

*iii TABLE OF CONTENTS

For Opinion See [127 S.Ct. 1148](#)

Supreme Court of the United States.
Roderick Keith MCDONALD, Petitioner,
v.

UNITED STATES OF AMERICA, Respondent.
No. 06-440.
September 27, 2006.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's decision - permitting prosecutors to manipulate the rules for assigning criminal cases so as to have a case against a prominent African-American politician tried in a foreign venue where the jury pool was virtually devoid of African-Americans - violates the defendant's fundamental right to due process of law, in conflict with decisions from the Second and Tenth Circuits, as well as the Louisiana and New Mexico Supreme Courts.

2. Whether the Ninth Circuit departed from fundamental due process principles, as articulated by this Court in [Carella v. California](#), 491 U.S. 263 (1989), and [Connecticut v. Johnson](#), 460 U.S. 73 (1983), by sustaining a conviction based on a jury instruction that failed to include all the elements of the crime charged, thereby permitting a conviction where the government failed to prove every element of the offense, in conflict with every other circuit to consider the issue.

QUESTIONS PRESENTED ... i

TABLE OF AUTHORITIES ... v

INTRODUCTION ... 1

OPINIONS BELOW ... 4

JURISDICTION ... 4

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS ... 5

STATEMENT OF THE CASE ... 5

A. Background ... 5

B. The District Court Proceedings ... 8

C. The Ninth Circuit Proceedings ... 10

REASONS FOR GRANTING THE WRIT ... 12

I. The Ninth Circuit Violated Fundamental Principles Of Due Process And Deepened A Circuit Split By Permitting The Government To Manipulate The Rules For Assigning Criminal Cases So As To Gerrymander This Case Into An Unfavorable Forum ... 12

II. The Ninth Circuit Violated Fundamental Principles Of Due Process By Sustaining A Conviction Based On Jury Instructions That Omitted The Key Element Of The Alleged Crime ... 18

CONCLUSION ... 22

*v TABLE OF AUTHORITIES

Cases

[Allen v. Hardy](#), 478 U.S. 255 (1986) ... 16

- [Batiste v. Blackburn](#), 786 F.2d 704 (5th Cir. 1986) ... 20
- [Batson v. Kentucky](#), 476 U.S. 79 (1986) ... 11, 17, 18
- [Byrd v. United States](#), 342 F.2d 939 (D.C. Cir. 1965) ... 20
- [Carella v. California](#), 491 U.S. 263 (1989) ... 3, 19
- [Cole v. Young](#), 817 F.2d 412 (7th Cir. 1987) ... 20
- [Connecticut v. Johnson](#), 460 U.S. 73 (1983) ... 3
- [Cruz v. Abbate](#), 812 F.2d 571 (9th Cir. 1987) ... 13
- [Davis v. Georgia](#), 429 U.S. 122 (1976) ... 16
- [Evans v. United States](#), 504 U.S. 255 (1992) ... 20
- [Francolino v. Kuhlman](#), 365 F.3d 137 (2d Cir.), cert. denied, 543 U.S. 872 (2004) ... 2, 13
- [Glenn v. Dallman](#), 686 F.2d 418 (6th Cir. 1982) ... 20
- *[vi](#)[Louisiana v. Simpson](#), 551 So. 2d 1303 (La. 1989) ... 2, 14
- [Mallett v. Bowersox](#), 160 F.3d 456 (8th Cir. 1998) ... 2, 17
- [Mallett v. Missouri](#), 494 U.S. 1009 (1990) ... 2, 16, 17
- [Marshall v. Jerrico, Inc.](#), 446 U.S. 238 (1980) ... 12
- [McDonald v. Goldstein](#), 83 N.Y.S. 2d 620, *aff'd*, 273 A.D. 649 (N.Y. App. 1948) ... 14
- [Middleman v. McNeil](#), 541 U.S. 433 (2004) ... 4
- New Mexico v. House*, 978 P.2d 967 (N.M. 1999) ... 2, 17
- [Osmulski v. Becze](#), 638 N.E.2d 828 (Ind. Ct. App. 1994) ... 2, 17
- [Parker v. Secretary for Dep't of Corrections](#), 331 F.3d 764 (11th Cir. 2003), cert. denied, 540 U.S. 1222 (2004) ... 20
- [Powers v. Ohio](#), 499 U.S. 400 (1991) ... 18
- [Rose v. Mitchell](#), 443 U.S. 545 (1979) ... 16
- [Sheppard v. Maxwell](#), 384 U.S. 333 (1966) ... 16
- [Turner v. Louisiana](#), 379 U.S. 466 (1965) ... 14
- *[vii](#)[Tyson v. Trigg](#), 50 F.3d 436 (7th Cir. 1995) ... 3, 16
- [United States v. Aguon](#), 851 F.2d 1158 (9th Cir. 1988) ... 20
- [United States v. Angotti](#), 105 F.3d 539 (9th Cir. 1997) ... 14
- [United States v. Dobson](#), 419 F.3d 231 (3d Cir. 2005) ... 20
- [United States v. Escobar-de Jesus](#), 187 F.3d 148 (1st Cir. 1999) ... 20
- [United States v. Frega](#), 179 F.3d 793 (9th Cir. 1999) ... 19
- [United States v. Garcia](#), 938 F.2d 12 (2d Cir. 1991) ... 21
- [United States v. Howard](#), 506 F.2d 1131 (2d Cir. 1974) ... 20
- [United States v. Laughlin](#), 26 F.3d 1523 (10th Cir. 1994) ... 20
- [United States v. Mechanik](#), 475 U.S. 66 (1986) ... 16
- [United States v. Mora](#), 15 Fed. Appx. 98 (4th Cir. 2001) ... 20
- [United States v. Olano](#), 507 U.S. 725 (1993) ... 18
- [United States v. Pearson](#), 203 F.3d 1243 (10th Cir. 2000) ... 2, 13, 14
- [United States v. Saadey](#), 393 F.3d 669 (6th Cir. 2005)

