No. 06-440

In the Supreme Court of the United States

RODERICK KEITH MCDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the denial of petitioner's motion to transfer his trial to a different division of the district court violated petitioner's right to due process.

2. Whether the district court's jury instructions regarding conspiracy to commit extortion were erroneous.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases–Continued: Page

Constitution and statutes:

Statutes—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is reprinted in 178 Fed. Appx. 643. The orders of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2006. A petition for rehearing was denied on June 21, 2006 (Pet. App. 7a). On September 12, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 19, 2006, and the petition was filed on September 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Central District of California of four counts of mail fraud with the intent to deprive the public of the right of honest services of a public official, in violation of 18 U.S.C. 1341 (2000 & Supp. III 2003) and 18 U.S.C. 1346; two counts of bribery concerning a government receiving federal funds, in violation of 18 U.S.C. 666; one count of conspiracy to commit extortion under color of official right, in violation of 18 U.S.C. 1951; and three counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). He was sentenced to 41 months of imprisonment, to be followed by a three-year term of supervised release. He was also fined $25,000 and ordered to pay $20,000 in restitution. The court of appeals affirmed. Pet. App. 1a-6a.

1. Petitioner was a publicly elected director of the West Basin Municipal Water District (WBMWD), a public agency that provides water and wastewater services to approximately 900,000 residents in Los Angeles County. Pet. E.R. 1.

a. In 1999, Transportation Concepts, a transportation service company located in Irvine, California, which is in Orange County, sought to renew its busing contract with the city of Carson, California. Upon learning that Carson was not going to exercise the five-year extension provision in its current contract but rather was going to solicit bids, Transportation Concepts met with petitioner about hiring him as a consultant. At a second meeting, petitioner stated that his fee would be a percentage of the value of the approximately $5 million contract. Transportation Concepts and petitioner did not then

enter into an agreement. Gov't E.R. 858-864; Gov't C.A. Br. 5-6.

In January 2000, Transportation Concepts learned that Carson had ranked it third among three finalists for the contract. Transportation Concepts thus returned to petitioner and asked for advice. Petitioner demanded a $120,000 contingency fee if Transportation Concepts received the contract, and Transportation Concepts retained him. Petitioner had already, however, begun conspiring with several members of the Carson City Council to award the contract to Transportation Concepts. Specifically, before January 2000, petitioner promised to pay $5000 each to Carson's mayor and two city council members in exchange for their votes on behalf of Transportation Concepts. On January 18, 2000, Transportation Concepts was awarded the busing contract. Petitioner paid money to the mayor and two city council members after the vote. Gov't E.R. 858-909, 926-1035; Gov't C.A. Br. 5-8.

b. In 2001, petitioner asked Laura Chao of Ocean Sky Group, Limited, a California company formed to make investments in China, to launder a $100,000 campaign contribution he had received. Petitioner gave Chao a $100,000 cashier's check written to Ocean Sky. Chao then purchased from her bank a cashier's check in the same amount, written to petitioner. Petitioner instructed Chao to create a phony invoice to account for Ocean Sky's receipt of the $100,000 cashier's check, and told Chao to issue him a 1099 tax form for the payment, falsely indicating that he was an independent contractor for Ocean Sky. To hide the source of the $100,000 political contribution, petitioner falsely stated on a California Fair Political Practices form that the source of the income was Ocean Sky and that it was paid to him for his

work as a consultant. Gov't E.R. 602-615, 1799-1804; Gov't C.A. Br. 11-12.

c. In 2001 and 2002, petitioner arranged for Luster National, Inc. (Luster) to secure a contract with WBMWD to build a pipeline in Carson without having to face a competitive bidding process. After arranging for Luster to receive the contract, petitioner told Luster's owner that he had to pay petitioner ten percent of the $5 million that was to be paid to Luster for the project. Per petitioner's instructions, Luster sent checks for $10,000, $5000, and $5000 to a company called Business Affairs Management. Business Affairs Management then wrote checks in the same amounts to petitioner and issued 1099 tax forms falsely indicating that the money it had received from Luster represented wages to petitioner for his work as an independent contractor. Gov't E.R. 315-328, 570-584; Gov't C.A. Br. 8-11.

