No. 06-994

In the Supreme Court of the United States

ANTHONY CICCONE, AKA SONNY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner and his co-conspirators committed extortion, within the meaning of the Hobbs Act, 18 U.S.C. 1951(b)(2), by wrongfully using threats of force, violence, and fear to obtain from union members their statutory rights to free speech and democratic participation in union affairs.

2. Whether, with respect to one of petitioner's convictions for extortion under the Hobbs Act, the evidence was sufficient to show that petitioner extorted monetary payments from the alleged victim.

3. Whether the interstate commerce element of a money laundering offense, under 18 U.S.C. 1956 (2000 & Supp. IV 2004), may be satisfied by proof of the effect on commerce of the criminal activity that generated the proceeds that were laundered.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-113a) is published at 459 F.3d 296.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2006. A petition for rehearing was denied on October 19, 2006. The petition for a writ of certiorari was filed on January 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18

U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); nine counts of conspiring to commit extortion, in violation of the Hobbs Act, 18 U.S.C. 1951; 11 counts of extortion or attempted extortion, in violation of 18 U.S.C. 1951; 10 counts of wire fraud, in violation 18 U.S.C. 1343 (Supp. IV 2004); one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); seven counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (B)(i); two counts of conducting an illegal gambling business, in violation of 18 U.S.C. 1955; and one count of witness tampering, in violation of 18 U.S.C. 1512(b) (2000 & Supp. IV 2004). He was sentenced to 180 months of imprisonment. In addition, he was ordered to pay restitution in the amount of $1,601,499, and to forfeit the amount of $1,636,499. Pet. App. 44a. The court of appeals affirmed the convictions, but vacated the sentence in light *United States* v. *Booker*, 543 U.S. 220 (2005), and remanded for resentencing.

1. The evidence at trial established the existence of a wide-ranging criminal enterprise involving the Gambino organized crime family. By extortionate means, the enterprise exercised influence over labor unions, businesses, and individuals operating at the piers in Brooklyn and Staten Island. Pet. App. 4a. The enterprise also ran the New York branch of a Costa Rican bookmaking business and a large-scale gambling operation that employed joker-poker electronic gambling devices. *Id.* at 35a-39a. Petitioner was a captain in the Family and a leading participant in its extortion and gambling activities. *Id.* at 4a. The enterprise used force to fill various leadership positions in the International Longshoremen's Association (ILA) with organized crime associates, and then by fraudulent means and oth-

erwise it proceeded to deprive union members of wages, benefits, and rights guaranteed to them by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 401 *et seq*. Pet. App. 6a-9a. Through its resulting control of the ILA's national health plan, it was able to award the plan's lucrative pharmaceutical services contract to a company partially owned by a Family associate. *Id*. at 9a-12a. The enterprise obtained influence over Local 1 of the ILA by extortion and over Local 1814 through its control of the local's president, Frank Scollo. In each case, it defrauded the local membership of wages, benefits, and rights. *Id*. at 13a-16a.

The enterprise also extorted sizeable, quarterly cash payments from Carmine Ragucci, the owner of Howland Hook Container Terminal. Scollo, the mob-controlled president of Local 1814, would collect the payments and pass them to petitioner directly or through a third-party. When Ragucci was late with a payment, petitioner would be "pissed off" and Scollo would convey petitioner's displeasure to Ragucci. Scollo believed the payments were "illegal" and therefore conducted the transmissions in a surreptitious manner. Neither Scollo nor Ragucci's brother Tommy, who worked with him at Howland Hook, knew of any legitimate reason for the payments. Pet. App. 16a-18a, 75a; Gov't C.A. Br. 25-27.

The enterprise also extorted monthly $1,500 payments from Frank Molfetta, the owner of a trucking company that did business with Howland Hook, Pet. App. 18a-19a; ordered Ragucci's brother Tommy to resign from his position at Howland Hook so that the position could be filled by a Family associate, *id*. at 26a-28a; extorted $5000 from Leonardo Zinna after learning that Zinna had charged two people $3000 each for waterfront

jobs, *id.* at 28a-29a; forced Nicola Marinelli to pay a portion of the workmen's compensation payments he received, *id.* at 29a-30a; and ordered Eduard Aleyev, the owner of a café in Brooklyn, to make monthly $1000 payments and to install illegal gambling machines in his restaurant, *id.* at 30a-32a. It used violent threats in an attempt to obtain money from the actor Steven Seagal and to get him to do business with the enterprise. *Id.* at 32a-35a.