... 21

[*viii United States v. Tillem, 906 F.2d 814 \(2d Cir. 1990\)](#) ... 21

[United States v. Tomblin, 46 F.3d 1369 \(5th Cir. 1995\)](#) ... 21

[United States v. Voss, 787 F.2d 393 \(8th Cir. 1986\)](#) ... 20

[United States v. Williams, 504 U.S. 36 \(1992\)](#) ... 11

[Vasquez v. Hillery, 474 U.S. 254 \(1986\)](#) ... 16

[Yates v. United States, 354 U.S. 298 \(1957\)](#) ... 19

Statutes

[18 U.S.C. § 1951](#) ... 5, 6

[28 U.S.C. § 1254\(1\)](#) ... 5

[28 U.S.C. § 84\(c\)](#) ... 6

INTRODUCTION

This case presents two fundamental questions in our criminal justice system: *First*, whether the government can racially gerrymander a defendant's case into a profoundly less diverse forum, in contravention of established rules and procedures for charging cases; *second*, whether a conviction may be sustained where the jury instruction failed to include all elements of the crime charged. The Ninth Circuit, per Judges Pregerson, Alarcón, and Bright (sitting by designation), answered both questions in the affirmative, thereby deepening a circuit split as to the first and contravening this Court's settled precedents as to the second.

1. In this case, the government manipulated the procedures for assigning criminal cases to a particular division within a judicial district so as to ensure that Roderick Keith McDonald - a prominent, well-respected African-American politician - would be tried in Orange County, where the prosecution was assured of obtaining a jury pool with less than 2% African-Americans. The allegations against Mr.

McDonald, who served the citizens of Los Angeles County for over a decade, arise *entirely* from activities and conduct occurring in Los Angeles County. Indeed, only two paragraphs of the fifty-seven paragraph indictment even mention Orange County, and they are utterly contrived - describing activities of a *third party* that are not even part of an alleged crime. Simply put, the government's basis for trying Mr. McDonald in Orange County is specious at best. Tellingly, Mr. McDonald's alleged co-conspirators were charged in Los Angeles County. He alone was singled out for different treatment. To this day the government has failed to offer a good-faith explanation for charging Mr. McDonald in Orange County. This case, thus, raises fundamental questions of due process. In affirming, the Ninth Circuit upset the constitutionally sensitive balance between the discretion of the prosecutor and the defendant's due process rights under the Fifth Amendment. Because the decision below conflicts with decisions of the Second and Tenth Circuits, and the Louisiana Supreme Court, which recognize the due process violation that can arise from the government's manipulation of criminal case assignments, this Court should grant review. *See Francolino v. Kuhlman, 365 F.3d 137 (2d Cir.), cert. denied, 543 U.S. 872 (2004); United States v. Pearson, 203 F.3d 1243 (10th Cir. 2000); Louisiana v. Simpson, 551 So. 2d 1303 (La. 1989).*

But more is at work in the government's obvious manipulation of venue selection in this case. The choice-of-venue gerrymandering raises heightened structural constitutional concerns because the decision to maneuver this case into Orange County virtually guaranteed that no African-Americans would sit on Mr. McDonald's jury. This issue was first presented to (but not passed on by) this Court in *Mallett v. Missouri, 494 U.S. 1009 (1990)*; however, since then the lower courts have divided on the issue. Like the court below, the Eighth Circuit has rejected the argument that racially-influenced venue selection violates due process, *see Mallett v. Bowersox, 160 F.3d 456 (8th Cir. 1998)*, whereas the courts in *New Mexico v. House, 978 P.2d 967, 993-94 (N.M. 1999)*, and *Osmulski v. Becze, 638 N.E.2d 828, 832-34 (Ind. Ct. App. 1994)*, have held precisely the opposite. *See also Tyson v. Trigg, 50 F.3d 436, 442 (7th Cir. 1995)* (Posner, C.J.). The Court should grant certiorari to resolve the conflict with respect to the due process implications of the manipulation of criminal case assignments, particularly where issues of race are involved.

2. At trial, over Petitioner's objection, the district court issued jury instructions for the conspiracy to extort charge that omitted the key element of conspiracy - namely, that the object of the conspiracy was to obtain money from persons *other* than the co-conspirators. The government conceded below that the jury instructions were not "a model of clarity," U.S. 9th Cir. Br. 32, and the Ninth Circuit agreed that the "challenged instruction that listed the elements of the offense *omitted a critical word: 'another.'*" App. 3a (emphasis added). That should have been the end of the matter. Settled case law from this Court and every circuit confirms that where an element of the charged offense is omitted from the jury instructions, and the omission is not otherwise harmless, the conviction cannot stand as a matter of due process. *See, e.g., Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam); *Connecticut v. Johnson*, 460 U.S. 73, 79-80 (1983).

That settled rule is not the standard in the Ninth Circuit. Judges Pregerson, Alarcón, and Bright attempted to rescue the otherwise doomed instruction by relying on the separately issued instruction for "extortion under color of official right." The problem for the government, however, is that for purposes of the conspiracy charge, *Mr. McDonald was not the person allegedly committing extortion under color of official right*. That aspect of the instruction applied to the alleged co-conspirators, members of the Carson City Council, not Mr. McDonald. In other words, no matter how cast, the Ninth Circuit permitted a conviction for a conspiracy if the jury found the alleged co-conspirators intended to obtain money from *Petitioner himself* (an inference they could have drawn from the record). That is not the law and the Ninth Circuit's determination that this critical mistake was cured by another, wholly irrelevant jury instruction, raises profound issues of due process.

In sum, the ruling below obliterates the careful scheme of appellate oversight of criminal jury verdicts that this Court has consistently demanded. Given there is a "reasonable likelihood" that the jury applied the jury instructions in a manner that violated the Constitution, *see Middleman v. McNeil*, 541 U.S. 433, 437 (2004), the Court should grant certiorari to address the Ninth Circuit's radical departure from this Court's precedents (as well as the well-traveled path of other courts of appeals), and vindicate its own

carefully articulated principles of criminal trial practice. Alternatively, this issue is appropriate for summary reversal.

OPINIONS BELOW

The Ninth Circuit's decision is reported at [178 Fed. Appx. 643](#), and reprinted in the Appendix (App.) at 1-6a. The Ninth Circuit's unreported order denying the petition for panel rehearing and suggestion for rehearing *en banc* is reprinted at App. 7a.