2. On July 30, 2003, a federal grand jury in the Central District of California returned an indictment charging petitioner with ten counts of honest services mail fraud, in violation of 18 U.S.C. 1341 (2000 & Supp. III 2003), and 18 U.S.C. 1346; five counts of bribery, in violation of 18 U.S.C. 666; one count of conspiracy to commit extortion under color of official right, in violation of 18 U.S.C. 1951; and five counts of money laundering and aiding and abetting, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and 18 U.S.C. 2. Pet. E.R. 1-23. The government filed the case in the Southern Division of the Central District, which encompasses Orange County, rather than in the Western Division, which includes Los Angeles County. Central District General Order 95-2 governs the assignment of criminal cases among its three divisions and states that "[a] criminal indictment or information may be assigned to the Southern Division

if at least one of the crimes charged, or any part thereof, is alleged to have been committed within the Southern Division." Gov't E.R. 1735A. The indictment alleged that the Hobbs Act extortion conspiracy took place in "Orange and Los Angeles counties." Pet. E.R. 18, para. 41. That count, Count 16, listed two overt acts involving Transportation Concepts—the faxing of bus rate information to petitioner and the drafting of the "consulting" agreement with petitioner—that occurred in Irvine, California, which is in the Southern Division. *Id.* at paras. 47, 51.

Before trial, petitioner filed a motion seeking a transfer from the Southern Division to the Western Division, claiming that such a transfer was mandated by General Order 95-2 because no part of the alleged crimes occurred in the Southern Division or, in the alternative, the district court should transfer the case as a matter of its discretion. See Gov't E.R. 1736-1743. On November 24, 2003, after a hearing, the district court denied petitioner's motion. The court found from the face of the indictment that at least part of one of the charged crimes was alleged to have occurred in the Southern Division. In addition, the court found that assignment of the case to the Southern Division was "certainly not done arbitrarily" and that "[t]here [wa]s a reason for filing it here." *Id.* at 1, 26.

At trial, petitioner submitted proposed instructions on the extortion conspiracy count stating that "the members of the conspiracy conspired to obtain money from another person or entity" (Pet. E.R. 150) and that "[i]t is not possible for a person to be part of a conspiracy to extort himself" (*id.* at 151). The district court rejected petitioner's proposed instructions and instructed the jury that in order to convict petitioner of conspiracy to

extort under color of official right, the government must prove that "there was an agreement between two or more persons to commit extortion under color of official right" and that "defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it." Gov't E.R. 1452-1453. The court further instructed that the government must prove the following elements:

> First, a co-conspirator was a Carson City Councilmember; [s]econd, the defendant or a co-conspirator intended to obtain money which defendant or a co-conspirator knew defendant or a co-conspirator was not entitled to; [t]hird, the defendant or a co-conspirator knew that the money would be given in return for taking some official action; and [f]ourth, commerce or the movement of an article or commodity in commerce from one state to another would have been affected in some way.

Pet. E.R. 173; see Gov't E.R. 1454. The court also later instructed the jury that "[t]he phrase 'extortion under color of official right' means a person's use of the power and authority of the public office he occupies to obtain money or something of value from another to which that person is not entitled." *Id.* at 1455.

On October 21, 2004, after two and a half weeks of trial, the jury convicted petitioner of four counts of honest services mail fraud, two counts of bribery, one count of conspiracy to commit extortion under color of official right, and three counts of money laundering. The jury acquitted petitioner of one count of honest services mail fraud and two counts of bribery, and failed to reach verdicts on the remaining counts. Docket entry No. 85 (Oct. 21, 2004).

Post-trial, on November 2, 2004, petitioner filed a motion for a new trial, renewing his claim that he was tried in the Southern Division in violation of General Order 95-2, and asserting for the first time that his trial thus violated his due process rights. Gov't E.R. 1805-1810. The motion claimed that the government acted arbitrarily and capriciously in "shoehorn[ing] the case into Orange County" by the way it phrased the allegations in the indictment. *Id.* at 1809. The motion made no claim of racial discrimination. On December 13, 2004, after a hearing, the district court denied petitioner's motion, finding that petitioner had shown neither a "capricious application" of the General Order nor an effect on his substantial rights. Pet. E.R. 181-182.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-6a. First, the court held that petitioner failed to show that he was prejudiced by the denial of his motion to transfer venue. *Id.* at 2a. Moreover, the court concluded that petitioner "ha[d] failed to demonstrate that the Government had a discriminatory purpose in seeking an indictment in the Southern Division," and thus his due process claim also failed. *Id.* at 2a-3a. The court further observed that petitioner "did not raise his claim properly in the District Court." *Id.* at 3a.