Lower-ranking members of the Gambino Family used the proceeds of the enterprise's extortion and gambling activities to pay "tributes" to the Family's higher-ranking members, including petitioner. Pet. App. 20a-26a. Petitioner both received money and paid a portion of the money he received to co-defendant Peter Gotti, who was the acting boss of the Family. *Id.* at 77a. Petitioner tampered with government witness Anthony Frazetta, who subsequently invoked his Fifth Amendment privilege before the grand jury. *Id.* at 39a-40a.

2. The Hobbs Act, 18 U.S.C. 1951(a), makes it a crime to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by * * * extortion or [to] attempt[] or conspire[] so to do." The Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2).

In this case, the ILA- and Local 1-related counts alleged that petitioner obtained the property of union members, including (1) union positions, money paid as wages and employee benefits, and other economic benefits that union members would have received but for the defendants' corrupt influence over the union; (2) the

right of union members to free speech and democratic participation in the affairs of the union as guaranteed by the LMRDA, 29 U.S.C. 411 and 481; and (3) the right of union members, under the LMRDA, 29 U.S.C. 501(a), to have the officers and agents of the union manage the money, property, and financial affairs of the union free of threatened force, violence and fear. See Pet. App. 6a-7a, 13a.

3. The substantive money laundering statute makes it a crime knowingly to conduct a "financial transaction" using "the proceeds of some form of unlawful activity" either "with the intent to promote the carrying on of specified unlawful activity," or with knowledge that the transaction is designed "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds." 18 U.S.C. 1956(a)(1), (a)(1)(A)(i) and (B)(i). The "financial transaction" must "in any way or degree affect[] interstate or foreign commerce." 18 U.S.C. 1956(c)(4)(A). Section 1956(h) makes it a crime to conspire to commit a substantive money laundering offense. The money laundering counts in this case alleged that the enterprise laundered the proceeds of its extortion and gambling activities by transferring them to the upper-level members of the Gambino Family with the intent to promote criminal activity and for concealment. See Pet. App. 20a, 77a.

4. Insofar as relevant here, petitioner raised the following claims on appeal:

a. Petitioner contended, first, that this Court's decision in *Scheidler* v. *NOW*, 537 U.S. 393 (2003), invalidated the Hobbs Act counts in the indictment that were based on the extortion of intangible property rights. The court of appeals declined to read *Scheidler* to hold that a Hobbs Act violation could not be premised on the

extortion of intangible property rights. Pet. App. 2a, 53a. Rather, the court understood *Scheidler* as clarifying that, in order to violate the Hobbs Act, a person must not only seek to deprive the victim of property, but also seek to obtain the property for himself. *Id.* at 2a-3a, 53a. Thus, the court concluded that the applicable inquiry with respect to each of the challenged extortion counts was whether "[petitioner was] (1) alleged to have carried out (or, in the case of attempted extortion, attempted to carry out) the deprivation of a property right from another, with (2) the intent to exercise, sell, transfer, or take some analogous action with respect to that right." *Id.* at 56a.

Applying this test, the court upheld the ILA- and Local 1-related counts, because the indictment charged not only that petitioner caused the relinquishment of the union members' LMRDA rights, but also that he did so in order to exercise those rights in a way that would profit the criminal enterprise financially. Pet. App. 57a. The court rejected the argument that petitioner could not obtain the union members' LMRDA rights because those rights may not be exercised by third parties, holding that property is obtainable for Hobbs Act purposes regardless of whether its use, transfer, or sale would be legal. *Id.* at 57a-59a.

b. Next, petitioner contended that the evidence failed to establish that petitioner obtained Carmine Ragucci's cash payments by extortion. The court of appeals held that a reasonable jury could find that the payments were extorted based on the evidence that Scollo conveyed to Ragucci petitioner's "displeasure" when the payments were late; the "highly surreptitious" manner in which the cash transmissions were conducted; Tommy's testimony that he knew of no legiti-

mate reason for the payments; and Scollo's testimony that "he knew his involvement was 'not the proper thing to do.'" Pet. App. 75a.

