. § 846, and one count of conspiring to distribute a controlled substance, in violation of 18 U. S. C. § 841(a)(1). Twice—at the close of the government's case-in-chief and before submission of the case to the jury—he moved unsuccessfully for judgment of acquittal on the ground that the government had failed to introduce sufficient evidence to warrant a finding of guilt beyond a rea-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 4, 1984

Re: No. 82-2113 Richardson v. United States

Dear Harry:

Both of the changes to my circulating opinion in this case which you propose in your letter of May 1st are agreeable to me. With respect to the second, your threat of another erudite footnote overbore me. The mistake in my circulation originated from the fact that, being a traditionalist, I still use the Julian calendar rather than the Gregorian calendar and was computing the passage of time on the basis of the former.

Sincerely,



Justice Blackmun

cc: The Conference

STYLISTIC CHANGES THROUGHOUT

Op 7+9

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated: MAY 7 1984

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2113

**ROBERT D. H. RICHARDSON, PETITIONER v.
UNITED STATES**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May —, 1984]

JUSTICE REHNQUIST delivered the opinion of the Court.

The jury trying petitioner acquitted him of one of several counts, but was unable to agree as to the others. The District Court declared a mistrial as to these counts of the indictment and set them down for retrial. Petitioner moved to bar his retrial, claiming that a second trial would violate the Double Jeopardy Clause of the Fifth Amendment because evidence sufficient to convict on the remaining counts had not been presented by the government at the first trial. The District Court denied this motion, and the Court of Appeals dismissed petitioner's appeal from that ruling for lack of jurisdiction under 28 U. S. C. § 1291 (1982). We now reverse that jurisdictional determination and proceed to address the merits of petitioner's double jeopardy claim. We find the claim unavailing, since it lacks its necessary predicate, there having been no termination of original jeopardy.

Petitioner was indicted in United States District Court for the District of Columbia on two counts of distributing a controlled substance, in violation of 18 U. S. C. § 846, and one count of conspiring to distribute a controlled substance, in violation of 18 U. S. C. § 841(a)(1). Twice—at the close of the government's case-in-chief and before submission of the case to the jury—he moved unsuccessfully for judgment of acquittal on the ground that the government had failed to introduce sufficient evidence to warrant a finding of guilt beyond a rea-

STYLISTIC CHANGES THROUGHOUT # p. 9

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

'84 JUN 21 AM 1:30

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated: _____ 21

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2113

ROBERT D. H. RICHARDSON, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June —, 1984]

JUSTICE REHNQUIST delivered the opinion of the Court.

The jury trying petitioner acquitted him of one of several counts, but was unable to agree as to the others. The District Court declared a mistrial as to these counts of the indictment and set them down for retrial. Petitioner moved to bar his retrial, claiming that a second trial would violate the Double Jeopardy Clause of the Fifth Amendment because evidence sufficient to convict on the remaining counts had not been presented by the Government at the first trial. The District Court denied this motion, and the Court of Appeals dismissed petitioner's appeal from that ruling for lack of jurisdiction under 28 U. S. C. § 1291. We now reverse that jurisdictional determination and proceed to address the merits of petitioner's double jeopardy claim. We find the claim unavailing, since it lacks its necessary predicate, there having been no termination of original jeopardy.

Petitioner was indicted in United States District Court for the District of Columbia on two counts of distributing a controlled substance, in violation of 21 U. S. C. § 841(a)(1), and one count of conspiring to distribute a controlled substance, in violation of 21 U. S. C. § 846. Twice—at the close of the Government's case-in-chief and before submission of the case to the jury—he moved unsuccessfully for judgment of acquittal on the ground that the Government had failed to introduce sufficient evidence to warrant a finding of guilt beyond a rea-

???

What is
will

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 26, 1984

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 82-2113, Richardson v. United States

No. 83-5063 Tranowski v. United States

Petitioner was convicted of perjury, based on alibi testimony he gave at his brother's trial. Petitioner had testified that a certain photograph of his brother was taken in petitioner's backyard at the time the brother was allegedly passing a counterfeit bill. At petitioner's trial the Government presented the testimony of an astronomer who testified that, based on the shadows cast by the figures in the picture, the picture could not possibly have been taken on the date and time petitioner testified that it was.

On appeal a panel of the CA7 ruled the scientific evidence inadmissible. 659 F.2d 750 (1981). The District Court denied the Government's motion for a new trial, reasoning that the CA7 had in effect ruled that the Government had failed to present sufficient evidence to go to the jury and that retrial was barred by the Double Jeopardy Clause.

