No. 06-1684

In the Supreme Court of the United States

JACK CHILINGIRIAN, 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 petitioner's conviction, after a bench trial, for conspiring to launder the proceeds of a mail and wire fraud scheme must be reversed on the ground of inconsistent verdicts because he was acquitted at the same trial of the predicate mail and wire fraud offenses.

2. Whether, in convicting petitioner on the money laundering conspiracy count, the district court constructively amended the indictment.

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OPINIONS BELOW

The initial opinion of the court of appeals affirming the convictions and remanding for resentencing (Pet. App. 5a-22a) is reported at 280 F.3d 704. The second opinion of the court of appeals reversing the sentencing order and remanding for resentencing (Pet. App. 23a-44a) is not published in the *Federal Reporter* but is reprinted in 95 Fed. Appx. 782. The court of appeals' order affirming the judgment (Pet. App. 1a-4a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2007. On March 2, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including June 22, 2007, and the

petition was filed on June 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to launder money in violation of 18 U.S.C. 1956(h). He was sentenced under the fraud guidelines to 37 months of imprisonment, two years of supervised release, and restitution in the amount of $335,167.50. Pet. App. 1a; 6a. The court of appeals affirmed his conviction, but remanded for resentencing under the money laundering guidelines. *Id.* at 5a-22a. On remand, petitioner was resentenced to 87 months of imprisonment. The court of appeals again reversed the sentencing order and remanded for a statement of reasons in computing the offense level. *Id.* at 23a-44a. Petitioner filed a petition for a writ of certiorari. Pet. 9. While the petition for a writ of certiorari was pending, the district court, on second remand, reimposed the 87-month prison term. This Court then granted the petition for a writ of certiorari, vacated the Sixth Circuit's decision, and remanded to the court of appeals for reconsideration in light of *United States* v. *Booker*, 543 U.S. 220 (2005). See 543 U.S. 1098 (2005). After a third remand to the district court for resentencing, at which the court imposed the 87-month prison term once again, the court of appeals affirmed. Pet. App. 1a-4a.

1. From 1988 through 1997, petitioner served as the attorney for Jack and Charles Rashid (collectively, the Rashids) and the Rashid family's company, Vehicle Radar Systems, Inc. (VRSS). Petitioner was also a 15% shareholder in VRSS. The evidence at trial established

that, beginning in 1988, the Rashids induced individuals to invest heavily in VRSS by falsely representing that the company had multi-million dollar contracts for the sale of its automobile radar braking systems and related technology. Pet. App. 6a-7a. "Investors" were shown forged letters and agreements and alleged escrow accounts containing up to $250 million. Gov't C.A. Br. 5-6. In 1992, VRSS filed a Chapter 11 bankruptcy reorganization petition, which was converted into a Chapter 7 liquidation proceeding in 1994. Pet. App. 7a; Gov't C.A. Br. 11.

In 1995, petitioner and the Rashids attempted to settle all of the bankruptcy claims against VRSS and the Rashids with money the Rashids had raised from a new group of Canadian investors. Pet. App. 7a. A new company, Advanced Radar Technologies (ART), was incorporated in Canada to receive these funds. Neither the Rashids nor petitioner informed the Canadian investors about VRSS's bankruptcy or their plan to use the investors' money to pay VRSS's creditors. *Id.* at 8a. The Canadians invested $2.48 million in ART. Petitioner endorsed $2.267 million of those checks into his client trust account, and then wrote checks worth $275,000 to himself, gave $1.473 million to Jack Rashid, and disbursed $480,000 to settle various investors' claims against the Rashids. *Ibid.*

In April 1996, Jack Rashid solicited an investment in ART from his friend James Kraft. Kraft invested money from his retirement account and brought in contributions from over 30 other investors. Petitioner deposited these funds in a new client trust account and withdrew money from this account for Jack Rashid and himself. Pet. App. 8a-9a.

2. On April 23, 1997, petitioner was indicted for conspiracy to commit mail and wire fraud (18 U.S.C. 371), 13 counts of wire fraud (18 U.S.C. 1343), 15 counts of mail fraud (18 U.S.C. 1341), aiding and abetting the interstate transportation of funds taken by fraud (18 U.S.C. 2314), witness tampering (18 U.S.C. 1512(b)(1)), and conspiracy to launder money instruments (18 U.S.C. 1956(a)(1)(A)(i), (B)(i) and (h)). The money laundering conspiracy count alleged that petitioner and Jack Rashid conspired to deposit the proceeds of mail and wire fraud into client trust accounts maintained by petitioner to disguise the nature of those proceeds, and to pay victims of the fraud in an effort to keep them from pursuing legal or criminal action against petitioner and the Rashids. Pet. App. 45a-68a.