c. Petitioner also contended that the evidence was insufficient to support his conviction on the money laundering counts in that it failed to establish that the charged laundering transactions, consisting of the tribute payments to upper-level members of the Gambino Family, affected interstate or foreign commerce. The court of appeals rejected this claim on three separate grounds. First, it reasoned that the underlying extortion and gambling offenses affected commerce. Second, it reasoned that the tribute payments themselves affected commerce by promoting the underlying extortion and gambling activities. Finally, it reasoned that the tribute payments affected commerce by promoting the Gambino Family's overall operation, "which clearly affects interstate commerce." Pet. App. 83a.

ARGUMENT

1. Petitioner challenges the intangible-property-rights theory underlying his Hobbs Act convictions on the ILA- and Local 1-related counts, which alleged that he obtained by extortion the free speech and democratic rights of union members. First, he contends (Pet. 13-18) that the intangible rights of free speech and democratic participation in the affairs of a union do not qualify as "property" within the meaning of the Hobbs Act, 18 U.S.C. 1951(b)(2). In addition, he contends (Pet. 19-21) that, even if such rights do qualify as property, they are not "obtain[able]" within the meaning of the Hobbs Act, 18 U.S.C. 1951(b)(2).

a. The court of appeals correctly held that a union member's intangible rights under the LMRDA qualify

as "property" for Hobbs Act purposes, and that holding does not conflict with any decision of this Court or another court of appeals. This Court's review of that claim is therefore unwarranted.

i. It is well established that the concept of "property" under the Hobbs Act is not limited to tangible property, but encompasses intangible property as well, including "any valuable right considered as a source or element of wealth." *United States* v. *Tropiano*, 418 F.2d 1069, 1075-1076 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970). See, *e.g.*, *United States* v. *Arena*, 180 F.3d 380, 393 (2d Cir. 1999), cert. denied. 531 U.S. 811 (2000); *Libertad* v. *Welch*, 53 F.3d 428, 444 n.13 (1st Cir. 1995); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d 1342, 1350 (3d Cir.), cert. denied, 493 U.S. 901 (1989); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987); *United States* v. *Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), cert. denied, 450 U.S. 916, 450 U.S. 985, and 452 U.S. 905 (1981); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979); *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir.), cert. denied, 411 U.S. 951 (1973).

Moreover, the other courts of appeals that have considered the issue have held, like the Second Circuit here, that the intangible rights of union members under the LMRDA qualifies as "property" for purposes of the Hobbs Act. See *United States* v. *Debs*, 949 F.2d 199, 202 (6th Cir. 1991), cert. denied, 504 U.S. 975 (1992); *United States* v. *Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986); see also, *e.g.*, *United States* v. *International Bhd. of Teamsters*, 708 F. Supp. 1388, 1398-1399 (S.D.N.Y. 1989); *Dusing* v. *Nuzzo*, 29 N.Y.S.2d 882 (Sup.

Ct.), modified on other grounds and aff'd, 31 N.Y.S.2d 849 (App. Div. 1941) (holding that rights incident to union membership are protected property interests). As the court explained in *Dusing*, 29 N.Y.S.2d at 884:

> The right to membership in a union is empty if the corresponding right to an election guaranteed with equal solemnity in the fundamental law of the union is denied. If a member has a "property right" in his position on the roster, * * * he has an equally enforcible property right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution.

ii. As petitioner acknowledges, *Scheidler* does not preclude the applicability of the Hobbs Act to extortionate conduct to obtain intangible property rights. In *Scheidler*, the respondents successfully sued the petitioners claiming that the petitioners were part of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity that included acts of extortion in violation of the Hobbs Act. The petitioners contended that their conduct did not constitute extortion within the meaning of the Act. This Court stated that "[t]here is no dispute * * * that petitioners interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights." 537 U.S. at 404. The Court concluded, however, that the petitioners' conduct did not constitute extortion because they did not "obtain" the clinics' property within the meaning of the Hobbs Act. *Id.* at 409. The Court explicitly declined to decide the "outer boundaries" of Hobbs Act liability for obtaining

intangible property rights, *id.* at 402, and it stated that it was not "reject[ing]" lower court decisions, "such as * * * *Tropiano*," holding that intangible rights may constitute "property" under the Hobbs Act, *id.* at 402 n.6.

iii. Petitioner's reliance (Pet. 17-18) on this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), interpreting the mail fraud statute is also misplaced. In *McNally*, the Court held that mail fraud convictions could not be based on the theory that a public official's conduct had deprived the citizens of their intangible right to honest and impartial government, which the Court concluded was not a property interest protected by the statute. Subsequently, in *Carpenter* v. *United States*, 484 U.S. 19 (1987), the Court made clear that the property protected by the mail fraud statute includes intangible as well as tangible property. The Court held in *Carpenter* that a conspiracy to trade on an employer's confidential business information is "property" within the reach of the mail fraud statute.

As an initial matter, the Court's analysis in *McNally*, which focused on the legislative history of the mail fraud statute and concerns of federalism, is not readily transferable to the Hobbs Act context. The *McNally* Court concluded that the mail fraud statute was enacted to criminalize the use of the mails to swindle the public, and thus construed the statute narrowly in line with that purpose, 483 U.S. at 358-360. The Court further observed that to construe the mail fraud statute to encompass the challenged conduct would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials." *Id.* at 360.

The Hobbs Act, unlike the mail fraud statute, was enacted specifically to address labor racketeering. Furthermore, construing the Hobbs Act to encompass the protection of LMRDA rights would not involve the federal government in setting arbitrary standards for union conduct. That is so because the LMRDA already sets forth with particularity the standards governing the democratic rights of union members. Accordingly, "*McNally*'s federalism rationale has no analogue in the union arena." *Debs*, 949 F.2d at 201; see *International Bhd. of Teamsters*, 708 F. Supp. at 1399 ("characterizing those rights created by the federal labor statutes as 'property' does not involve the federal government in setting arbitrary standards for conduct in the way that the same characterization of the ethereal and changeable notions of 'good government' and 'honest and faithful services' would"). For that reason alone, petitioner's claim of a conflict with mail fraud cases (Pet. 17-18) is misplaced.

Even assuming that *McNally* were to apply in the Hobbs Act context, the LMRDA rights implicated in this case are more akin to the intangible rights held protected as property in *Carpenter* than the rights held not to be property in *McNally*. The right of members to democratic participation in a union's affairs is a valuable right capable of directly affecting the members' financial status. As the court found in *Rodonich* v. *House Wreckers Union Local 95*, 627 F. Supp. 176, 179 n.2 (S.D.N.Y. 1985), LMRDA rights provide union members with a source of livelihood, and this constitutes a source of wealth much like the ordinary right to control one's business assets, which has repeatedly been held to be covered by the Hobbs Act. See, *e.g.*, *Northeast Women's Ctr.*, 868 F.2d at 1350 (right of health center to

continue to operate its business); *Tropiano*, 418 F.2d at 1075-1076 (right to solicit business); *Santoni*, 585 F.2d at 673 (right to make business decisions).

iv. Nor is petitioner's claim helped by this Court's decision in *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999), on which he also relies (Pet. 15-16). In that case, the Court held that a "generalized right to be secure in one's business interests" free from a competitor's false advertising about his own product is not "property" within the meaning of the Fourteenth Amendment because that right lacks the element of exclusivity. 527 U.S. at 672-673. The Court did not address, much less reject, the notion that the intangible rights of union members under the LMRDA qualify as "property" for purposes of the Hobbs Act.

b. Likewise, there is no merit to petitioner's claim that he and his cohorts did not "obtain" the union members' rights to free speech and democratic participation in union affairs, within the meaning of the Hobbs Act.

As discussed above, the Court in *Scheidler* held that a Hobbs Act violation requires "not only the deprivation but also the acquisition of property." 537 U.S. at 404. The Court found that the petitioners' deprivation of the abortion clinics' ability to exercise their property rights did not amount to extortion because the petitioners "neither pursued nor received 'something of value from' respondents that they could exercise, transfer, or sell." *Id.* at 405 (quoting *United States* v. *Nardello*, 393 U.S. 286, 290 (1969)).

In this case, the court of appeals applied the standard set forth in *Scheidler* for determining whether property has been obtained under the Hobbs Act, and it correctly concluded that the ILA and Local 1 counts

satisfied that standard. As the court explained, the indictment alleged not only that petitioner deprived the union members of their LMRDA rights, but that, in doing so, he "sought to exercise those rights [himself] by telling various delegates whom to vote for in certain leadership positions, and by controlling various elected officials' performance of their union duties." Pet. App. 57a.

Petitioner argues (Pet. 19-20) that his activities qualified not as extortion but as coercion, which the Court in *Scheidler* defined as the use of force or threats of force to restrict another's freedom of action without necessarily obtaining his property. 537 U.S. at 405. But given the "overlap" between the elements of extortion and coercion, many acts of extortion also qualify as coercion. See *id.* at 407-408. This case involves the additional ingredient that separates extortion from coercion—*i.e.*, the pursuit or receipt of the victim's rights. *Id.* at 405. Where, as here, the defendant has sought or obtained property by means of coercive acts, he has committed both crimes.

2. Petitioner contends (Pet. 21-27) that the evidence was insufficient to support his substantive and conspiracy convictions for extorting money from Carmine Ragucci, the owner of Howland Hook. Specifically, he argues that the evidence failed to establish that the purpose of the cash payments was illegitimate or that he obtained the payments through any threat or affirmative exploitation of fear.

Under the Hobbs Act, the definition of extortion is not limited "to those circumstances in which property is obtained through the wrongful use of fear created by implicit or explicit threats." *United States* v. *Abelis*, 146 F.3d 73, 83 (2d Cir. 1998), cert. denied, 525 U.S. 1009

(1998), and 525 U.S. 1147 (1999). Rather, it is enough if the defendant "knowingly and willfully create[d] or instill[ed] fear, or use[d] or exploit[ed] existing fear 'with the specific purpose of inducing another to part with his or her property.'" *Ibid.* (citation omitted).

The evidence at trial showed that Ragucci made sizeable, quarterly cash payments to Scollo, who delivered the money to petitioner directly or through a third-party in a secretive, surveillance-conscious manner because, as Scollo testified, he knew that what they were doing was illegal. Pet. App. 17a-18a. Ragucci had a strong financial backer when he opened Howland Hook and would not have needed a loan or investment from petitioner. Gov't C.A. Br. 124. Both Scollo and Ragucci's brother Tommy, who was intimately involved in Howland Hook, testified that, to their knowledge, petitioner never loaned Ragucci money and was not an investor in his shipping terminal. Pet. App. 18a.

Tommy, Scollo, and Frank Molfetta (a trucking company owner and victim of petitioner's extortion operation), each of whom was close to Ragucci and worked in the same local industry, testified at trial that they knew of petitioner's reputation as a mobster and feared him. Gov't C.A. Br. 124. Scollo testified that, when Ragucci was late with a quarterly payment, petitioner would be "pissed off" and he would direct Scollo to "make sure that guy does the right thing," and "make sure you go back and * * * get it." Scollo would then communicate petitioner's displeasure to Ragucci. Pet. App. 17a. When Ragucci wanted to place his brother Tommy in the position of hiring agent at Howland Hook, he had to consult with petitioner. Gov't C.A. Br. 124.

Viewed in the light most favorable to government, see *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), the

above evidence was more than sufficient to permit the inference that Ragucci feared petitioner and that petitioner exploited that fear in order to obtain the quarterly payments. This is especially so given the overwhelming evidence establishing petitioner's pattern of extortionate conduct and his criminal relationship with waterfront unions and businesses.

Petitioner argues that, in concluding that the evidence was sufficient to show that petitioner extorted the payments from Ragucci, the court of appeals improperly shifted the burden of proof at trial to him by considering the absence of evidence of a legitimate reason for the payments. Although the court of appeals did observe that there was "no affirmative evidence" that the payments were legitimate, Pet. App. 75a, and that no legitimate reasons for the payments were presented to the jury, *ibid.*, it supported its sufficiency-of-the-evidence determination with ample record evidence, including Scollo's communication to Ragucci of petitioner's displeasure with late payments; the cash nature of the payments and the surreptitiousness of their transmission; Tommy's testimony, as a person in a position to know, that he was unaware of any legitimate purpose for the payments; and Scollo's knowledge that his involvement in collecting the payments was "not the proper thing to do." *Ibid.* Nothing in that analysis shifted the burden to petitioner; instead, it simply pointed out that nothing in the record dispelled the rational inference that the payments were the product of fear, rather than any legitimate reason.

