No. 21-740

In the Supreme Court of the United States

RICHARD E. PAULUS, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction, in the context of an interlocutory appeal of the denial of a double-jeopardy claim, to consider petitioner's "independent" due-process claims.

2. Whether petitioner's retrial would be barred by the Double Jeopardy Clause.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Ky.):

United States v. *Paulus*, No. 15-cr-15 (Sept. 1, 2020)

United States Court of Appeals (6th Cir.):

United States v. *Paulus*, No. 20-6017 (Aug. 16, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is not published in the Federal Reporter, but is available at 2021 WL 3620445. The opinion of the district court (Pet. App. 15a-31a) is not published in the Federal Supplement, but is available at 2020 WL 10759440. Prior opinions of the court of appeals are reported at 952 F.3d 717, and 894 F.3d 267.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2021. The petition for a writ of certiorari was filed on November 15, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was found guilty on one count of health care fraud, in

violation of 18 U.S.C. 1347, and ten counts of making materially false statements in connection with a health care benefit program, in violation of 18 U.S.C. 1035(a)(2). Pet. App. 2a. The court granted a post-verdict judgment of acquittal on all counts and conditionally granted a new trial pursuant to Federal Rule of Criminal Procedure 29. *Ibid.* The court of appeals reversed the court-ordered acquittal, vacated the new-trial order, reinstated the jury's verdict, and remanded for further proceedings. 894 F.3d 267. The district court sentenced petitioner to 60 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals then vacated petitioner's convictions and remanded for a new trial. 952 F.3d 717. The district court subsequently denied petitioner's motion to dismiss the indictment on double-jeopardy grounds, Pet. App. 4a, 15a-31a, and the court of appeals affirmed, *id.* at 1a-14a.

1. Petitioner is a former cardiologist at King's Daughters Medical Center (KDMC) in Ashland, Kentucky. 894 F.3d at 272. He specialized in implanting stents—small cylinders made of wire mesh that are inserted into a blocked artery in order to "prop[] the artery open" and "increase blood flow." *Id.* at 271. Inserting a stent is a risky procedure that can have dangerous side effects; the justification for inserting one is that the amount of "stenosis" (blockage) in an artery is so great that "the risk of a heart attack or stroke caused by the stenosis is more severe than any risks posed by the stenting procedure" itself. *Ibid.*

To determine the amount of stenosis, a cardiologist must perform an angiogram, an invasive procedure in which a catheter is used to inject contrast dye into a patient's arteries, in order to highlight blockages on an x-

ray. 894 F.3d at 271. Both the medical profession and insurance companies have clear rules for when a stent should be implanted: with rare exceptions, stents should only be used to treat stenosis of 70% or more, or stenosis between 50% and 70% if further tests show a significant reduction in blood flow to the heart; stents should not be used when stenosis is below 50%. *Id.* at 271-272.

Petitioner performed an "astronomical" number of angiogram and stent procedures on his patients, far more than any of his colleagues. 894 F.3d at 272. In some years, he performed more stent procedures than the entire cardiology departments of major hospitals like Johns Hopkins and the University of Kentucky Medical Center. See, *e.g.*, 17-5410 C.A. App. 13; 17-5410 Gov't C.A. Br. 14 & n.5. Petitioner routinely billed Medicare, Medicaid, and private insurance companies for his services and was "first in the nation for the total amount billed to Medicare" for angiograms and stents. 894 F.3d at 272; see 17-5410 Gov't C.A. Br. 12 (citing evidence that, between 2006 and 2013, petitioner sought $1.1 billion in reimbursement from Medicare for those procedures). Petitioner reaped huge benefits from that volume of work, including an annual salary that placed him among the highest-paid cardiologists in the country. 894 F.3d at 272. KDMC likewise earned millions of dollars from those procedures. See 17-5410 Gov't C.A. Br. 13-14.

Between 2008 and 2012, federal and state authorities received anonymous complaints, including from a colleague of petitioner's at KDMC, that petitioner was performing stent procedures on patients who did not need them. 894 F.3d at 272-273. In response to those complaints, federal and state investigators collectively reviewed hundreds of cases in which petitioner had billed Medicare or other insurance companies for stent pro-

cedures. *Ibid.* Those reviews revealed that petitioner falsely documented the degree of stenosis, billing Medicare and other insurance providers as though the stents were medically necessary, when in fact he was repeatedly inserting stents in healthy patients, including many who had little or no stenosis. *Ibid.*

2. A federal grand jury in the Eastern District of Kentucky charged petitioner with one count of health care fraud, in violation of 18 U.S.C. 1347, and 26 counts of making materially false statements in connection with a health care benefit program, in violation of 18 U.S.C. 1035(a)(2). Indictment 11-14.

In preparation for trial, the government retained an expert cardiologist, who reviewed records of approximately 250 to 300 of petitioner's procedures and found that, in at least 62 cases, petitioner had classified a blockage of no more than 40% as a blockage of 70% or more. 894 F.3d at 274. The government also arranged for testimony from the experts used by the state regulator and insurance company who had previously investigated petitioner, each of whom had reviewed records of a selection of petitioner's procedures and similarly found that he had repeatedly classified cases with blockage less than 50%—and, in at least one case, no blockage at all—as involving 70% blockage or more. See *id.* at 273-274. Six other "cardiologists who had either worked with [petitioner] in the past or had treated his patients" presented similar testimony. *Id.* at 273. For example, one doctor who reviewed the records of 20 to 50 of petitioner's former stent patients estimated that for 20 of those cases the patients' blockages did not "warrant[] a stent." *Id.* at 274. Another doctor found a "substantial number" of cases in which petitioner's patients had blockages of only 10%-20% and thus "did not need a

stent." *Ibid.* Another who had treated several of petitioner's patients while petitioner was unavailable testified that they "did not have any significant stenosis." *Ibid.*; see *ibid.* (chart summarizing additional testimony).