JURISDICTION

The Ninth Circuit entered judgment on April 25, 2006. Petitioner timely filed a petition for panel *5 rehearing and suggestion for rehearing *en banc*, which was denied on June 21, 2006. On September 12, 2006, Justice Kennedy granted Petitioner's application to extend the time within which to file a petition for a writ of certiorari to October 19, 2006. This Court has jurisdiction under [28 U.S.C. § 1254\(1\)](#).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

No person shall ... be deprived of life, liberty, or property, without due process of law

[18 U.S.C. § 1951](#) provides, in pertinent part:

The term "extortion" means 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.

STATEMENT OF THE CASE

A. Background

Petitioner Roderick Keith McDonald is a public servant who comes from a family with a proud history of service to the people of Los Angeles. The son of a current member of the United States Congress, Mr. McDonald became active in politics at a young age and has continued that family tradition of service. In 1994, he was first elected by his peers to serve on the West Basin Municipal Water District ("Municipal District"), the local government agency responsible

for providing water and waste water *6 services for all of Los Angeles County. Petitioner's 9th Cir. Excerpts of Record ("E.R.") at 73. He was reelected in 1998 and again in 2002. *Id.*

In 2003, Mr. McDonald was indicted for allegedly engaging in various acts of political corruption in Los Angeles County. E.R. 1-23. He was one of several officials indicted, including three alleged co-conspirators serving on the Carson City Council. The government failed to secure a conviction on the majority of counts. E.R. 195.

The government did not dispute that 20 of the 21 counts in the indictment concerned only Los Angeles County, where Mr. McDonald lived, worked, and served on the Municipal Board. E.R. 29. In the remaining count, the government accused Mr. McDonald of conspiring with three members of the Carson City Council to commit extortion in connection with a contract for public bus services in violation of the Hobbs Act, [18 U.S.C. § 1951](#). App. 2a; E.R. 18-19. (Carson City is located in Los Angeles County.)

Although Mr. McDonald is a citizen and former public official in Los Angeles County, and although the government charged him with criminal acts occurring in and arising from Los Angeles County, it did not indict or try him in the Western Division of the U.S. District Court for the Central District of California (which encompasses Los Angeles County). App. 2a; E.R. 1. Rather, the government intentionally assigned McDonald's case to the Southern Division, which consists entirely of Orange County. *See* [28 U.S.C. § 84\(c\)](#). According to the United States Census Bureau, "Black persons" represent only 1.9% of the citizens of Orange County. *7 *See* U.S. Census Bureau, *California QuickFacts*, available at <http://quickfacts.census.gov/qfd/states/06/06059.html>. And, unsurprisingly, there were in fact no African-Americans on Mr. McDonald's jury.

Under the Central District of California's general orders, a criminal indictment or information may only be assigned to the Southern Division "if at least one of the crimes charged, or any party thereof, is alleged to have been committed within the Southern Division." E.R. 25. The government's sole basis for channeling this case to the Southern Division is found in the conspiracy count. However, the two paragraphs of the indictment referencing Orange

County merely describe the non-criminal business activities of a *non-party*, Transportation Concepts. *See* E.R. 20. Those two paragraphs alleged that an individual located in Irvine faxed bus rate information to Mr. McDonald and drafted a consulting agreement. These supposedly "overt acts" were not actually a part of the alleged crime of conspiracy to violate the Hobbs Act.

Tellingly, Mr. McDonald's purported co-conspirators *in that very alleged conspiracy* were indicted in the Western Division, rather than the Southern Division. Specifically, Carson City Council member Manuel Ontal was indicted in the Western Division for his role in the same alleged extortion conspiracy. E.R. 26, 33. Moreover, when Councilman Ontal was indicted, the government filed a related-case notice to a previous case filed in the Western Division against yet another Council member, virtually ensuring that the case would remain in the Western Division. However, the federal prosecutors conspicuously avoided filing a *8 similar notice in this case, which would have likely prompted a transfer to the same judge in the Western Division. *See* E.R. 28-30, 33-35, 121.

B. The District Court Proceedings

Petitioner sought a venue transfer from the Southern Division to the Western Division. App. 2a; E.R. 25. The government vigorously opposed the motion. E.R. 28-31. The government represented to the district court that the conspiracy scheme "involved the victimization of Transportation Concepts," and that Mr. McDonald "was to act as the conduit for funneling the extorted payments from Transportation Concepts to the elected officials" on the Carson City Council. E.R. 29. Specifically, the government argued that Petitioner "would not have been able to accomplish his criminal design" without the faxing of rate information, and that Petitioner "caused" a Transportation Concepts employee to draft the written consulting agreement. E.R. 29-30. The district court denied Mr. McDonald's motion. App. 2a; E.R. 36.

At trial, however, the evidence offered by the Transportation Concepts employee completely contradicted the government's theory. *See, e.g.*, E.R. 100-103. Indeed, the government does not now dispute that the two paragraphs relied on as the sole basis for trying Mr. McDonald in Orange County describe

ordinary business activities of a *third party* which was not a member of the alleged Hobbs Act conspiracy. See U.S. 9th Cir. Br. 21-22. In short, the government relied exclusively on the non-criminal conduct of a non-conspirator to establish venue.

*9 The government also proposed the following jury instruction regarding the charge of conspiracy under color of official right:

“First, a co-conspirator was a Carson City Council member;

“Second, the defendant or a co-conspirator intended to obtain money which defendant or a co-conspirator knew defendant or co-conspirator was not entitled to;

“Third, the defendant or a co-conspirator knew that the money would be given in return for taking some official action; and

“Fourth, commerce or the movement of an article or commodity in commerce from one state to another would have been affected in some way.” E.R. 173 (Instruction 22).

Petitioner objected to this instruction and argued that it permitted the jury to convict him based only on evidence that he agreed to bribe the Carson City Council members - not that he (or his alleged co-conspirators) actually obtained a benefit from *another* party. See E.R. 38, 40, 148-49. He proposed an alternative instruction that made clear that a *person cannot conspire to extort money from himself or his co-conspirators*. App. 3a; E.R. 150-151. Petitioner's proposed jury instruction made clear that the jury must find that “the members of the conspiracy conspired to obtain money from another person or entity when they knew they were not entitled to that money.” E.R. 150. The district court, however, gave the erroneous instruction with no clarification. E.R. 161, 173.

*10 At the same time, the district court issued an instruction regarding the substantive offense of extortion under official color. U.S. 9th Cir. Excerpts of Record (“U.S.E.R.”) at 1455. That instruction stated: “The 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.* However, for purposes of the conspiracy charge and this instruction, Mr. McDonald was *not* the person charged with extortion under color of official right. Rather, he was merely alleged

to be a conspirator with members of the Carson City Council, who in turn were alleged to have acted “under color of official right.” See U.S.E.R. 1186.^[FN1]

FN1. The jurors may have been confused on this point as well, because other charges against Mr. McDonald *did* concern his role as a public official.

Mr. McDonald was convicted by an Orange County jury of 10 of the 21 counts in the indictment, including the Hobbs Act conspiracy count. App. 1-2a. He moved for a new trial, renewing his claim that the government's manipulation of the case assignment system in order to ensure that the case would be tried outside of Los Angeles County violated his due process rights. E.R. 174-79. The district court denied the motion. E.R. 181-82.

C. The Ninth Circuit Proceedings

Petitioner appealed to the Ninth Circuit, arguing, *inter alia*, that the government's manipulation of the case assignment out of Los Angeles County and the *11 use of a jury instruction that omitted an element of the offense violated his due process rights. See App. 1-3a.

Judges Pregerson, Alarcón, and Bright (sitting by designation) affirmed. App. 6a. The panel rejected Mr. McDonald's due process claim arising out of the manipulation of the case assignment on the basis that Petitioner “failed to demonstrate that the Government had a discriminatory purpose in seeking an indictment in the Southern Division.” App. 2-3a. The panel ignored the argument that the government's gerrymandering constituted structural constitutional error.^[FN2]

FN2. The panel suggested in passing that Mr. McDonald had failed to raise his claim properly in the district court. App. 3a. That assertion fails on the face of the record. To be sure, Petitioner did not specifically cite [Batson v. Kentucky, 476 U.S. 79 \(1986\)](#), which addressed issues analogous to those presented here; however, he clearly raised the issue of structural constitutional error, as the district court itself acknowledged in denying his motion for a new trial. E.R. 181. In any event, there is no dispute that the

questions presented were both “presented to and passed on” by the Ninth Circuit. [United States v. Williams](#), 504 U.S. 36, 41-42 (1992).

Turning to the incomplete jury instruction for the conspiracy to commit extortion charge, the panel acknowledged that it “failed to specify that the defendant must have taken money from ‘another person’ outside of the conspiracy.” App. 3a. However, while holding that the “challenged instruction that listed the elements of the offense *omitted a critical word: ‘another,’*” App. 3a (emphasis added), the panel affirmed the conviction solely on *12 the basis of the instruction defining the crime of “extortion under color of official right,” even though (for purposes of the conspiracy charge), it was Mr. McDonald’s *co-conspirators*, not Mr. McDonald, who stood accused of “extortion under color of official right.” App. 3a.

Mr. McDonald filed a timely petition for panel rehearing and rehearing *en banc*, which the Ninth Circuit denied. App. 7a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Violated Fundamental Principles Of Due Process And Deepened A Circuit Split By Permitting The Government To Manipulate The Rules For Assigning Criminal Cases So As To Gerrymander This Case Into An Unfavorable Forum.

The decision of Judges Pregerson, Alarcón, and Bright violates fundamental principles of due process and deepens an important circuit split. The decision allows federal prosecutors to manipulate the case assignment system so that an African-American defendant can be gerrymandered into a jurisdiction in which the jury pool is predominately white. In so doing, the Ninth Circuit has upset the constitutionally sensitive balance between prosecutorial discretion and the Fifth Amendment right of defendants to demand that the government play by the rules.

To be sure, “[i]n an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law.” [Marshall v. Jerrico, Inc.](#), 446 U.S. 238, 248 (1980). However, as a *13 different panel of the Ninth Circuit has recognized, although a defendant “has no right to any particular procedure

for the selection of the judge [or venue] ... he is entitled to have that decision made in a manner free from bias or the desire to influence the outcome of the proceedings.” [Cruz v. Abbate](#), 812 F.2d 571, 574 (9th Cir. 1987) (Kozinski, J.) (emphasis added). In other words, the “suggestion that the case assignment process is being manipulated for motives other than the efficient administration of justice casts a very long shadow, touching the entire criminal justice system.” *Id.* That is this case.

The decision below to the contrary - refusing to recognize any due process violation absent a showing of discriminatory purpose - is in conflict with decisions of the Second and Tenth Circuits. Both courts recognized the “substantial due process concerns” raised by the manipulation of case assignment processes in criminal cases. See [Francolino v. Kuhlman](#), 365 F.3d 137, 141 (2d Cir.), *cert. denied*, 543 U.S. 872 (2004); [United States v. Pearson](#), 203 F.3d 1243, 1253-54, 1257 (10th Cir. 2000). Both *Pearson* and *Francolino* involved situations in which the government influenced the selection of the judge for a criminal case. In *Francolino*, the Second Circuit specifically observed that allegations of government manipulation of case assignments raise significant due process concerns. See 365 F.3d at 141 (“We agree with the District Court that a criminal justice system in which the prosecutor alone is able to select the judge of his choice to preside at trial, even in limited types of cases, raises serious concerns about the appearance of partiality, irrespective of the motives of the prosecutor in selecting a given judge.”). Similarly in *14 *Pearson*, the Tenth Circuit suggested that the manipulation of otherwise neutral case assignment rules implicates due process concerns that must be examined. See 203 F.3d at 1259 (observing “prosecutorial judge-shopping may violate the Due Process Clause”).

In like manner, two state courts have concluded that judicial assignment systems allowing prosecutors to select the judge or venue for a particular case violate due process. In [Louisiana v. Simpson](#), 551 So. 2d 1303 (La. 1989), the Louisiana Supreme Court held that “[t]o meet due process requirements, capital and other felony cases must be allotted for trial to the various divisions of the court, or to judges assigned criminal court duty, on a random or rotating basis or under some other procedure adopted by the court which does not vest the district attorney with power

to choose the judge to whom a particular case is assigned.” *Id.* at 1304 (emphasis added) (citing [Turner v. Louisiana](#), 379 U.S. 466 (1965)). Here, the government was able to pick a more favorable forum through the inclusion of contrived allegations irrelevant to the charged crime (after all, the government does not dispute that the overt acts were not an element of the Hobbs Act conspiracy, see U.S. 9th Cir. Br. 22).^[FN3] So too, in an earlier decision, a New York state court took a similar approach. In [McDonald v. Goldstein](#), 83 N.Y.S. 2d 620, *aff’d*, 273 A.D. 649 (N.Y. App. 1948), *15 the court rejected a district attorney’s challenge to an order divesting his office of its long-accepted authority to select judges for criminal cases, relying on general principles of due process. See *id.* at 625.

FN3. Nor can it. While the conduct of a co-conspirator may be sufficient to permit venue, the conduct of a third party who is not a co-conspirator cannot. See, e.g., [United States v. Angotti](#), 105 F.3d 539, 545 (9th Cir. 1997).

Here, the government’s use of pretextual allegations to maneuver Mr. McDonald’s case into Orange County raises structural constitutional concerns. Although Petitioner was charged and tried in Orange County, his alleged co-conspirator, Councilman Manuel Ontal, was charged and tried for the *same alleged extortion scheme* in the Western Division. E.R. 26, 33. The government specifically noted that Councilman Ontal’s case was related to a previous case in the Western Division, thereby ensuring it would be tried there, while at the same time it failed to file that standard notice in this case. See E.R. 28-30, 33-35, 121.

The government has never explained this glaring discrepancy. And the government never denied that it made misstatements to the district court in the course of opposing Mr. McDonald’s request to be tried in his home county. See U.S. 9th Cir. Br. 30. The prosecutors told the district court that without the faxing of “rate information,” the “defendant would not have been able to accomplish his criminal design.” E.R. 29-30. That was not true. There was no evidence presented at trial even suggesting that the faxing of rate information played an essential role (or, for that matter, *any* role) in the Carson City Council decision that formed the basis for the government’s charge. See

E.R. 97, 103; U.S.E.R. 1690-92. Finally, to this day, the government has offered no explanation for its decision to try Petitioner in Orange County.

*16 The apparent manipulation of the case assignment system raises heightened due process concerns because it ensured that Mr. McDonald, a popular and respected African-American politician from Los Angeles, would be tried before an Orange County jury with no African-Americans. As Judge Posner observed in [Tyson v. Trigg](#), 50 F.3d 436 (7th Cir. 1995), addressing a closely-related issue, “race is special in the Supreme Court’s thinking about criminal procedure. This is not an inference. It is what the Court has said.” *Id.* at 442 (citing [United States v. Mechanik](#), 475 U.S. 66, 70 & n.1 (1986); [Vasquez v. Hillery](#), 474 U.S. 254, 263-64 (1986); [Allen v. Hardy](#), 478 U.S. 255, 259 (1986) (per curiam); [Rose v. Mitchell](#), 443 U.S. 545, 550-59 (1979)). For example, challenges to the composition of the grand jury are usually moot if the defendant is convicted. However, in [Vasquez](#), this Court held that “discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review.” [Vasquez](#), 474 U.S. at 263-64 (citing [Davis v. Georgia](#), 429 U.S. 122 (1976) (per curiam); [Sheppard v. Maxwell](#), 384 U.S. 333, 351-352 (1966)).

Race is different. Where race may be the motivating factor for jury gerrymandering, the structural constitutional implications are profound and call for searching judicial scrutiny. Indeed, this very issue was presented to the Court in [Mallett v. Missouri](#), 494 U.S. 1009 (1990), in which three Justices dissented from denial of certiorari. In his dissenting opinion, Justice Thurgood Marshall argued that the Court should finally decide “whether a trial court’s decision to transfer a ... trial of an Afro-American defendant to a county with no *17 residents of the defendant’s race violate” the Constitution. *Id.* at 1009. Justice Marshall reasoned that “[j]ust as ... prosecutors may not use peremptory challenges to exclude members of the defendant’s race from the jury, [Batson v. Kentucky](#), 476 U.S. 79 (1986), ... trial courts may not transfer venue of the trial to accomplish the same result by another means.” *Id.* That issue is presented again here.

In the wake of this Court’s declining to intervene in [Mallett](#), the lower courts have divided on this issue.

Like the panel below, the Eighth Circuit has rejected the argument that the *Batson* analysis should be applied to venue selection in assessing due process violations. See [Mallett v. Bowersox](#), 160 F.3d 456 (8th Cir. 1998). By contrast, two state courts have applied the *Batson* framework to claims such as this. See *New Mexico v. House*, 978 P.2d 967, 993-94 (N.M. 1999); [Osmulski v. Becze](#), 638 N.E.2d 828, 832-34 (Ind. Ct. App. 1994). These courts have held that use of a venue provision to transfer a trial from one location to another may create a *prima facie* case of discrimination, where the effect of the transfer results in a significantly reduce percentage of minorities on the jury pool. See [Osmulski](#), 638 N.E. 2d at 834 (holding use of venue provision “effectively operat[ed] as strikes against every potential African-American juror”); [House](#), 978 P.2d at 994.

In this case, Mr. McDonald is a member of a “cognizable racial group.” The 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. And there is evidence that the government manipulated the *18 court’s rules, treating Mr. McDonald differently from his alleged co-conspirator in the venue decision. Applying the *Batson* framework, Mr. McDonald need only raise an inference of discrimination to establish a *prima facie* case of discrimination. He has plainly done so. The burden then shifts to the government to justify its actions with a neutral explanation, which it repeatedly has failed to provide.

In sum, like a *Batson* error, the government’s manipulation of criminal case assignment rules to obtain a jury pool with virtually no African-Americans “casts doubt on the integrity of the judicial process,” [Powers v. Ohio](#), 499 U.S. 400, 411 (1991) (internal quotation omitted), and “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,” [United States v. Olano](#), 507 U.S. 725, 732 (1993) (internal quotation omitted). Because this case arises on direct appeal, it presents an exceptionally good vehicle for the Court to address the conflicting case law among the lower courts and to clarify the constitutional limitations on prosecutorial manipulation of the case assignment system, as well as the applicability of *Batson* to that analysis where, as here, issues of race are implicated by the sharp differences in the jury pools.

II. The Ninth Circuit Violated Fundamental Principles Of Due Process By Sustaining A Conviction Based On Jury Instructions That Omitted The Key Element Of The Alleged Crime.

Petitioner was convicted of conspiracy to commit extortion based on a fundamentally flawed instruction that permitted the Orange County jury to find him guilty based solely on a finding of extortion *19 or bribery *by his co-conspirators*. Put differently, the jury instructions permitted Petitioner to be convicted based solely on the premise that the Carson City Council members (Petitioner’s alleged co-conspirators) agreed to accept money *from Mr. McDonald*, rather than an innocent third party. See E.R. 173. However, the well-settled law of conspiracy requires more. The object of the conspiracy must be to unlawfully obtain money from *another person outside the conspiracy*. A defendant “could not have conspired to extort money from himself.” [United States v. Frega](#), 179 F.3d 793, 808 n.19 (9th Cir. 1999). Notably, the government does not contend otherwise, expressly conceding that the disputed jury instruction was not “a model of clarity.” U.S. 9th Cir. Br. 32. On appeal, the Ninth Circuit agreed, holding that “[t]he challenged instruction that listed the elements of the offense omitted a critical word: ‘another.’” App. 3a (emphasis added).

That should have been the end of the matter. It is well settled that the Due Process Clause precludes conviction where the government has not proven each and every element of the charged offense. [Carella v. California](#), 491 U.S. 263, 265 (1989) (per curiam). Jury instructions that relieve the prosecutor “of this burden violate a defendant’s due process rights.” *Id.* Thus, where a jury instruction would permit a conviction on a legally impermissible basis, the conviction must be reversed even if the jury might have convicted for a permissible reason. See [Yates v. United States](#), 354 U.S. 298, 312 (1957). Where, as here, the jury instruction omitted an admittedly “critical” element, App. 3a, the courts of appeals have uniformly required vacature of the *20 defendant’s conviction unless the prosecution can demonstrate that the omission is otherwise harmless. See, e.g., [United States v. Dobson](#), 419 F.3d 231 (3d Cir. 2005); [Parker v. Secretary for Dep’t of Corrections](#), 331 F.3d 764 (11th Cir. 2003), cert. denied, 540 U.S. 1222 (2004); [United States v. Mora](#), 15 Fed. Appx. 98 (4th Cir. 2001); [United States v. Escobar-de Jesus](#), 187 F.3d 148 (1st

[Cir. 1999](#)); [United States v. Laughlin, 26 F.3d 1523 \(10th Cir. 1994\)](#); [Cole v. Young, 817 F.2d 412 \(7th Cir. 1987\)](#); [United States v. Voss, 787 F.2d 393 \(8th Cir. 1986\)](#); [Batiste v. Blackburn, 786 F.2d 704 \(5th Cir. 1986\)](#); [Glenn v. Dallman, 686 F.2d 418 \(6th Cir. 1982\)](#); [United States v. Howard, 506 F.2d 1131 \(2d Cir. 1974\)](#); [Byrd v. United States, 342 F.2d 939 \(D.C. Cir. 1965\)](#). The departure from this well-settled practice by Judges Pregerson, Alarcón, and Bright, implicates serious due process concerns and warrants this Court's review. Indeed, given the clarity of this issue and the uniformity of the courts of appeals, the Court may also wish to consider summary reversal.

Contrary to the panel decision below, it makes no difference that the jury was also instructed on the substantive crime of extortion. The panel reasoned that because the court defined “ ‘extortion under color of official right’ ” to require that the money or thing of value come from “ ‘another,’ ” ... it [was] unlikely that the jury was misled.” App. 3a. But in this case, *the substantive crime of extortion only applied to Mr. McDonald's alleged co-conspirators*. Although “[b]ribery is committed by both the bribe giver and recipient,” “extortion is only committed by the recipient.” [United States v. Aguon, 851 F.2d 1158, 1167 \(9th Cir. 1988\)](#) (en banc), *rev'd on other grounds*, [Evans v. United States, 504 U.S. 255 \(1992\)](#); *21see also [United States v. Saadey, 393 F.3d 669, 676 \(6th Cir. 2005\)](#) (holding private individual cannot be convicted of extortion under the Hobbs Act); [United States v. Tomblin, 46 F.3d 1369, 1383 \(5th Cir. 1995\)](#) (same); [United States v. Garcia, 938 F.2d 12, 14 \(2d Cir. 1991\)](#) (noting distinction between bribery and extortion); [United States v. Tillel, 906 F.2d 814, 822 \(2d Cir. 1990\)](#) (same).

Put differently, although a private citizen may be convicted of conspiring to commit extortion under color of official right by entering into an agreement with a public official to extort money from a third party in exchange for an official act, he may not be convicted of the extortion itself. For purposes of the conspiracy charged, Mr. McDonald was a “private citizen” - he was not charged with extorting under official color of right. Rather, the alleged co-conspirators, the Carson City Council members, were the individuals allegedly committing extortion under official color of right.

Thus, the unrelated extortion instruction could have

in no way clarified or saved the fundamentally flawed conspiracy instruction.^[FN4] Because Mr. McDonald was convicted based on jury instructions that denied his due process right to have the government prove each element of the alleged crime, the Ninth Circuit's departure from settled law calls for this Court's intervention.

FN4. Indeed, given that Mr. McDonald was charged with acting under color of official right *in other counts*, the instruction only served to further confuse the jury.

***22 CONCLUSION**

For the foregoing reasons, this Court should grant the petition for writ of certiorari. Given the clarity of the second issue presented and the uniformity of the decisions of the courts of appeals with respect to that issue, the Court may also consider summarily reversing and ordering the Ninth Circuit to vacate the conspiracy conviction.

McDonald v. United States of America
2006 WL 2791182 (U.S.) (Appellate Petition, Motion and Filing)

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For Opinion See [127 S.Ct. 1148](#)

Supreme Court of the United States.
Roderick Keith MCDONALD, Petitioner,
v.
UNITED STATES OF AMERICA, Respondent.
No. 06-440.
January 3, 2007.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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***i** TABLE OF CONTENTS

TABLE OF AUTHORITIES ... iii

INTRODUCTION ... 1

ARGUMENT ... 1

CONCLUSION ... 8

***iii** TABLE OF AUTHORITIES

Cases

[Allen v. Hardy](#), 478 U.S. 255 (1986) ... 5

[Batson v. Kentucky](#), 476 U.S. 79 (1986) ... 1, 2, 4, 5

[Behrens v. Pelletier](#), 516 U.S. 299 (1996) ... 6

[Boyde v. California](#), 494 U.S. 370 (1990) ... 7

[Eastern Associated Coal Corp. v. United Mine Workers of America](#), Dist. 17, 531 U.S. 57 (2000) ... 6

[Epps v. Iowa](#), 901 F.2d 1481 (8th Cir. 1990) ... 4

[Estelle v. McGuire](#), 502 U.S. 62 (1991) ... 7

[Louisiana v. Simpson](#), 551 So. 2d 1303 (La. 1989) ... 5

[Mallett v. Bowersox](#), 160 F.3d 456 (8th Cir. 1998) ... 2, 4

[Mallett v. Missouri](#), 494 U.S. 1009 (1990) ... 4

[Middleton v. McNeil](#), 541 U.S. 433 (2004) ... 7

***iv** [New Mexico v. House](#), 978 P.2d 967 (N.M.), cert. denied, 529 U.S. 894 (1999) ... 2, 3, 4

[Osmulski v. Becze](#), 638 N.E.2d 828 (Ind. Ct. App. 1994) ... 2, 4

[Purkett v. Elem](#), 514 U.S. 765 (1995) ... 2

[Rose v. Mitchell](#) 443 U.S. 545 (1979) ... 5

[Tyson v. Trigg](#), 50 F.3d 436 (7th Cir. 1995) ... 5, 6

[United States v. Erwin](#), 155 F.3d 818 (6th Cir. 1998) ... 6

[United States v. Gallo](#), 763 F.2d 1504 (6th Cir. 1985) ... 6

[United States v. LiCausi](#), 167 F.3d 36 (1st Cir. 1999) ... 3

[United States v. Maldonado-Rivera](#), 922 F.2d 934 (2d Cir. 1990) ... 3

[United States v. Mechanick](#), 475 U.S. 66 (1986) ... 5

[United States v. Pearson, 203 F.3d 1243 \(10th Cir. 2000\)](#) ... 6

[United States v. Pistone, 177 F.3d 957 \(11th Cir. 1999\)](#) ... 3

[United States v. Williams, 504 U.S. 36 \(1992\)](#) ... 5

*[v. Vasquez v. Hillery, 474 U.S. 254 \(1986\)](#) ... 5

[Wallace v. Price, No. 99-231, 2002 WL 31180963 \(W.D. Pa. Oct. 1, 2002\)](#) ... 4

[Yates v. United States, 354 U.S. 298 \(1957\)](#) ... 8

Statutes

[18 U.S.C. § 1951 \(a\)](#) ... 3

INTRODUCTION

Both issues presented by this case warrant this Court's review. By manipulating case assignment procedures to bring about a racially non-diverse jury pool, the government effectively denied petitioner, a prominent and well-respected African-American public official, a jury of his peers. The Ninth Circuit's blinking at these racial gerrymandering tactics deepens a divide among the lower courts regarding the balance between due process rights and prosecutorial discretion, squarely presenting an issue ripe for this Court's review. The court compounded the manifest injustice meted out to petitioner when it allowed to stand a conviction based on a jury instruction that omitted a critical element of the crime charged. This Court's intervention is thus doubly needed. Indeed, the conspiracy conviction is so palpably improper that the Court may wish to consider summary reversal.

ARGUMENT

1. The Ninth Circuit's decision permits prosecutors to gerrymander an African-American defendant's case into a forum where the government is assured of obtaining a predominantly white jury pool. In the Twenty-first Century, this should not be. The decision below violates fundamental principles of due process and conflicts with the decisions of numerous lower courts.

a. In defending the Ninth Circuit's decision on the merits, respondent contends that a presumption of regularity supports prosecutorial decisions absent clear evidence that the prosecutor's act was both motivated by a discriminatory purpose and had a discriminatory effect. Br. in Opp. 13-14. The law, however, is not nearly so clear. To the contrary, state courts have held that when alleging discriminatory intent in connection with venue selection, a defendant need only raise an inference of discrimination to establish a *prima facie* case under the framework prescribed by this Court in [Batson v. Kentucky, 476 U.S. 79 \(1986\)](#), whereas the Eighth Circuit *2 has held the opposite. [Mallett v. Bowersox, 160 F.3d 456 \(8th Cir. 1998\)](#).

Respondent nevertheless argues that there is no conflict warranting this Court's review. Br. in Opp. 14-16. Yet, respondent concedes that in [Osmulski v. Becze, 638 N.E. 2d 828, 832-834 \(Ind. Ct. App. 1994\)](#), the court "conclude [d] that the *Batson* framework *directly applies* to the venue-transfer situation." Br. in Opp. 15-16 (emphasis added) (citing to [Osmulski, 638 N.E.2d at 833](#)). Respondent attempts to distinguish *New Mexico v. House, 978 P.2d 967 (N.M.), cert. denied, 529 U.S. 894 (1999)*, on the grounds (i) that the court observed there was "little jurisprudence" on principles to be applied to the selection of venue; (ii) that the court adopted a "modified" *Batson* test to determine whether venue selection was discriminatory; and (iii) that the court ultimately found no evidence of discriminatory intent or effect. Br. in Opp. 15-16. Those purported distinctions fail to diminish the direct *Batson*-driven conflict among the courts.

First, the so-called "modified" *Batson* test applied in *House* involves the *same* analysis for venue selection as would apply to peremptory challenges: (i) the defendant must make out a *prima facie* case of racial discrimination in the State's motion to select a particular venue; (ii) the State must present a race-neutral explanation; and (iii) once a race-neutral explanation is advanced, the trial court must resolve whether the defendant has proven intentional racial discrimination. [House, 978 P.2d at 994-95](#). These steps are *identical* to those articulated by this Court in [Purkett v. Elem, 514 U.S. 765, 767 \(1995\)](#) (per curiam), describing the appropriate procedure for evaluating peremptory challenges under *Batson*.