3. The money laundering counts on which petitioner was convicted charged him with laundering the proceeds of the Gambino Family's extortion and gambling activities. The alleged money laundering transactions con-

sisted of the payment of "tributes" to the Family's leaders, including petitioner, from the proceeds of the underlying crimes. In concluding that the evidence was sufficient to establish that the money laundering offenses affected interstate or foreign commerce as required by the money laundering statute, see 18 U.S.C. 1956(c)(4), the court of appeals reasoned in part that "[t]he alleged extortion victims were businesses and unions that engaged in interstate commerce, and the gambling operations * * * were international in scope." Pet. App. 83a. Petitioner contends (Pet. 27-28) that, under this Court's decision in *United States* v. *Cabrales*, 524 U.S. 1 (1998), it is impermissible to consider the conduct that generated the laundered funds in determining whether the commerce requirement of the money laundering statute was met.

As an initial matter, the court of appeals did not rely solely on the underlying extortion and gambling activities in concluding that petitioner's money laundering offenses affected commerce. It also noted that the money laundering transactions themselves affected commerce "by promoting the activities that gave rise to [the proceeds]," and by promoting the Gambino Family's operations as a whole, which "clearly affect[ed] commerce." Pet. App. 83a. Petitioner does not take issue with these bases for concluding that the commerce requirement was satisfied. While the court considered these factors "collectively," *ibid.*, each is also individually sufficient to support the conviction.

Moreover, the partial reliance of the court of appeals on the commercial impact of the underlying criminal activity does not conflict with *Cabrales*. In *Cabrales*, the Court held that venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(ii) and 18 U.S.C. 1957,

is proper only in the district in which the prohibited laundering transaction occurred, and not in the district in which the laundered proceeds were unlawfully generated. 524 U.S. at 6-10. The issue of whether the underlying criminal activity may be considered in determining if the commerce requirement had been satisfied was neither raised nor addressed in *Cabrales*. Nor does the rationale of *Cabrales*—that the illicit financial transaction is the "proscribed conduct" in a money laundering offense, see *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 n.4 (1999)—preclude consideration of the underlying crime for purposes of determining whether there was an effect on commerce. To the contrary, the Court in *Cabrales* observed that the underlying offense may be regarded as an "essential element" of money laundering, and that the laundering transaction "facilitate[s]" the underlying offense or "ma[kes] it profitable by impeding its detection." 524 U.S. at 7-8. Those observations support the conclusion that the commercial effect of the underlying criminal activity can establish that a transaction involving the proceeds affected interstate commerce. See, *e.g.*, *United States* v. *Hatcher*, 323 F.3d 666, 672 (8th Cir. 2003) (relying on effect on commerce of underlying jewelry store robbery in upholding money laundering conviction); *United States* v. *Owens*, 167 F.3d 739, 753 (1st Cir.), cert. denied, 528 U.S. 894 (1999).

The court of appeals decisions on which petitioner relies (Pet. 28) do not concern the issue of whether the underlying crime may be considered in determining if a money laundering offense affected commerce. *United States* v. *Villarini*, 238 F.3d 530, 534-535 (4th Cir. 2001), like *Cabrales*, involved the issue of venue. In *United States* v. *Mankarious*, 151 F.3d 694, 705 (7th Cir.), cert.

denied, 525 U.S. 1056 (1998), the court held that a mail fraud offense may produce proceeds for purposes of the money laundering statute before any actual mailing in furtherance of the fraudulent scheme took place. And in *United States* v. *LeBlanc*, 24 F.3d 340, 346-347 (1st Cir.), cert. denied, 513 U.S. 896 (1994) the court held that, for purposes of sentencing under the Sentencing Guidelines, the particular money laundering offense at issue fell within the "heartland" of money laundering and therefore did not warrant a downward departure. Accordingly, none of those decisions supports review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2007