After a bench trial, the district court convicted petitioner on the money laundering conspiracy charge but acquitted on all other counts. The district judge specifically rejected the notion that its verdict was inconsistent, explaining that petitioner's "role as lawyer and advocate" created "reasonable doubt" as to whether he possessed the scienter required by the other counts. But, as to the money laundering conspiracy count, the district judge found no reasonable doubt "that there was an intent to conceal or disguise" the proceeds of the fraudulent scheme. Gov't C.A. Br. 35-36.[1]

3. Notwithstanding the district judge's explanation at sentencing, petitioner argued in his first appeal that his money laundering conspiracy conviction should be reversed because it was inconsistent with his acquittals

[1] Charles Rashid, the only other co-defendant to plead not guilty and go to trial, was convicted of the mail fraud conspiracy and on numerous substantive mail and wire fraud counts. See *United States* v. *Rashid*, 274 F.3d 407, 412 (6th Cir. 2001).

on the mail and wire fraud counts. The court of appeals concluded that inconsistent verdicts rendered by a judge, like those rendered by a jury, provide no basis for reversal. Pet. App. 12a-15a. The court relied chiefly on this Court's reasoning in *Harris* v. *Rivera*, 454 U.S. 339, 345-348 (1981) (per curiam), which held on collateral review that inconsistent verdicts at a bench trial do not violate the Constitution. Pet. App. 13a-14a. An "apparent inconsistency in a trial judge's verdict," this Court said, does not "give[] rise to an inference of irregularity * * * that is sufficiently strong to overcome the well-established presumption that the judge adhered to basic rules of procedure." *Harris*, 454 U.S. at 347. Such an inconsistency might be due to "doubt * * * that [the judge] might or might not [have been] able to articulate in a convincing manner," to an error of law in the defendant's favor, or to lenity. *Ibid*.

Petitioner also argued on appeal that the district court improperly allowed the government to amend the money laundering conspiracy count by finding him guilty on that count without convicting him of the mail and wire fraud violations alleged as predicate acts. The court of appeals rejected that claim, Pet. App. 15a-17a, explaining that a defendant can be guilty of money laundering even if he did not commit the predicate act personally—indeed, even if he did not know what form the unlawful activity took—so long as he knew that his transactions involved the proceeds of an unlawful activity. *Id*. at 17a. Because petitioner's participation in the mail and wire fraud offenses was "never essential" to proving that he conspired to launder money, the court concluded that his "conviction for the latter at the same time as [his] acquittal on the former did not result in an amendment to the indictment." *Ibid*.

ARGUMENT

Petitioner renews his contentions (Pet. 12-30) that the district court rendered an inconsistent verdict and erroneously allowed the government to amend the indictment. The court of appeals correctly rejected these arguments, and further review is not warranted.

1. Petitioner first contends (Pet. 13-20) that his conviction for conspiring to launder the proceeds of the fraudulent scheme was inconsistent with his acquittals on the mail and wire fraud counts, and that the asserted inconsistent verdict violated his Fifth and Sixth Amendment rights. Although the rule permitting inconsistent jury verdicts is long established, see *United States* v. *Powell*, 469 U.S. 57, 58 (1984), petitioner says that bench trials pose a different problem.

Contrary to petitioner's assertion, there was no inconsistency in the district court's verdict. The money laundering statute does not require that a defendant actually participate in the activity that generates the unlawful proceeds to be laundered. Indeed, he need not even know the nature of the activity that generated the proceeds. The statute requires only that he conduct a financial transaction with the specified impermissible intent (*e.g.*, to promote certain unlawful activity or to conceal the nature of the proceeds) "knowing that the property involved in [the] financial transaction represents the proceeds of some form of unlawful activity." 18 U.S.C. 1956(a)(1). Consequently, the district court could reasonably have concluded that the mail and wire fraud offenses were committed by the Rashids and not petitioner, but that petitioner laundered the proceeds knowing that they stemmed from the Rashids' unlawful activities. As the court of appeals recognized, "proving that [petitioner] committed mail and wire fraud was

never essential to proving that he conspired to launder money." Pet. App. 17a. For that reason, this case is not an appropriate vehicle for this Court to consider whether inconsistent bench verdicts are permissible.

Nor in any event is that question worthy of this Court's attention. *Harris* v. *Rivera*, 454 U.S. 339 (1981) (per curiam), held that inconsistent verdicts rendered at a bench trial do not violate the Constitution so long as the defendant received a fair trial and the record contains sufficient evidence of the defendant's guilt on the count for which he was convicted. *Id.* at 348. Although the Court in *Harris* did not decide whether on direct appeal it would exercise its supervisory power to reverse an inconsistent nonjury verdict, *id.* at 342 n.7, petitioner relies on the Constitution and does not ask this Court to invoke its supervisory power. Moreover, the reasoning underlying the constitutional rule in *Harris*—that one should "presum[e] that the judge adhered to basic rules of procedure," particularly when there exist "[o]ther explanations for an apparent inconsistency," *id.* at 347—applies with equal force to the Court's supervisory power.

The federal cases relied upon by petitioner (Pet. 14-16), *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960), and *United States* v. *Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223 (9th Cir. 1981), both predate *Harris* and so did not benefit from the Court's guidance. The Ninth Circuit has subsequently questioned the "viability" of *Duz-Mor* in light of *Harris*. *United States* v. *Upshaw*, 685 F.2d 1202, 1204 n* (1982). And the only federal court of appeals to decide the issue since *Harris* has upheld inconsistent verdicts. *United States* v. *Wright*, 63 F.3d 1067, 1073-1074 (11th Cir. 1995).

As for the state cases cited by petitioner (Pet. 16-17), each relies on state common law to conclude that inconsistent nonjury verdicts require reversal.[2] See *Akers* v. *Commonwealth*, 525 S.E.2d 13, 16-19 (Va. Ct. App. 2000); *State* v. *Meyer*, 832 P.2d 357, 361-365 (Kan. Ct. App. 1992); *Shell* v. *State*, 512 A.2d 358, 362-364 (Md. 1986); *People* v. *Williams*, 297 N.W.2d 702, 703 (Mich. Ct. App. 1980). Because this Court does not review routine decisions by state courts interpreting state law, see Robert L. Stern et al., *Supreme Court Practice* § 3.1(d), at 130-131 (8th ed. 2002), and *Dickerson* v. *United States*, 530 U.S. 428, 438 (2000), the decisions do not establish any conflict the Court can resolve.

2. Petitioner also argues that the district court constructively amended the indictment in finding him guilty on the money laundering conspiracy count. Pet. 20-30. A "[c]onstructive amendment occurs when 'the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of [an uncharged offense].'" *United States* v. *Wallace*, 59 F.3d 333, 337 (2d Cir. 1995) (quoting *United States* v. *Mollica*, 849 F.2d 723, 729 (2d Cir. 1988)).

Here, petitioner says, because he was acquitted on the mail and wire fraud counts, his money laundering conspiracy conviction must have rested on predicate acts other than the mail and wire fraud offenses alleged in the indictment.[3]

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[2] *State* v. *Knight*, 835 A.2d 47 (Conn. 2003), also cited by petitioner, did not reach the question. See *id.* at 56.

[3] Petitioner advanced this same claim in his previous petition for a writ of certiorari, and this Court, rather than granting plenary review on that issue, simply vacated and remanded for further consideration

This second argument suffers from the same infirmity as the first: the money laundering charge did not depend upon petitioner's participation in the mail and wire fraud offenses. It was enough for petitioner to have laundered money knowing it to be the proceeds of the fraud alleged in the indictment and carried out by the Rashids. See Pet. App. 62a-63a; 18 U.S.C. 1956(a)(1). In the absence of evidence at trial of another possible source for the money, there is no reason to think that the district court relied on predicate acts other than the mail and wire fraud offenses charged in the indictment.

Neither of the cases on which petitioner relies (Pet. 27-30) advances his cause. In *United States* v. *Rahseparian*, 231 F.3d 1267 (10th Cir. 2000), cert. denied, 532 U.S. 974 (2001), the defendant had been indicted for mail fraud and for laundering the proceeds of that fraud; he was convicted on both counts. The court reversed the mail fraud conviction on the ground that the defendant was unaware of the fraud. *Id.* at 1262-1264. He therefore could not have knowingly laundered its proceeds, and so the court reversed the money laundering conviction as well. *Id.* at 1267.

In this case, by contrast, petitioner's acquittal on the mail and wire fraud counts did not rule out his conviction on the money laundering count. The court made no finding that petitioner lacked knowledge of the fraudulent scheme alleged in the indictment and carried out by the Rashids; rather, it found reasonable doubt concerning petitioner's intent to defraud. Gov't C.A. Br. 35-36.

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in light of *United States* v. *Booker*, 543 U.S. 220 (2005). See 543 U.S. 1098 (2005).

That finding did not preclude his conviction for knowingly laundering the proceeds of the fraud.

Nor is petitioner helped by *United States* v. *Handakas*, 286 F.3d 92 (2d Cir.), cert. denied, 537 U.S. 894 (2002). There, the defendant was convicted *inter alia* of conspiracy to commit mail fraud and conspiracy to commit money laundering. The court reversed his conviction for mail fraud on the ground that the statute was unconstitutionally vague as applied. *Id.* at 100-112. Because the mail fraud count was the only available predicate for the money laundering count, the court held that the money laundering conviction must also fall: since the mail fraud statute was unconstitutionally vague as applied, there was no mail fraud offense and therefore no illicit proceeds to launder. *Id.* at 112-113.

Here, by contrast, the district court did not find that there was no mail or wire fraud offense, but only that petitioner was not a criminally culpable participant in the fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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