Second, the court held that, taken as a whole, the district court's jury instructions regarding the extortion conspiracy count were not misleading. Pet. App. 3a. Specifically, while the challenged instruction omitted the word "another," the district court later defined "extor-

tion under color of official right" to "require that the money or thing of value come from 'another.'" *Ibid.*[1]

ARGUMENT

1. Petitioner challenges (Pet. 12-18) the assignment of his trial to the Southern Division of the Central District of California on due process grounds, alleging that the government "manipulate[d] the case assignment system" to charge him in "a jurisdiction in which the jury pool is predominately white." Pet. at 12. Petitioner's claim lacks merit and further review by this Court of the court of appeals' unpublished decision is unwarranted.

a. The assignment of petitioner's case to the Southern Division complied with the district court's General Order governing division assignments, and the district court found no arbitrary or capricious application of the provisions of the General Order. Gov't E.R. 26. Count 16 of the indictment, which charged petitioner with conspiracy to commit extortion under color of official right, alleged that two overt acts in furtherance of the conspiracy occurred in the Southern Division. See Pet. E.R. 17-18, para. 41 (alleging that the conspiracy in Count 16 occurred "in Orange and Los Angeles counties"). Specifically, paragraph 47 alleged that petitioner "caused a representative of Transportation Concepts in Irvine, California" (a city located in the Southern Division) to fax to petitioner rate information prepared by the bus company, and paragraph 51 alleged that "a representative of Transportation Concepts, Inc., in Irvine, Califor-

[1] The court of appeals also rejected petitioner's claims that the evidence was insufficient to support his money laundering and mail fraud convictions and that the district court erroneously grouped his convictions in determining the applicable Sentencing Guidelines range. Pet. App. 4a-6a. Petitioner does not renew those claims in this Court.

nia, prepared a written consulting agreement that reflected [petitioner's] terms," including "payment of $60,000 to [petitioner] upon contract approval by the City of Carson and additional monthly payments of $2500 per month for a period of two years." Pet. E.R. 20, paras. 47, 51.

As the district court found, the allegation about the consulting agreement was "the more critical part" because it was the "real essence of what's alleged as far as [petitioner's] being in the middle of the whole supposed transaction here." Gov't E.R. 26. In other words, the company from which petitioner conspired to extort money is located in the Southern Division, and that company prepared, in the Southern Division, the consulting agreement meant to disguise the extortion payments. As the district court found (*id.* at 26), that is "reason for filing" the indictment in the Southern Division, and satisfies the requirement of General Order 95-2 that "at least one of the crimes charged, *or any part thereof*, is alleged to have been committed within the Southern Division." *Id.* at 1735A (emphasis added).[2]

The court of appeals also correctly concluded that the assignment did not violate petitioner's due process rights. Petitioner does not, and cannot, claim that assignment to the Southern Division deprived him of a "fair trial in a fair tribunal." *Bracy* v. *Gramley*, 520 U.S. 899, 904-905 (1997) (quoting *Withrow* v. *Larkin*, 421 U.S. 35, 46 (1975)). A defendant has no constitutional right to trial in any particular division, *United States* v.

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[2] In suggesting that Transportation Concepts' non-party status is relevant to the proper venue, petitioner misquotes the General Order as requiring that "the crimes charged, or any *party* thereof, is alleged to have been committed with the Southern Division." See Pet. 7 (emphasis added).

Etsitty, 130 F.3d 420, 425 (9th Cir. 1997) (per curiam), amended by 140 F.3d 1274 (9th Cir. 1998), cert. denied, 525 U.S. 1003 (1998), nor to have members of any particular race on his jury, *Taylor* v. *Louisiana*, 419 U.S. 522, 538 (1975).

b. Petitioner argues (Pet. 13-15) that the decision below conflicts with cases holding that the manipulation of case assignment processes violates due process "absent a showing of discriminatory purpose." Putting aside that petitioner made no showing of any manipulation here, the asserted conflict is illusory. As an initial matter, all of the cases petitioner cites involve assignment of cases to a particular *judge*, not (as here) to a particular division within a judicial district. See *Francolino* v. *Kuhlman*, 365 F.3d 137, 168 (2d Cir.), cert. denied, 543 U.S. 872 (2004); *United States* v. *Pearson*, 203 F.3d 1243, 1255 (10th Cir.), cert. denied, 530 U.S. 1268 (2000); *Cruz* v. *Abbate*, 812 F.2d 571, 573-574 (9th Cir. 1987); *Louisiana* v. *Simpson*, 551 So. 2d 1303, 1304 (La. 1989) (on rehearing) (per curiam); *McDonald* v. *Goldstein*, 83 N.Y.S. 2d 620, 622, aff'd, 273 A.D. 649 (N.Y. App. 1948). These cases rest on the principle that "judges are not fungible." *Laird* v. *Tatum*, 409 U.S. 824, 834 (1972) (memorandum of Rehnquist, J., on motion for recusal). See *Pearson*, 203 F.3d at 1255-1256 (quoting *Laird*, 409 U.S. at 834); *Francolino*, 365 F.3d at 141 (noting that "due process requires a neutral and detached judge in the first instance") (internal quotation marks omitted); *Cruz*, 812 F.2d at 573 ("The selection of a judge to preside at a criminal trial is a matter of considerable significance to the criminal defendant."). As such, the cases are, at a minimum, not directly applicable to the assignment of a case to a particular division within a district, where no "judge-shop-