The Government appealed under 18 U.S.C. §3731, and a second panel of the CA7 reversed, holding that the District Court had improperly interpreted the decision of the earlier panel. 702 F.2d 668 (1983). The second panel read the first panel's decision as resting on an interpretation of the Federal Rules of Evidence and not as holding the evidence insufficient to convict. The panel rejected petitioner's assertion that appellate reversal for erroneous admission of evidence bar retrial if the remaining evidence is insufficient to convict. Noting that the question had

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 27, 1984

MEMORANDUM TO THE CONFERENCE:

Re: Cases held for No. 82-2113, Richardson v. United States

No. 83-5911 Gooday v. United States

Petitioner was charged with first degree murder for a crime committed on the Fort Apache Indian Reservation. At petitioner's request, the jury was instructed on the lesser included offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter. Petitioner was acquitted of first-degree murder, but the jury deadlocked as to the lesser included offenses. The trial court, sua sponte, declared a mistrial and scheduled the case for retrial on the remaining offenses. The district court denied petitioner's motion to dismiss the case on grounds of prosecutorial misconduct and on double jeopardy grounds.

The CA9 affirmed the order scheduling petitioner for a second trial. 714 F.2d 80 (1983). The Court of Appeals rejected petitioner's argument that since the indictment charged only first degree murder, he could not be retried on the lesser included offenses after being acquitted of the greater charge brought in the indictment. The court followed the lead of the only other circuit to address this issue, and held that each of the lesser included offenses should be treated as if it had been a separate count of the indictment. The Court of Appeals also rejected petitioner's arguments that the judicial declaration of mistrial gave rise to a double jeopardy bar to retrial and that retrial was barred because of prosecutorial misconduct.

The Court of Appeals applied well-settled law in determining that the judicial declaration of a mistrial following a deadlocked jury did not implicate double jeopardy protections, a principle we reaffirm in Richardson.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 26, 1984

Re: 82-2113 - Richardson v. United States

Dear Bill:

Although we may ultimately find some common ground, for the present I am troubled by several aspects of your opinion.

The holding on appealability, I am afraid, will authorize more interlocutory appeals than we can now foresee. I recognize that your holding on the merits will foreclose future appeals in cases presenting the precise claim that is presented here, but this is only one species of mistrial. Under your opinion, I would assume that a midtrial order declaring a mistrial--possibly on the basis of prosecutorial misconduct or because of a threat to a juror--might be immediately appealable as a component of a double jeopardy claim on the ground that there was no "manifest necessity" for the judge's action. I do not believe such an order should be appealable, but I am afraid that your analysis would make them reviewable on interlocutory appeal.

The jurisdictional question in this case is whether the District Court's order denying the motion for a verdict of acquittal is appealable after a trial in which the jury fails to reach a verdict.¹ If it is appealable, then this

¹The Solicitor General states the question presented as follows:

"Whether a criminal defendant whose first trial resulted in a hung jury has a right to have the trial court's determination of sufficiency of the evidence at
Footnote continued on next page.

Court, or the Court of Appeals, should make a ruling on the sufficiency of the evidence. Naturally, if the evidence was sufficient, we would affirm the District Court's order, and then petitioner would have no double jeopardy claim, or no "colorable" double jeopardy claim, if you like. If the evidence was insufficient, we would reverse the District Court's order, and the District Court would then enter a judgment of acquittal, which would then bar a subsequent prosecution and conviction.

Unless I am mistaken, your opinion never directly answers the question presented. Your opinion does hold that petitioner's "type" of "double jeopardy claim" is immediately appealable, but then holds that this "type" of double jeopardy claim is really not a double jeopardy claim at all. Since you never review the correctness of the District Court's order denying the motion for a judgment of acquittal, I take it you hold, albeit sub silentio, that such an order is not immediately appealable. Once you make that holding, of course, there is no jurisdiction over the denial of petitioner's motion to bar retrial, because there is no verdict to bar retrial and petitioner would now have no double jeopardy claim.