The government also planned to rely on a letter sent to the United States Attorney's Office by KDMC stating that it had reviewed roughly 1049 stent procedures petitioner had performed at the hospital and identified 75 cases in which petitioner implanted stents in patients with blockages of 30% or less. D. Ct. Doc. 156-1, at 1 (Aug. 16, 2016) (KDMC Letter). KDMC did not review every procedure that petitioner had performed at the hospital (which totaled about 4600), nor did it report any procedures where the blockage was higher than 30% but still below the general 50% threshold for implanting a stent. *Ibid.* In the letter, KDMC offered to refund its Medicare reimbursements for the 75 procedures that it had identified and to cooperate with the government's investigation, "with the hope and expectation" that the government would not seek criminal or civil penalties against the hospital. *Id.* at 2.

The government informed KDMC that it intended to introduce evidence of the hospital's investigation at petitioner's trial and therefore had an obligation to disclose KDMC's letter to petitioner. See 19-5532 Gov't C.A. Br. 10. Although petitioner was aware that KDMC had investigated his conduct and had found 75 unnecessary procedures (many of which had also been reviewed by government experts and formed the basis for charges against petitioner), he did not know the total number of procedures the hospital had reviewed. 952 F.3d at 721-722. KDMC, however, objected to disclosure, asserting that the information in the letter was privileged and that its evidentiary use was barred by

Federal Rule of Evidence 408. *Ibid.*; see, *e.g.*, D. Ct. Doc. 156-3 (Aug. 16, 2016); D. Ct. Doc. 156-2 (Aug. 16, 2016); KDMC Letter 1-2.

After reaching an impasse with KDMC, the government filed an *ex parte* motion asking the district court to resolve the privilege issue. See D. Ct. Doc. 156 (Aug. 16, 2016) (Ex Parte Mot.). The government contended that the results of KDMC's internal investigation were not privileged and that they were relevant to petitioner's guilt because they corroborated the findings of government experts that many of the 75 procedures at issue were unnecessary. *Id.* at 4-6. And the government explained that because it intended to use the hospital's findings as evidence at trial, it was required to disclose those findings to petitioner under Federal Rule of Criminal Procedure 16. *Id.* at 5.

The government further contended that the results of KDMC's investigation should be disclosed to petitioner under *Brady* v. *Maryland*, 373 U.S. 83 (1963). Ex Parte Mot. 5. Although the government considered KDMC's finding of 75 clearly unnecessary procedures to be inculpatory, it recognized that the hospital's investigation suggested a rate of clearly unnecessary procedures of about 7.5% (75 out of 1049 procedures reviewed), whereas the government's experts' review of a smaller number of procedures could suggest that closer to 50% of petitioner's procedures were unnecessary. *Ibid.* Thus, although the government did not intend to argue at trial that its experts relied on a representative sample or to otherwise cite the rate of unnecessary procedures as evidence of guilt—and although the rate did not "fit into [petitioner's] current defense" that "all of his procedures were medically necessary"—the government argued that disclosure of the letter was required

because the rate "could be viewed as exculpatory at sentencing" or trial "if [petitioner's] defense strategy changes." *Ibid.*

Following an ex parte hearing, the district court denied the government's motion on the ground that KDMC had informed the government of the results of its internal investigation in confidential settlement discussions and that the information was therefore inadmissible at trial under Rule 408. D. Ct. Doc. 163, at 1 (Aug. 24, 2016). The court acknowledged that the government had an independent "obligation, pursuant to *Brady* v. *Maryland*, to disclose potential exculpatory information to a defendant" and "appreciate[d]" the government's diligence in "bringing the *Brady* issue to the Court's attention." D. Ct. Doc. 303, at 18-19 (Dec. 5, 2016) (Ex Parte Hr'g Tr.). The court took the view, however, that information about the hospital's investigation would not be exculpatory at trial and that any exculpatory value related to punishment could be assessed at sentencing. *Ibid.* The court accordingly ordered the government "not to disclose" the information to petitioner before trial. *Id.* at 18. The court did not address KDMC's privilege claim. *Ibid.*

3. Petitioner proceeded to a jury trial and was found guilty on the health care fraud count and ten of the false statement counts. Verdict Form 1-3. The jury acquitted petitioner on five of the false statement counts, see *ibid.*, and the government voluntarily dismissed 11 others, Judgment 1.

Petitioner filed a post-verdict motion under Federal Rule of Criminal Procedure 29 for a judgment of acquittal on the counts on which the jury had found him guilty, see D. Ct. Doc. 263 (Oct. 24, 2016), and an alternative motion under Federal Rule of Criminal Procedure 33

for a new trial, see D. Ct. Doc. 298 (Nov. 21, 2016). The district court granted a judgment of acquittal. D. Ct. Doc. 318, at 52 (Mar. 7, 2017) (Acquittal Op.). The court reasoned that the jury had insufficient evidence from which to conclude that petitioner knowingly made false statements or intended to commit fraud, on the theory that the government had failed to prove that the amount of blockage in an artery is an "objectively verifiable fact subject to proof or disproof," rather than a "subjective medical opinion, incapable of confirmation or contradiction." *Id.* at 20 (emphasis omitted). The court conditionally granted petitioner a new trial for the same reasons. *Id.* at 48-51; see Fed. R. Crim. P. 29(d)(1) (requiring court to "conditionally determine whether any motion for a new trial should be granted if [a] judgment of acquittal is later vacated or reversed").

The government appealed, and the court of appeals reinstated the jury's verdict. 894 F.3d 267 (*Paulus I*). The court explained that "[t]he degree of stenosis *is* a fact capable of proof or disproof," and that the jury was entitled to credit the "phalanx of experts who testified that [petitioner] systematically recorded severe blockages even when the angiograms only showed mild blockages or no blockage at all." *Id.* at 275, 277. Based on that evidence—and significant circumstantial evidence, including petitioner's "'astronomical' billing numbers, his enormous salary, injured patients' testimony, and other evidence about KDMC's behavior"—the court determined that the jury reasonably could have found that petitioner knowingly made false statements and intentionally committed fraud. *Id.* at 278; see *id.* at 276-278. The court also vacated the district court's conditional grant of a new trial. *Id.* at 279.

4. On remand, the government filed an ex parte motion with the district court in which it renewed its request to disclose to petitioner the complete results of KDMC's internal investigation. D. Ct. Doc. 352 (Dec. 14, 2018). The government reiterated its view that the rate of unnecessary procedures could have exculpatory value at sentencing and explained that the government therefore had "an obligation to ensure this information is produced to the defense." *Id.* at 2. After further consultation with the government and KDMC, the court unsealed the records of the earlier ex parte proceeding and authorized the government to disclose KDMC's letter to petitioner, on the understanding that doing so would not interfere with the hospital's assertion of evidentiary privileges "in any other federal or state proceeding." D. Ct. Doc. 357, at 1-2 (Jan. 2, 2019).

After receiving those materials, petitioner filed a motion for a new trial or dismissal of the indictment, in which he argued that the nondisclosure of KDMC's letter before trial had violated his due-process rights under *Brady*. D. Ct. Doc. 366, at 20-42 (Feb. 25, 2019) (New Trial Mot.). Petitioner recognized that the government had brought the *Brady* issue to the district court's attention and made a "valid argument that the evidence at issue was exculpatory and required to be disclosed to the defense before trial," and that the court had "prohibit[ed] disclosure" of that evidence over the government's objection. *Id.* at 1; see *id.* at 7-19 (summarizing government's repeated efforts to convince district court to authorize disclosure of information on *Brady* grounds notwithstanding KDMC's privilege claims). Nonetheless, petitioner accused the government of misconduct in "acquiesc[ing]" to the court's nondisclosure order and presenting evidence to the jury

that suggested a higher rate of unnecessary procedures than was reflected in KDMC's investigation. *Id.* at 21, 31-32. Petitioner contended that, had he known about the KDMC letter earlier, he would have "fundamentally shifted [his] trial strategy toward a defense of innocent mistake." *Id.* at 37.

The district court denied petitioner's motion. D. Ct. Doc. 374, at 27 (Apr. 18, 2019) (New Trial Op.). The court observed that petitioner was aware before trial that KDMC had "reviewed a random selection" of his stent procedures and found 75 procedures that were clearly unnecessary, and that he also knew which of those 75 procedures had been reviewed by government experts and introduced at trial. *Id.* at 5, 12-13. Although petitioner did not know "that the sample size from which the 75 procedures were flagged was a total of 1,049 procedures"—and thus that the 75 cases with blockage of 30% or less were 7.5% of that total—the court determined that petitioner "knew or should have known the essential facts" that would have allowed him to uncover that information through the exercise of reasonable diligence. *Id.* at 10, 13. Accordingly, the court determined that petitioner's *Brady* rights had not been violated. *Id.* at 14.

The district court also rejected petitioner's contention that the government's failure to disclose the full contents of KDMC's letter before trial constituted "misconduct" that warranted dismissal of the indictment. New Trial Op. 19-21. The court observed that, when KDMC objected to disclosure of the letter, the government appropriately "brought the matter before the Court to adjudicate the issue." *Id.* at 20. And the court explained that petitioner's "disagree[ment] with the Court's

determination does not transform the Government's actions into misconduct." *Id.* at 21.

The district court sentenced petitioner to 60 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4.

5. The court of appeals vacated petitioner's convictions and remanded to the district court for a new trial. 952 F.3d 717 (*Paulus II*).

One of petitioner's arguments on appeal was that the district court's order not to disclose KDMC's letter before trial violated *Brady*. 19-5532 Pet. C.A. Br. 35-44. The government, in turn, continued to acknowledge that the letter was potentially exculpatory but argued that the district court's decision to withhold it did not violate *Brady* because the evidence ultimately proved not to be material: petitioner already knew most of the "essential facts" contained in the letter; he could have discovered the missing fact (the sample size) through reasonable diligence; and the inculpatory force of KDMC's finding that petitioner performed 75 procedures with 30% blockage or less, based on a review of less than a quarter of petitioner's total procedures, outweighed any exculpatory value. 19-5532 Gov't C.A. Br. 32-41.

At oral argument, the court of appeals asked the government why it had not told the court about the existence of the KDMC letter during the earlier appellate proceedings in *Paulus I*, and whether it had violated an "ethical obligation to th[e] court" by not doing so. See D. Ct. Doc. 424-1, at 33 (May 4, 2020) (Appeal Tr.). In response, the government explained that *Paulus I* involved whether the evidence introduced at trial was sufficient to support a conviction, not whether undisclosed evidence may have warranted a new trial; the government's appellate counsel in *Paulus I*, who had not been

involved in the trial or pretrial proceedings, had been unaware of the substance of the ex parte proceedings relating to the KDMC letter, which were under seal and outside the trial record; and, in any event, the government had reasonable grounds for accepting the district court's nondisclosure order because—as the district court itself had determined—the withheld information was not ultimately material. Appeal Tr. 17-24, 33. The government further explained that, although the jury was aware of the total number of procedures reviewed by the government's experts, the government had not argued at trial that those procedures represented a random sample or that the rate of unnecessary procedures was inculpatory. *Id.* at 20-23.

In its opinion the court of appeals stated that it "sympathize[d] with the prosecution," noting "that the government believed it had an obligation to disclose" the KDMC letter to petitioner before trial, sought a district court ruling on that issue, and ultimately did not disclose the information "solely because of the district court's order" finding that the letter's contents were not exculpatory and were protected by Rule 408. 952 F.3d at 728. Although the court observed that it had "no knowledge" of those proceedings at the time it decided *Paulus I*, it did not fault the government for that or suggest that its assessment of the acquittal order at issue in the first appeal would have been different had the *Brady* issue been raised at that time. *Id.* at 727; see *id.* at 721, 727 (explaining that *Paulus I* involved a judgment of acquittal based on the sufficiency of "the evidence presented at trial—which did not include the [KDMC] [l]etter").

The court of appeals concluded, however, that the district court's decision to withhold KDMC's letter had

violated petitioner's *Brady* rights and warranted a new trial. 952 F.3d at 724-728. The court of appeals disagreed with the district court's determination that petitioner "could have gathered the missing detail (the sample size) with 'minimal investigation,'" reasoning that KDMC likely would have resisted further inquiries about its internal investigation on privilege grounds and that petitioner could not easily have recreated the hospital's analysis. *Id.* at 725-726 (citation omitted). The court of appeals also concluded that the error was prejudicial: it noted (as it had in *Paulus I*) that petitioner's "intent was a close issue" at trial and that petitioner might have used the rate of unnecessary procedures to assert that he made only "occasional mistakes," rather than engaging in "systemic and purposeful fraud," or to impeach the government's experts "by calling into question how representative their samples were." *Id.* at 726-727. The court also deemed the information more helpful to petitioner than harmful, reasoning that KDMC's identification of 75 improper procedures would have been cumulative of other government evidence and would not have prevented petitioner from asserting a mistake theory of defense. *Id.* at 727-728.

6. Following the court of appeals' decision in *Paulus II*, petitioner moved for (and the government did not oppose) immediate release from custody, which the district court granted. D. Ct. Docs. 404-407 (Mar. 5-6, 2020). Petitioner then filed a motion to dismiss the indictment on the theory that it was barred by the Double Jeopardy Clause. D. Ct. Doc. 424, at 6-15 (May 4, 2020) (Mot. to Dismiss). Petitioner contended that the decision in *Paulus I*, reversing the grant of acquittal, had been "procured by fraud"; that *Paulus I* was "effectively overruled" in *Paulus II*; and that the original

judgment of acquittal should bar his retrial. *Id.* at 10-14.

The district court denied petitioner's motion. Pet. App. 15a-31a. The court observed that petitioner had repeatedly argued, both in the district court and the court of appeals, that the proper remedy for the *Brady* violation would be a new trial. *Id.* at 26a-27a; see *id.* at 27a n.7 (noting that petitioner "request[ed] a new trial at least three times at both the district and circuit court levels"). The district court therefore determined that petitioner had waived his double-jeopardy objection. *Id.* at 28a.

The district court further determined, in the alternative, that petitioner's double-jeopardy claim lacked merit. Pet. App. 28a-30a. The court rejected petitioner's argument that "*Paulus I* should be treated as void" and that the court should "act as if [petitioner] remains acquitted." *Id* at 28a. It explained that the court of appeals—"in fact the same panel of judges"—"did not take the opportunity in *Paulus II* to overrule *Paulus I*" or to otherwise suggest that *Paulus I* was wrongly decided, and that the district court had "no authority to overrule, ignore, or void" that decision. *Id.* at 30a. The district court also "decline[d]" to undertake the "fruitless exercise" of "guessing" how the sufficiency of the evidence might have been analyzed had the KDMC letter been in evidence during petitioner's trial. *Id.* at 29a.

7. The court of appeals affirmed. Pet. App. 1a-14a. It observed that, although its jurisdiction usually extends only to "'final decisions'" of district courts, *id.* at 5a (quoting 28 U.S.C. 1291), "the denial of a motion to dismiss based on the Double Jeopardy Clause" is one of a "very limited list of exceptions to th[at] general rule," *ibid.* (citing *Abney* v. *United States*, 431 U.S. 651, 662 (1977)).

Accordingly, the court recognized that it had jurisdiction to review petitioner's "double jeopardy claim and its 'necessary components,'" notwithstanding the absence of a final judgment. *Ibid.* (quoting *Richardson* v. *United States*, 468 U.S. 317, 322 (1984)) (brackets omitted). The court observed, however, that it lacked jurisdiction to review any "independent claims" of government misconduct in such an interlocutory posture. *Id.* at 5a n.1.

The court of appeals determined that petitioner's double-jeopardy claim lacked merit. Pet. App. 6a-13a. It observed that "the Double Jeopardy Clause was not implicated" by its previous decisions in *Paulus I*, which had reinstated the jury's verdict, or *Paulus II*, which had applied the longstanding principle "that the remedy for a *Brady* violation is a new trial." *Id.* at 8a-9a (citation and internal quotation marks omitted). The court also found petitioner's assertion that its decision in "*Paulus II* effectively overruled *Paulus I*" made "little sense" in light of the "entirely distinct" issues in those two appeals. *Id.* at 7a-8a n.2. The court explained that its "holding in *Paulus I* that the evidence was sufficient (without the [KDMC] Letter) has no bearing on whether the evidence at a new trial would be sufficient—that trial hasn't happened yet and [the court of appeals is] not the factfinder." *Id.* at 8a n.2. And the court further observed that "[e]ven if the government [had] disclosed the [KDMC] Letter * * * in *Paulus I*," the "remedy for the *Brady* violation would have been a new trial," not an acquittal that would have barred a retrial under the Double Jeopardy Clause. *Ibid.*

The court of appeals also rejected petitioner's contention that "alleged prosecutorial misconduct" in the first appeal provided an additional factor that

warranted barring a retrial. Pet. App. 9a. It acknowledged that prosecutorial misconduct may trigger double-jeopardy protections when a prosecutor intentionally provokes the defendant into requesting a mistrial. *Id.* at 10a-11a (citing *Oregon* v. *Kennedy*, 456 U.S. 667, 673 (1982)). But the court found no support for petitioner's request to "import th[at] exception into the *Brady* context and beyond the mistrial context." *Id.* at 11a. The court emphasized that the remedy for most trial errors—including *Brady* errors—is a new trial, and that no court had deviated from that remedy to instead preclude a retrial altogether. *Id.* at 11a-12a (citing cases). The court moreover determined that dismissal would be unwarranted even assuming that a prosecutorial-misconduct claim could bar a retrial outside the context of a provoked mistrial. *Id.* at 12a. The court found it "hard to see" how the circumstances could show a governmental effort to "save a potential 'second bite at the apple'" at a future retrial, observing that the government would have no incentive to deliberately cause reversible error before trial in order to undo an otherwise-valid conviction down the road, and in any event, the government in this particular case "wanted to disclose the *Brady* material, but the district court ordered them not to." *Id.* at 13a.

In light of the court of appeals' determination that petitioner's "substantive arguments [were] without merit," it did not address the district court's alternative determination that petitioner "waived any double jeopardy objection" by specifically requesting a new trial as a remedy for the *Brady* violation. Pet. App. 10a n.3.

8. In preparation for the new trial, the government subpoenaed additional material from KDMC related to its investigation that was the subject of *Paulus II*.

KDMC claimed that the material is privileged. A magistrate judge rejected that claim, D. Ct. Doc. 449 (Sept. 30, 2021), and the district court overruled KDMC's objections, D. Ct. Doc. 464 (Jan. 18, 2022). KDMC filed a petition for a writ of mandamus in the court of appeals challenging that decision, see 22-5071 C.A. Doc. (Jan. 28, 2022), and the district court has stayed proceedings pending resolution of that petition, see D. Ct. Doc. 469 (Feb. 14, 2022).

ARGUMENT

Petitioner contends (Pet. 25-35) that the court of appeals erred in finding that it lacked interlocutory jurisdiction over his due-process prosecutorial-misconduct claims and in denying his double-jeopardy claim. The court of appeals properly assessed the scope of its jurisdiction, considered petitioner's allegation of government misconduct in connection with his double-jeopardy claim, and determined that his claim was unfounded. That decision is correct and involves a factbound application of settled legal principles that does not conflict with any decision of this Court or of another court of appeals. And this case would in any event be a poor vehicle for considering the questions presented, given the district court's alternative determination that petitioner waived his double-jeopardy claim. The petition for a writ of certiorari should be denied.

1. a. The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. That guarantee recognizes "the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek." *Currier* v. *Virginia*, 138 S. Ct. 2144, 2149 (2018). Accordingly, the Double Jeopardy Clause

precludes a retrial after a jury has acquitted the defendant, *Green* v. *United States*, 355 U.S. 184, 188 (1957); after a trial court has entered a pre-verdict judgment of acquittal on the ground that the evidence introduced at trial was "insufficient to establish criminal liability for an offense," *Evans* v. *Michigan*, 568 U.S. 313, 318-319 (2013); or where "a defendant's conviction has been overturned [on appeal] due to a failure of proof at trial," *Burks* v. *United States*, 437 U.S. 1, 16 (1978). The Clause also prevents a retrial where the prosecution engages in conduct "intended to provoke the defendant into moving for a mistrial." *Oregon* v. *Kennedy*, 456 U.S. 667, 679 (1982).

The Double Jeopardy Clause does not, however, preclude the government from appealing a post-verdict judgment of acquittal, where "reversal on appeal would merely reinstate the jury's verdict" without "expos[ing] the defendant to a second trial." *United States* v. *Wilson*, 420 U.S. 332, 344-346, 352-353 (1975). Nor does it "prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988); see *United States* v. *Scott*, 437 U.S. 82, 90-91 (1978). Those circumstances present "no semblance of the[] types of oppressive practices" that the Double Jeopardy Clause was adopted to prevent. *Currier*, 138 S. Ct. at 2149 (brackets, citation, and internal quotation marks omitted).

The withholding of exculpatory evidence material to a defendant's guilt or punishment, in violation of the due-process principles articulated in *Brady* v. *Maryland*, 373 U.S. 83 (1963), is among the class of errors that warrants a new trial—not dismissal of the

prosecution altogether. See, *e.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 421-422 (1995) (holding that defendant who establishes *Brady* error on appeal or in postconviction proceedings "is entitled to a new trial"); *Giglio* v. *United States*, 405 U.S. 150, 155 (1972) (same); cf. *Brady*, 373 U.S. at 88-91 (affirming state court's grant of a "new trial [on] the question of punishment" where prosecution withheld exculpatory evidence in capital case). A jury verdict obtained without disclosure of evidence covered by *Brady* is not "worthy of confidence," *Kyles*, 514 U.S. at 434, and the defendant is therefore entitled to "a fair readjudication of his guilt free from error," *Burks*, 437 U.S. at 15. But a "reversal for trial error" of that kind, "as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case" and "implies nothing with respect to the guilt or innocence of the defendant." *Ibid.* Thus, ordering a retrial following a successful defense appeal on *Brady* grounds is not "an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *Scott*, 437 U.S. at 91; see *Burks*, 437 U.S. at 15.

b. As the court of appeals correctly recognized, those principles resolve this case. Pet. App. 6a-9a. In *Paulus I*, the court of appeals reversed the district court's post-verdict judgment of acquittal, finding the evidence at trial sufficient to establish that the amount of stenosis in a person's arteries in an objectively verifiable fact and that the jury could reasonably have determined from the evidence here that petitioner made false statements to insurance companies in order to profit by implanting stents into patients who did not need them. 894 F.3d at 275-278. The reinstatement of the jury's guilty verdict on that ground did not violate

the Double Jeopardy Clause. See *Wilson*, 420 U.S. at 344-346, 352-353.

In *Paulus II*, the court of appeals considered petitioner's claim that the district court's decision not to disclose the KDMC letter before trial violated his due-process rights under *Brady*. 952 F.3d at 724-728. That claim did not bear on the sufficiency issue addressed in *Paulus I*. Pet. App. 7a-8a n.2. Instead, petitioner's contention in *Paulus II* was that the KDMC letter should have been turned over to him before trial because it would have supported a different defense theory than the one he pursued—namely, that even if his statements to insurance companies were objectively false, they were isolated mistakes—not that the evidence in the first case had been insufficient for a rational jury to return a verdict of guilt. See 19-5532 Pet. C.A. Br. 35-44.

The court of appeals correctly determined that the appropriate remedy for the *Brady* error was a new trial, not an acquittal. 952 F.3d at 724-728 (citing cases); see *Kyles*, 514 U.S. at 421-422; see also, *e.g.*, *Poventud* v. *City of New York*, 750 F.3d 121, 133 (2d Cir. 2014) ("The remedy for a *Brady* violation is therefore a new trial, as proof of the constitutional violation need not be at odds with his guilt."); *United States* v. *Oruche*, 484 F.3d 590, 595 (D.C. Cir. 2007) ("[O]nce a court finds a *Brady* violation, a new trial follows as the prescribed remedy, not as a matter of discretion."), cert. denied, 558 U.S. 1085 (2009). A retrial to correct such an error does not violate the Double Jeopardy Clause. See, *e.g.*, *Scott*, 437 U.S. at 91; *Burks*, 437 U.S. at 15; see also *United States* v. *Lewis*, 368 F.3d 1102, 1107 (9th Cir. 2004) (explaining that a new trial is "the very remedy that *Brady* prescribes," and joining other circuits that "have explicitly held that defendants may not invoke the Double

Jeopardy Clause in such circumstances"), cert. denied, 543 U.S. 1053 (2005).

2. Petitioner contends (Pet. 31-35) that double-jeopardy principles nonetheless bar his retrial because the government committed a "fraud upon the court" during the appellate proceedings in *Paulus I* by not informing the court of appeals of the ex parte district court proceedings related to the KDMC letter. He also contends (Pet. 25-30) that the court of appeals improperly "refused to consider" that claim on jurisdictional grounds. Those contentions lack merit.

a. As an initial matter, the court of appeals did in fact consider petitioner's allegations of government misconduct in connection with his double-jeopardy claim. Relying on the same decisions that petitioner cites (Pet. 25-27), the court determined that it had jurisdiction to review "the denial of [petitioner's] motion to dismiss based on the Double Jeopardy Clause," Pet. App. 5a (citing *Abney* v. *United States*, 431 U.S. 651, 662 (1977)), including the "necessary components" of petitioner's double-jeopardy claim, *ibid.* (quoting *Richardson* v. *United States*, 468 U.S. 317, 322 (1984)) (brackets omitted). The court then considered that claim on the merits and rejected it, explaining that nondisclosure of the *Brady* issue during *Paulus I* did not mislead the court into reversing a judgment of acquittal that it otherwise would have affirmed. Pet. App. 7a-8a n.2, 10a-13a.

The only arguments that the court of appeals determined it lacked jurisdiction to review involved petitioner's "independent claims" that asserted government misconduct violated his due-process rights and therefore warranted dismissal of the prosecution under the court's "inherent powers." Pet. App. 5a & n.1; see 20-6017 Pet. C.A. Br. 43-46. That determination had little practical

effect. The court of appeals' consideration of the double-jeopardy claim included express consideration of whether "alleged prosecutorial misconduct" in the first appeal, "considered together with [petitioner's] vacated judgment of acquittal and the *Brady* violation, require dismissal under the Double Jeopardy Clause." Pet. App. 9a; see *id.* at 9a-13a. Petitioner does not explain why consideration of his prosecutorial-misconduct claim through the lens of "inherent powers" would have yielded a different result. See Pet. 27 (stating that "[p]etitioner's fraud upon the court allegations [we]re integrally bound up in his double jeopardy claim").

In any event, the court of appeals' determination that it lacked jurisdiction to consider petitioner's independent claims of government misconduct on an interlocutory basis was correct. "Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." *Gunn* v. *Minton*, 568 U.S. 251, 256 (2013) (citation and internal quotation marks omitted). Under 28 U.S.C. 1291, the courts of appeals have jurisdiction to review "final decisions of the district courts." Section 1291's final-judgment rule "requires that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984) (citation and internal quotation marks omitted). And in the particular context of a criminal case, "the rule prohibits appellate review until conviction and imposition of sentence." *Ibid.*

This Court has recognized a limited exception to the final-judgment rule for certain "'collateral order[s]'" that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable

on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (citation omitted). Because "the reasons for the final judgment rule are especially compelling in the administration of criminal justice," this Court has "interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness in criminal cases." *Flanagan*, 465 U.S. at 264-265 (citation and internal quotation marks omitted); see *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 799 (1989).

The Court has permitted appeal of the denial of a motion to dismiss a criminal prosecution in only two circumstances: where the motion was based on the Double Jeopardy Clause, *Abney*, 431 U.S. at 660-662, or on the Speech or Debate Clause, *Helstoski* v. *Meanor*, 442 U.S. 500, 506-507 (1979). The Court has reasoned that an interlocutory appeal is appropriate in those circumstances because the right being invoked is an "immunity from prosecution." *Midland Asphalt*, 489 U.S. at 801 (citation omitted). But in permitting those limited types of interlocutory appeals, the Court has emphasized the "crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges." *Ibid.* (citation omitted). And it has repeatedly rejected extensions of the exception that would encompass orders denying motions to dismiss on non-immunity grounds, even though a successful appeal would end the prosecution. See, *e.g.*, *id.* at 799 (denial of motion to dismiss based on prosecutor's alleged violation of grand-jury secrecy rule); *United States* v. *MacDonald*, 435 U.S. 850, 863 (1978) (denial of motion to dismiss based on alleged violation of Sixth Amendment speedy-trial right).

The court of appeals thus correctly rejected petitioner's contention (Pet. 27-28) that he was entitled to interlocutory review of his "fraud upon the court" due-process claim because it called into question "the propriety of a second trial." This Court rejected an extension of the collateral-order doctrine much like the one that petitioner seeks here in *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (per curiam), which held that the denial of a motion to dismiss based on alleged prosecutorial vindictiveness in violation of the Due Process Clause was not immediately appealable. *Id.* at 270.

Like other claims outside the limited exceptions discussed above, the district court's denial of petitioner's due-process claim (to the extent that it has not already been rejected in connection with the court of appeals' resolution of his double-jeopardy appeal) can and "must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940); see, *e.g.*, *Hollywood Motor Car*, 458 U.S. at 269-270 & n.3 (holding that appeal of the denial of a due-process-based motion to dismiss must be "postponed until the rendition of judgment"). If petitioner is ultimately convicted at trial, he will have a full opportunity to seek appellate review of his due-process claims and, if necessary, review by this Court. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting Court's "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

b. The district court's resolution of petitioner's double-jeopardy claim, which incorporated his allegations of prosecutorial misconduct, was correct. See Pet. App. 5a-

13a. The crux of petitioner's argument (Pet. 31-35) is that the government committed "fraud upon the court" in *Paulus I* by not disclosing the KDMC letter found to be subject to *Brady* in *Paulus II*; that the first appeal's result—a reversal of a judgment of acquittal—is accordingly invalid; and that the original acquittal order should be reinstated and bar any retrial. That factbound argument lacks merit and does not warrant further review.

As petitioner appears to recognize (Pet. 2-3, 31, 35), prosecutorial-misconduct claims are typically the province of the Fifth Amendment's Due Process Clause. The Sixth Amendment's Double Jeopardy Clause is concerned with such misconduct not for its own sake, but only insofar as it might cause a defendant to be tried twice for the same offense. See *Beringer* v. *Sheahan*, 934 F.2d 110, 113 (7th Cir.), cert. denied, 502 U.S. 1006 (1991). Accordingly, this Court has recognized that a defendant may invoke the protections of the Double Jeopardy Clause if the prosecutor deliberately goads him into requesting a mistrial, *Kennedy*, 456 U.S. at 676, consistent with the principle that "prosecutors [cannot] treat trials as dress rehearsals until they secure the convictions they seek," *Currier*, 138 S. Ct. at 2149. But outside that narrow circumstance, claims of "prosecutorial misconduct" are treated "like any other error that unfairly prejudices a defendant." *Beringer*, 934 F.2d at 113; see *Burks*, 437 U.S. at 15.

As the court of appeals recognized, such trial-error treatment is particularly appropriate for *Brady* errors. See Pet. App. 11a-13a. The government has no incentive to deliberately cause reversible error by withholding material exculpatory information in order to undo an otherwise-valid conviction and "save a potential 'second bite at the apple'" at a future retrial. *Id.* at 12a-13a;

see *Lewis*, 368 F.3d at 1108 (explaining that even deliberate *Brady* violations are intended to help the prosecution "win at trial—not to force a second go-around" at a retrial) (citation omitted). The *Brady* violation would sabotage any conviction that the government would obtain, and the first trial would not provide a good "dress rehearsal[]," *Currier*, 138 S. Ct. at 2149, for one in which the exculpatory information were introduced. And as the court of appeals further recognized, even if a *Brady* violation might in some case produce a double-jeopardy violation, that did not occur here.

First, no government misconduct or "fraud on the court" occurred in this case. As explained, the government sought to disclose the KDMC letter to petitioner, but the hospital objected on privilege grounds. See, *e.g.*, D. Ct. Doc. 156-3; D. Ct. Doc. 156-2; KDMC Letter 1-2. Faced with a conflict between its *Brady* obligations and the hospital's objections, the government appropriately "brought the matter before the [district court] to adjudicate the issue." New Trial Op. 20-21; see Ex Parte Mot. 4-5. After a hearing, the district court ordered the government "not to disclose" the letter based its determination that the letter would not be exculpatory at trial and was protected from disclosure under Rule 408. Ex Parte Hr'g Tr. 18-19. The court accepted only the possibility that the letter might be exculpatory as to petitioner's punishment, and deferred consideration of that issue until sentencing. *Ibid.*

As the lower courts correctly observed, petitioner's "disagree[ment] with the [district c]ourt's determination does not transform the [g]overnment's actions into misconduct." New Trial Op. 21; see Pet. App. 13a ("The record shows that the prosecution wanted to disclose the *Brady* material, but the district court ordered them

not to. That is not intentional prosecutorial misconduct designed to trigger a new trial."); 952 F.3d at 728 (same, and stating that court "sympathize[d] with the prosecution"). Nor did the government commit misconduct in connection with the appellate proceedings in *Paulus I*. As the court of appeals explained, that appeal concerned a question of evidentiary sufficiency that was "entirely distinct" from whether the KDMC letter should have been disclosed. Pet. App. 8a n.2. Petitioner cites no authority that would impose an ethical or other requirement on the government, when defending a jury's verdict against a district court's finding that the trial evidence was insufficient, to advise the appellate court of potential claims of error *outside* the trial record that the defendant might raise in a later appeal as grounds for a new trial if the verdict is reinstated.

The absence of any such obligation is especially clear here, because the government had a good-faith basis for determining that, in light of the record at petitioner's trial, the evidence was ultimately immaterial and therefore not required to be disclosed under *Brady*. See New Trial Op. 10-14; see also *Turner* v. *United States*, 137 S. Ct. 1885, 1893 (2017) (explaining that, even if the government agrees that evidence was exculpatory and improperly withheld before trial, relief under *Brady* is warranted only if the evidence was material and prejudicial "in the context of the entire record," including the ensuing trial) (quoting *United States* v. *Agurs*, 427 U.S. 97, 112 (1976)). Although the court of appeals rejected the government's materiality argument and found a *Brady* violation, 952 F.3d at 724-728, it explained that the government's "nondisclosure of the [KDMC] Letter * * * in *Paulus I*" did not indicate any "intent by the

prosecutor to place [petitioner] under new jeopardy," Pet. App. 13a.

Second, and in any event, the government's failure to raise the *Brady* issue in *Paulus I* had no effect on that appeal's outcome. A challenge to the sufficiency of the evidence (and the appeal of the district court's resolution of such a challenge) turns on whether a "rational trier of fact could have found proof of guilt beyond a reasonable doubt" based on "the record evidence adduced at the trial." *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979). Contrary to petitioner's apparent submission, such a challenge does not require (or even permit) judicial consideration of extra-record evidence that was not before the jury. The question, in other words, is not whether a court believes a jury could find guilt based on all the evidence known to the court and the parties; it is whether a jury could find guilt based on the evidence that was actually before it.

The court of appeals correctly applied those settled principles here, explaining that its holding in *Paulus I* addressed only whether "the evidence was sufficient" to sustain the jury's original verdict, which had been reached "without the *Brady* evidence." Pet. App. 7a-8a n.2. The court observed that the issues in *Paulus I* and *Paulus II* were "entirely distinct" and that its *Brady* decision in *Paulus II* accordingly did "not have the effect of invalidating" its sufficiency decision in *Paulus I*. *Id.* at 8a n.2. The court made clear that "[e]ven if the government" had disclosed the KDMC letter in *Paulus I*, "the remedy for the *Brady* violation would have been a new trial," not affirmance of the district court's erroneous judgment of acquittal. *Ibid.*; see *id.* at 9a ("When a court finds that prosecutors did not disclose [*Brady*] evidence, 'we vacate the conviction and remand for a new

trial.' We don't order the case to be dismissed on double jeopardy grounds.") (quoting *United States* v. *Tavera*, 719 F.3d 705, 708 (6th Cir. 2013)) (brackets, citation, and ellipses omitted).

The court also emphasized that it has never opined on the sufficiency of the evidence at a trial in which the KDMC investigation was introduced, which "hasn't happened yet." Pet. App. 8a n.2. And no double-jeopardy principle bars a retrial at which petitioner may introduce that evidence.

3. Petitioner identifies no decision of another court of appeals that would have reached a different result from the decision below. And his assertions that the decision below conflicts with decisions of this Court is unsound.

Petitioner contends (Pet. 34) that the court of appeals' reasoning is inconsistent with this Court's decision in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977), which held that the Double Jeopardy Clause precludes the government from appealing a district court's judgment of acquittal based on insufficient evidence where "the jury failed to agree on a verdict." *Id.* at 570; see *id.* at 571-576. *Martin Linen Supply* makes clear, however, that a judgment of acquittal entered "after a jury rendered a guilty verdict" is "appealable by the United States." *Id.* at 570. The government's appeal in *Paulus I*, which challenged the district court's post-verdict judgment of acquittal and sought to reinstate the jury's unanimous guilty verdict, was therefore fully consistent with *Martin Linen Supply*. Petitioner's later success in obtaining a new trial based on a claim of error unrelated to the sufficiency of the evidence does not mean that the government's appeal in *Paulus I* was "an end-run" around the Double Jeopardy

Clause, Pet. 35; it simply reflects that different errors warrant different remedies, see, *e.g.*, *Burks*, 437 U.S. at 15-16.

Petitioner additionally contends (Pet. 31-33) that the court of appeals' reasoning is inconsistent with *Greer* v. *United States*, 141 S. Ct. 2090 (2021), and *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944), overruled on other grounds, *Standard Oil Co.* v. *United States*, 429 U.S. 17 (1976). But neither of those cases involved double-jeopardy or *Brady* claims, much less any suggestion that a defendant is entitled to outright acquittal in these circumstances. *Greer* held that, on review for plain error, a defendant bears the burden of establishing that he was prejudiced by jury instructions that omitted an element of the offense by showing that, had "the proper instruction [been] given," the government could not have "introduce[d] additional evidence to prove" the missing element. 141 S. Ct. at 2098. And *Hazel-Atlas* held that federal courts have equitable authority "to set aside fraudulently begotten judgments" in civil cases. 322 U.S. at 245; see Pet. 29 (acknowledging that an equivalent power "to withdraw a judgment because of fraud upon the court" may not exist "in criminal cases"). The court of appeals' holding in this case does not conflict with either of those decisions.

4. In any event, this case would be a poor vehicle for considering petitioner's double-jeopardy claim in light of the district court's alternative holding that petitioner waived that claim by affirmatively contending before the district court and in the second appeal that the remedy for his *Brady* claim was a new trial. Pet. App. 26a-28a. Even "[t]he most basic rights of criminal defendants," including the protections of the Double Jeopardy Clause, are "subject to waiver." *Peretz* v. *United States*,

501 U.S. 923, 936 (1991); see, *e.g.*, *Currier*, 138 S. Ct. at 2151 (holding that defendant may waive double-jeopardy claim by consenting to successive trials); cf. *Scott*, 437 U.S. at 99 ("[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice."). Although the court of appeals found it unnecessary to consider petitioner's waiver in light of its determination that petitioner's double-jeopardy claim lacked merit, see Pet. App. 10a n.3, the government may rely on that waiver as an alternative basis for affirming the judgment, see *United States* v. *New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) ("[A] prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted.").

Petitioner cites (Pet. 32 n.3) this Court's decision in *Burks* v. *United States*, *supra*, for the proposition that a defendant does not "waive his right to invoke double jeopardy protection by moving for a new trial." *Burks*, however, held that a defendant does not "waive[] his right to a judgment of acquittal on the basis of evidentiary insufficiency" merely "by moving for a new trial" in the district court. 437 U.S. at 18. The Court did not suggest that a defendant may (as here) affirmatively urge both the district court and the court of appeals that the remedy for his *Brady* claim would be a new trial; obtain that relief on that ground, rather than relief based on evidentiary insufficiency; and then argue that the circumstances in fact entitle him to an acquittal. See, *e.g.*, 19-5532 Pet. C.A. Br. 44 (arguing that "[t]his *Brady* violation commands a new trial"). At the very least, the need for this Court to resolve the threshold waiver question before considering the merits of

petitioner's claims provides a compelling reason to deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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