ping," *Pearson*, 203 F.3d at 1259; *Francolino*, 365 F.3d at 140, is alleged to have occurred.

More importantly, the federal cases cited by petitioner (Pet. 13-14) do not support the notion that prosecutorial judge-shopping is a per se due process violation. See *Pearson*, 203 F.3d at 1263 (holding that, "even if we accept Mr. Pearson's contentions as to the prosecution's motivation in reordering the defendants' names on the superseding indictment so that the case would be assigned to Judge Belot, the assumed due process violation arising out of that conduct is not structural error and is harmless beyond a reasonable doubt");[3] *Francolino,* 365 F.3d at 141 (observing that "numerous courts of appeals have held that such judge-shopping, without more, *does not* mandate a new trial"). These cases are consistent with the other federal cases addressing the matter. See *Mallett* v. *Bowersox*, 160 F.3d 456, 460 (8th Cir. 1998) ("We also reject Mallett's argument that the change of venue procedure in this case was inherently lacking in due process."), cert. denied, 528 U.S. 853 (1999); *Sinito* v. *United States*, 750 F.2d 512, 515 (6th Cir. 1984) ("Even when there is an error in the process by which the trial judge is selected, or when the selection process is not operated in compliance with local rules, the defendant is not denied due

[3] Although petitioner asserts (Pet. 13-14) that "the Tenth Circuit suggested that the manipulation of otherwise neutral case assignment rules implicates due process concerns that must be examined," the *Pearson* court expressly declined to decide whether due process was implicated: "we have assumed, *without deciding*, that the Due Process Clause of the Fifth Amendment entitles Mr. Pearson to an impartial method of assigning his case to a particular judge." *Pearson*, 203 F.3d at 1266-1267 (emphasis added).

process as a result of the error unless he can point to some resulting prejudice.").

Nor do petitioner's state cases (Pet. 14-15) support a per se rule. In *Simpson*, the court held, on a "prospective" basis only, 551 So. 2d at 1305, that a system that vests district attorneys "with power to choose the judge to whom a particular case [wa]s assigned" violates due process. *Id.* at 1304. The court did not hold, however, that the prosecutor's selection of the judge or venue mandates reversal of a conviction absent a showing of prejudice. Indeed, Louisiana courts have applied harmless error analysis in such situations. See *Louisiana* v. *Huls*, 676 So. 2d 160, 167-168 (La. Ct. App. 1996) (applying harmless error analysis and affirming conviction even though the case assignment system violated due process under the holding in *Simpson*); *Louisiana* v. *Romero*, 552 So. 2d 45, 49 (La. Ct. App. 1989) (same). Likewise, although the state court in *McDonald* rejected a district attorney's challenge to a court order divesting his office of its long-accepted authority to select judges for criminal cases—because "[c]ourts must be independent and free from outside supervision, especially by any of the litigants"—the court's holding rested on state law. 83 N.Y.S. 2d at 625. The court did not hold that venue or judge selection by the prosecutor inherently violates due process principles of the federal Constitution. *Id.* at 625-626. As the Tenth Circuit observed, "the state court cases—*Simpson* and *McDonald*—although containing sweeping language about the impropriety of allowing prosecutors to select judges," do not address the situation of "the alleged manipulation of the case assignment system in an individual case and the contention that a conviction should be overturned because of that manipulation." *Pearson*, 203 F.3d at 1259.

c. Petitioner contends that this case raises "heightened structural constitutional concerns," Pet. 2, because "[t]he government's decision to try him in Orange County rather than Los Angeles County had the effect of virtually ensuring the absence of African-American jurors." Pet. 17. Petitioner further asserts (Pet. 18) that the framework that this Court prescribed in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), for determining whether peremptory challenges in the petit jury selection process were racially motivated should be applied to determine whether the selection of venue was racially motivated. Petitioner claims (Pet. 18) that under that framework he "need only raise an inference of discrimination to establish a *prima facie* case of discrimination," which he claims he has done.