You state that "petitioner's argument necessarily assumes that the judicial declaration of a mistrial was an event which terminated jeopardy in his case and which allowed him to assert a valid claim of double jeopardy." Opinion, at 8. If petitioner were not attempting to appeal the order denying his motion for a judgment of acquittal, petitioner would indeed have to argue that the hung jury terminated jeopardy. But petitioner's argument assumes no such extravagant position--he naturally cannot claim that the failure of the jury to reach a verdict terminates jeopardy. The event which would terminate jeopardy is the granting of his motion for a verdict of acquittal. Of course, the District Court denied that motion; but if that

that trial reviewed on appeal before the commencement of the second trial." Br. for United States I.

holding were reversed on interlocutory appeal, jeopardy would be terminated and retrial and conviction barred under Burks. You maintain that our "holding in Burks established only that an appellate court's finding of insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal. . . ." Ibid.² What Burks recognized, of course, is that any court's holding of insufficient evidence, not overturned on further appeal, bars a later trial and conviction on the charge. A defendant has the right to a ruling on his insufficiency motion by a district court, even where there is a mistrial.³ The whole question presented here is whether petitioner should have the opportunity to obtain such a holding by an appellate court before retrial.

²You also state that Burks "obviously did not establish . . . that a hung jury is the equivalent of an acquittal." Ibid. This is so obvious, however, I fail to see the point in mentioning it--it does not even qualify as a "straw man."

³Rule 29(a) provides that the district court

"on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

Rule 29(c) expressly provides that if "the jury . . . is discharged without having rendered a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged" It further states: "If no verdict is returned the court may enter judgment of acquittal." The use of the word "may" naturally does not give the district court discretion to deny the motion if there was insufficient evidence.

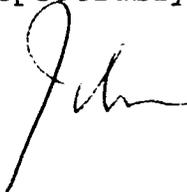
It may be that a district court could take a Rule 29 motion under advisement until the close of the retrial, but that is not what occurred in this case.

If the analysis in the latter portion of your opinion is correct--which indicates that petitioner's claim of insufficient evidence at his first trial would be immune from review after a conviction at his second trial--then the order denying the motion for judgment of acquittal at the close of the first trial is a collateral order under Cohen, and this Court (or the Court of Appeals) should address the sufficiency question. I agree with the Court of Appeals, however, that petitioner's claim of insufficient evidence at his first trial is subject to review after a subsequent conviction, and hence fails to meet the third part of the Cohen test.

Moreover, I am concerned by the significance you seem to draw from the conclusion that "the failure of the jury to reach a verdict is not an event which terminates jeopardy." Ibid. What if a prosecution judge discharges the jury twenty minutes after they retired because he considers an acquittal likely and knows that the prosecutor has found additional evidence that can be presented at a second trial? If we assume that there was no "genuinely deadlocked jury," see Arizona v. Washington, 434 U.S., at 509, I believe the defendant would have a right--protected by the Double Jeopardy Clause--to have his first trial completed. I am afraid that your analysis on the merits either rejects the possibility of such a valid claim or, if it is preserved, leaves the door open to immediate appellate review.

Thus, although I was originally impressed by Judge Scalia's opinion, I am now persuaded that Judge Wilkey had the better of the argument and that we should hold that the order denying the motion for a judgment of acquittal is not a collateral order subject to interlocutory appeal.

Respectfully,



Justice Rehnquist

Copies to the Conference

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

84 JUN 25 9:56

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: JUN 25 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2113

ROBERT D. H. RICHARDSON, PETITIONER
v. UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June —, 1984]

JUSTICE STEVENS, dissenting.

The dispositive question of appellate jurisdiction that is presented in this case is whether an order denying a motion for a judgment of acquittal on the ground that the evidence is legally insufficient is appealable as a final judgment.¹ I believe that the order is not appealable; therefore, as a matter of law, not even a colorable double jeopardy question is presented.

I

After the District Court had discharged the jury because it was unable to agree upon a verdict on two counts of the indictment, petitioner filed two separate motions: (1) a motion for a judgment of acquittal on the ground that the evidence was legally insufficient to support a conviction; and (2) a motion to bar retrial on the ground that because he was "entitled to judgments of acquittal on those counts," a second trial would violate the Double Jeopardy Clause. App. 15a. On Friday, September 11, 1981, the District Court entered a written order denying the first motion. App. 18a. Petitioner promptly filed a notice of appeal in which he described

¹The Solicitor General states the question presented as follows:

"Whether a criminal defendant whose first trial resulted in a hung jury has a right to have the trial court's determination of sufficiency of the evidence at that trial reviewed on appeal before the commencement of the second trial." Br. for United States I.

77
When
W.S.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 26, 1984

No. 82-2113 Richardson v. United States

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference