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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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BORDEN, J., with whom NORCOTT and KATZ, Js., join, concurring and dissenting. I agree with and join the dissenting opinion of Justice Katz with respect to part I of the majority opinion—that the state should have been required to present expert testimony concerning the possible injurious effects of the oral consumption of raw marijuana. I would therefore affirm the judgment of the Appellate Court with respect to the defendants' risk of injury convictions. See *State* v. *Padua*, 73 Conn. App. 386, 398–99, 808 A.2d 361 (2002).

I concur with part II of the majority opinion that the Appellate Court improperly reversed the defendants' convictions for conspiracy to sell marijuana within 1500 feet of a public housing project on account of instructional impropriety because any error was harmless beyond a reasonable doubt, and that the imposition of a sentence for both conspiracy to sell marijuana and conspiracy to sell marijuana within 1500 feet of a public housing project would violate the double jeopardy clause of the United States constitution. See id., 404, 405.

I write separately with respect to part III of the majority opinion because I concur in part. In part III A of the majority opinion, the majority addresses the issue of whether the defendant Miranda Virgilia Calvente was entitled, under double jeopardy principles, to have the Appellate Court decide her claim that the evidence was insufficient to sustain her conviction for conspiracy to sell marijuana within 1500 feet of a public housing project, when the court had already reversed the conviction for instructional error. The state has conceded this issue. Nonetheless, the majority declines to engage in the constitutional analysis and, instead invokes our supervisory authority to hold that a reviewing court must address a defendant's evidentiary insufficiency claim prior to its remand for retrial because of instructional error. The majority then evaluates the evidence supporting the conviction and concludes that it was sufficient. I agree with that conclusion reached in part III B of the majority opinion.

I disagree, however, with part III A of the majority opinion in which it invokes our supervisory authority without deciding the constitutional issue. I would decide the double jeopardy claim in the defendant's favor.[1] In other words, I conclude that, when a defendant presents a claim of evidentiary sufficiency on appeal, she is entitled by virtue of the prohibition against double jeopardy to have that claim fully considered, irrespective of whether she presents another valid appellate claim. See *Burks* v. *United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (holding that double jeopardy clause bars retrial when reviewing

court has found evidence insufficient to support guilty verdict). Put simply, if the defendant is correct in that claim of evidentiary sufficiency she may not be retried on that charge because to permit such a retrial would allow the state to try her twice for the same offense when it had adduced legally insufficient evidence to convict her in the first trial. That is tantamount to a verdict acquitting her in the first trial because, if the defendant were correct in her evidentiary insufficiency claim, she should legally have been acquitted, and the double jeopardy principle would prohibit the state from taking a second bite of the conviction apple.

Although I acknowledge that there is a split of authority on this question, I agree with those numerous authorities, both state and federal, that hold that the double jeopardy clause requires an appellate court to review a criminal defendant's insufficiency of the evidence claim prior to remanding a case for a retrial because of trial error.[2] Specifically, I disagree with the reasoning in those cases that have concluded that the United States Supreme Court decision in *Richardson* v. *United States*, 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984), is inconsistent with the conclusion that double jeopardy principles require a reviewing court to address a defendant's insufficiency of the evidence claim regardless of a finding that trial error necessitates a new trial. *Richardson* held that the defendant could not prevail on his claim that the double jeopardy clause required a reviewing court to address his insufficiency claim where the first trial had resulted in a mistrial following a hung jury. Id., 322–23. The court reasoned that the defendant's claim ''lack[ed] its necessary predicate, there having been no termination of original jeopardy.'' Id., 318. In its analysis, however, the *Richardson* court specifically distinguished the facts of that case from those of *Burks* v. *United States*, supra, 437 U.S. 1, in which the defendant had appealed from a final judgment of conviction, and noted that ''[t]he case law dealing with the application of the prohibition against placing a defendant twice in jeopardy following a mistrial because of a hung jury has its own sources and logic.'' *Richardson* v. *United States*, supra, 323. Given the court's own narrow phrasing of its holding, I see no justification for extending the rule beyond the context of mistrials.

I also note that this has long been our understanding and practice, even in cases decided after *Richardson*. See, e.g., *State* v. *Jones*, 234 Conn. 324, 334, 662 A.2d 1199 (1995) (addressing defendant's unsuccessful insufficiency claim, despite concluding in same appeal that new trial was warranted because of trial error); *State* v. *Gray*, 200 Conn. 523, 535–36, 512 A.2d 217 (addressing defendant's insufficiency claim before considering claim of trial error because '' 'if we were to rule that the evidence was insufficient, the defendant would be entitled to an acquittal rather than a new trial' ''), cert.

denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 376 (1986); *State* v. *Fernandez*, 198 Conn. 1, 21, 501 A.2d 1195 (1985) (addressing defendant's insufficiency claim despite having already found that trial error merited new trial because finding of insufficiency would bar retrial); see also *State* v. *Warholic*, 84 Conn. App. 767, 769 n.1, 854 A.2d 1145 (addressing defendant's sufficiency of evidence claim despite concluding that prosecutorial misconduct warranted new trial "because a determination of evidentiary insufficiency would entitle the defendant to a judgment of acquittal"), cert. granted, 271 Conn. 935, 861 A.2d 512 (2004); *State* v. *Bermudez*, 79 Conn. App. 275, 277 n.3, 830 A.2d 288 (same), cert. granted, 266 Conn. 921, 835 A.2d 61 (2003).

Finally, even if, following *Richardson*, there remains some doubt as to strict application of the *Burks* rule in the context of an appeal that presents both claims of trial error and insufficiency of the evidence, I agree with the majority that requiring review of the insufficiency claim makes sense as a matter of sound appellate policy and fundamental fairness. When a defendant challenges a conviction on appeal solely on the basis of evidentiary insufficiency, he is entitled to have the court review that claim and, if he is correct, no retrial is permitted. *Burks* v. *United States*, supra, 437 U.S. 18. If the same rule were not to apply to a defendant who presents two valid claims on appeal—one for evidentiary insufficiency and one for trial error—that defendant would be worse off than the first defendant, because he would be subject to a retrial despite the fact that the state had not adduced sufficient evidence in his first trial. That would be a bizarre result. Indeed, such a scenario would incentivize prosecutorial manipulation of the appellate process: the state, faced with two such valid claims, and recognizing the validity of both, would be well-advised to confess error on the trial error claim and thereby gain the opportunity to fill any evidentiary gaps at the second trial that it left open in the first trial.[3] Sound appellate policy and fundamental fairness require that we structure our appellate process so as to avoid these results.[4]

[1] We ordinarily invoke our supervisory powers to enunciate a rule that is *not* constitutionally required but that we think is preferable as a matter of policy; see, e.g., *State* v. *Reynolds*, 264 Conn. 1, 215, 836 A.2d 224 (2003) (" '[the exercise of our supervisory powers] is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole' "), cert. denied, U.S. , 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); not, as the majority does in the present case, to avoid deciding a constitutional question that is squarely presented.

[2] Compare *United States* v. *Wallach*, 979 F.2d 912, 917 (2d Cir. 1992) (double jeopardy protection mandates that "a reversal of a conviction on grounds other than sufficiency does not avoid the need to determine the sufficiency of the evidence before a retrial may occur"), cert. denied, 508 U.S. 939, 113 S. Ct. 2414, 124 L. Ed. 2d 637 (1993), *United States* v. *Haddock*, 961 F.2d 933, 934 (10th Cir.) (same), cert. denied, 506 U.S. 828, 113 S. Ct. 88, 121 L. Ed. 2d 50 (1992), and *Dillon* v. *State*, 317 Ark. 384, 388, 877 S.W.2d 915 (1994) (same) with *United States* v. *Porter*, 807 F.2d 21, 23–24 (1st

Cir. 1986) (relying on *Richardson* v. *United States*, supra, 468 U.S. 317, in concluding double jeopardy clause not implicated by First Circuit Court of Appeals refusal, upon determining that defendant was entitled to retrial because of trial error, to consider defendant's sufficiency of evidence claim; grant of retrial did not terminate defendant's initial jeopardy), cert. denied, 481 U.S. 1048, 107 S. Ct. 2178, 95 L. Ed. 2d 835 (1987), and *United States* v. *Miller*, 952 F.2d 866, 871–72 (5th Cir.) (same), cert. denied, 505 U.S. 1220, 112 S. Ct. 3029, 120 L. Ed. 2d 900 (1992).

[3] Ironically, in such a case, the defendant's arguments in support of her claim of insufficiency may serve to assist the state to fill such gaps on retrial. See S. Wang, "Insufficient Attention to Insufficient Evidence: Some Double Jeopardy Implications," 79 Va. L. Rev. 1381 (1993).

[4] Furthermore, providing appellate review of a claim of evidentiary insufficiency, even when the defendant has presented a valid claim of trial error, is consistent with our recent reaffirmation of the waiver rule in *State* v. *Perkins*, 271 Conn. 218, 856 A.2d 917 (2004). The waiver rule dictates that when a defendant's motion for judgment of acquittal at the close of the state's case is denied, a defendant has two options: forgoing presentation of a defense and obtaining appellate review of the sufficiency of the evidence based solely on the state's presentation of its case; or presenting evidence on her behalf and obtaining appellate review of the sufficiency of the evidence based on the evidence in toto, thus risking that her presentation of her defense will have filled in gaps in the state's case. Id., 229. In *Perkins*, we recognized that the waiver rule presents a defendant with a "difficult dilemma," but not an unfair one. Id., 243. To add, however, to the difficult choice required of the defendant by the waiver rule the additional requirement that, by raising trial error claims along with a sufficiency claim on appeal, she risks that the reviewing court may elect not to address her sufficiency claim at all, compounds an already difficult choice with a fundamentally unfair one.