While under the equal protection component of the Fifth Amendment's Due Process Clause prosecutorial decisions may not be based on race, the presumption of regularity supports prosecutorial decisions, in the absence of "clear evidence to the contrary." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). In related contexts, this Court has held that to establish a violation of equal protection, the defendant must show that the prosecutor's act both was motivated by a discriminatory purpose and had a discriminatory effect. See *ibid.*; *McCleskey* v. *Kemp*, 481 U.S. 279, 292 (1987) (to prove that the State's death penalty statute violates the Equal Protection Clause, defendant must prove that "the decisionmakers in *his* case acted with discriminatory purpose" and that this purposeful discrimination had a discriminatory effect on him); *Wayte* v. *United States*, 470 U.S. 598, 608 (1985) (same with respect to a selective prosecution claim). Here, petitioner cites no evidence of a discriminatory purpose on the part of the government

in indicting him in the Southern Division, nor any evidence of discriminatory effect on him from being tried in that division. Indeed, petitioner did not even assert a claim of racial discrimination until appeal. Moreover, based on the claims that petitioner did make in the district court, the court found that "[t]here [wa]s a reason for filing" the indictment in the Southern Division (namely, that "critical" aspects going to the "essence" of the Hobbs Act extortion conspiracy were alleged to have occurred there), Gov't E.R. 26, and that petitioner had shown neither a "capricious" application of the General Order nor an effect on his substantial rights. Pet. E.R. 181-182.[4]

Petitioner asserts that the lower courts are divided over whether discriminatory purpose in venue selection can be determined using the *Batson* framework. Pet. 17 (citing *Mallett*, 160 F.3d 456); *New Mexico* v. *House*, 978 P.2d 967, 993-994 (N.M.), cert. denied, 528 U.S. 894 (1999); *Osmulski* v. *Becze*, 638 N.E.2d 828, 832-834 (Ind.

[4] Petitioner's purported evidence (Pet. 15) of manipulation is that Manuel Ontal, a former Carson City Council member, "was charged and tried for the *same alleged extortion scheme* in the Western Division." Unlike petitioner, however, Ontal was not charged with conspiracy, but was charged with and pleaded guilty to a substantive violation of the Hobbs Act for taking a $5000 payoff in exchange for his vote on the bus contract; the payoff occurred in Los Angeles County. Gov't E.R. 1767-1768. Because Ontal was charged with a substantive violation of the Hobbs Act rather than a conspiracy, the information in his case did not allege the overt acts alleged in paragraphs 47 and 51 of petitioner's indictment (or indeed any overt acts at all), and thus he was not subject to trial in the Southern Division. In addition, contrary to petitioner's assertions (Pet. 15), the government introduced evidence at petitioner's trial of the overt acts in the Southern Division and the nexus of the conspiracy to that Division, and stood by its statements to the district court with respect to those allegations. See Gov't E.R. 1816-1818; Gov't C.A. Br. 30.

Ct. App. 1994)). Again, there is no conflict warranting this Court's review. All of the federal courts that have considered the issue have agreed that *Batson* is not applicable in these circumstances. See *Mallett*, 160 F.3d at 460 (refusing to apply *Batson* to a claim involving "the transfer of a black defendant's criminal case to a county with no black residents"); *Epps* v. *Iowa*, 901 F.2d 1481, 1483 (8th Cir. 1990) (noting the lack of "any authority to support a conclusion" that a "change of venue to a county with such a small black population that there was virtually no chance that any black persons would be included on the venire" violated the defendant's right to equal protection); *Wallace* v. *Price*, No. 99-231, 2002 WL 31180963, at *54 (W.D. Pa. Oct. 1, 2002) (observing that the *Batson* Court "never once suggested that its holding applied in cases where the trial court changed venire from one county to another"); *Goins* v. *Angelone*, 52 F. Supp. 2d 638, 666 (E.D. Va. 1999) (noting, in rejecting an ineffective-assistance claim, that "courts have held that a change of venue to a locality with a venire that includes few or no minorities does not violate a black defendant's constitutional rights"). In one of the two state cases cited by petitioner, the court observed that there was "little jurisprudence" on the potential application of venire and petit jury principles to the selection of venue, *House*, 978 P.2d at 993, and it "adapted" a "modified" *Batson* test to determine whether the venue selection in that case was discriminatory, *id.* at 993-994. The court ultimately found no evidence of discriminatory intent or effect, observing that "the mere statistical measure of a venue's ethnic proportions cannot, by itself, lead to the presumption that a person of a given race will be unable to receive a fair trial in that venue." *Id.* at 995. Only in *Osmulski* did the court conclude that the *Batson* frame-

work directly applies to the venue-transfer situation. 638 N.E.2d at 833. That lone decision from a state intermediate appellate court does not give rise to a conflict in authority warranting resolution by this Court. The Court denied review in both *Mallett* and *House*, and there is no reason for a different result here.

In any event, this case is not an appropriate vehicle for resolving whether the *Batson* framework applies to claims of racial discrimination in venue selection because petitioner did not properly preserve that claim. Petitioner did not raise a due process claim with respect to venue selection until after his trial, and he did not make a claim based on racial discrimination until his appeal. See pp. 6-7, *supra*. As a result, no factual record was developed in the trial court regarding petitioner's present racial-discrimination claim, much less did the trial court consider whether the *Batson* framework should apply in this context. Although the court of appeals' unpublished per curiam opinion could be said to have passed on petitioner's racial-discrimination claim, it did so only briefly and on the grounds that petitioner had "failed to demonstrate that the Government had a discriminatory purpose in seeking an indictment in the Southern Division," and that petitioner "did not raise his claim properly in the District Court." Pet. App. 2a-3a.

2. Petitioner also challenges (Pet. 18-21) the district court's jury instructions on Count 16, conspiracy to commit extortion under color of official right. Petitioner contends that the instructions did not make sufficiently clear that he could not be convicted of extortion under color of official right if he merely paid the corrupt City Council members in exchange for their votes, without having obtained the money from Transportation Concepts. Those facts would establish only bribery, peti-

tioner contends, not extortion under color of official right.

When faced with an ambiguous jury instruction that allegedly eliminated an element of the offense, "the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Middleton* v. *McNeil*, 541 U.S. 433, 437 (2004) (per curiam) (internal quotation marks omitted) (quoting *Estelle* v. *McGuire*, 502 U.S. 62, 72 (1991)). "It is well established that the instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72.

As the court of appeals held (Pet. App. 3a), in the context of the instructions as a whole and the entire trial, it is not reasonably likely that the jury misunderstood the requirements of the extortion conspiracy. The district court instructed the jury that in order to convict defendant of Count 16, the evidence must prove that "defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it." Gov't E.R. 1453. The indictment charged only one object of the conspiracy: "for [petitioner] to obtain money from Transportation Concepts and to offer a portion of this money to coconspirators [City Council members] Fajardo, Sweeney and Ontal in exchange for their votes to award the Carson bus contract to Transportation Concepts." Pet. E.R. 18-19. Thus, the instructions as a whole required the jury to find that petitioner entered into an agreement with the corrupt City Council members to extort money from Transportation Concepts.

Furthermore, the government's evidence was directed at the theory that petitioner entered into an agr-

eement with the Carson City Council members to extort money from Transportation Concepts. The government never relied on the position that the jury could convict petitioner of Count 16 if the evidence showed that petitioner paid monies obtained from another source. See *Boyd* v. *California*, 494 U.S. 370, 383 (1990) (arguably ambiguous instruction, when considered in context of proceedings and evidence presented, did not pose reasonable likelihood that jurors would misinterpret instructions). The government adduced evidence that even before he was officially retained as a "consultant" for Transportation Concepts, petitioner conspired with members of the Carson City Council to extort a bus company in connection with the transportation contract. Council member Manual Ontal testified that before voting on the bus contract, he entered into an agreement with petitioner to vote for the contractor who would pay money. Gov't E.R. 1026-1027. Similarly, Councilman Darryl Sweeney testified that petitioner stated that after he received half of the $120,000 payment from Transportation Concepts, he would give $5000 to each of the co-conspirator council members. Many weeks after the vote, Sweeney testified, he was in fact paid his $5000 share of Transportation Concepts's payment, and the delay was because petitioner had not yet been paid by Transportation Concepts. *Id.* at 981-984. Accordingly, in light of the instructions as a whole and the trial record, there is no reasonable likelihood that the jury was misled that it could convict petitioner based on the premise that the Carson City Council members agreed to accept money from petitioner rather than from Transportation Concepts. The court of appeals' determination to that effect, in an unpublished opinion, warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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