Second, the ultimate result in *House* stems from the government's having come forward with *plausible* race-neutral explanations, in stark contrast to the absence of any such explanations in the case at hand. In *House*, the State articulated several race-neutral explanations for *3 changing venue, including the fact that the selected venue “had not been subjected to the frequent, pervasive, contemporaneous, and highly prejudicial publicity regarding the case.” [House, 978 P.2d at 994](#). The selected venue also “had a much larger population than the small close-knit community of [the original venue] and would be less likely to be tainted by the prejudicial publicity.” *Id.* While the court deemed those justifications “plausible,” *id.*, the government's reasons for maneuvering Mr. McDonald's case into Orange County are emphatically not.

Respondent concedes that at most *three* paragraphs of the fifty-seven paragraph indictment even mention Orange County. Br. in Opp. 8-9. The contention that those paragraphs described “overt acts” that were “critical” to proving the charged crime, *id.*, is contrary both to the law and to the record. An overt act is not an element of a conspiracy under [18 U.S.C. § 1951 \(a\)](#). See United States Court of Appeals for the Ninth Circuit, Manual of Model Criminal Jury Instructions § 8.16; [United States v. Pistone, 177 F.3d 957 \(11th Cir. 1999\)](#) (per curiam); [United States v. LiCausi, 167 F.3d 36, 46 \(1st Cir. 1999\)](#); [United States v. Maldonado-Rivera, 922 F.2d 934, 983 \(2d Cir. 1990\)](#). Respondent conceded before the Ninth Circuit, as required by the record, *see e.g.*, E.R. 100-103, that the allegations relating to the Southern Division merely described non-criminal business activities of a non-party who was not an alleged member of the conspiracy. See U.S. 9th Cir. Br. 21-22. Respondent's representation that Mr. McDonald was indicted in the Southern Division because the allegations relating to that division were “critical” to proving the conspiracy charge does not, and cannot, account for why Mr. McDonald's alleged co-conspirators were indicted in the Western Division.

Third, the *House* court's observation that it found “little jurisprudence” on the issue of evaluating discriminatory intent in venue selection illustrates why *4 resolution by this Court is warranted. In *House*, the court explicitly recognized that the defendant was “echoing Justice Marshall's dissent [from denial of

certiorari] in *Mallett v. Missouri*,” [978 P.2d at 993](#) (citing [Mallett, 494 U.S. 1009 \(1990\)](#) (Marshall, J., dissenting)), and proceeded to utilize the *Batson* test. This case marks the third time this Court has been asked to take up this issue and guide lower courts faced with allegations of racially motivated venue selection.

b. Refusing to apply the *Batson* framework to race-based case assignments results in a perverse anomaly. When prosecutors eliminate jurors of a particular race one by one, defendants need only establish a *prima facie* case of discrimination; yet, defendants must prove discriminatory purpose and effect when the government engages in *wholesale exclusion* of members of a race by manipulating venue into a particular forum. Indeed, even when noting its lack of awareness of “any authority to support a conclusion” that an African-American defendant's constitutional rights were violated by a change of venue, the Eighth Circuit nevertheless declared itself “troubled by the state trial court's decision” to change venue to such a county. [Epps v. Iowa, 901 F.2d 1481, 1483 \(8th Cir. 1990\)](#).

In the seventeen years since racially-motivated jury gerrymandering was first presented to the Court in *Mallett v. Missouri*, Justice Thurgood Marshall's impassioned arguments have been augmented by the profound split between federal courts (*see Mallett, 160 F.3d at 460; Epps, 901 F.2d at 1483; Wallace v. Price, No. 99-231, 2002 WL 31180963, at *54 (W.D. Pa. Oct. 1, 2002)*) (noting that the *Batson* Court did not suggest its holding would apply to venue transfers)) and state courts ([House, 978 P.2d at 993-94; Osmulski, 638 N.E.2d at 832-34](#)). This case - involving an African-American public official who was the sole defendant among his alleged co-conspirators to be placed on trial in a forum virtually devoid of African-American jurors - provides the Court *5 with an opportunity to resolve the issue whether the *Batson* framework applies to analysis of prosecutorial manipulation of the case assignment system when race issues are implicated.

c. Respondent's assertion that the claim was not properly preserved for this Court's review, Br. in Opp. 16, is belied by the record. The Ninth Circuit considered petitioner's *Batson* claim and rejected it, holding that petitioner “failed to demonstrate that the Government had a discriminatory purpose in seeking an indict-

ment in the Southern Division” *Id.* There are no facts in dispute, and the record is fully adequate to allow this Court to decide whether the *Batson* framework applies to venue selection. The issue was both pressed to and passed on by the Ninth Circuit and is thus ripe for review by this Court. See [United States v. Williams](#), 504 U.S. 36, 41-42 (1992).

d. Respondent argues that the conflict identified by petitioner is illusory. Br. in Opp. 10-12. Respondent rests on the unsteady ground that neither the federal nor state cases cited by petitioner squarely hold that judge-shopping is a *per se* due process violation. *Id.* at 11-12. This contention fundamentally misses the import of the due process implications discussed in those cases. In light of the “special” nature of race in this Court’s criminal procedure jurisprudence, see [Tyson v. Trigg](#), 50 F.3d 436, 442 (7th Cir. 1995) (citing to [United States v. Mechanick](#), 475 U.S. 66, 70 & n.1 (1986); [Vasquez v. Hillery](#), 474 U.S. 254, 263-64 (1986); [Allen v. Hardy](#), 478 U.S. 255, 259 (1986) (per curiam) [Rose v. Mitchell](#) 443 U.S. 545, 550-59 (1979)), judicial scrutiny of racial gerrymandering should be no less searching than that afforded to race-neutral judge-shopping.

Respondent acknowledges that in [Louisiana v. Simpson](#), 551 So. 2d 1303, 1304 (La. 1989) (on rehearing) (per curiam), the court held - without reservation - that a procedure vesting district attorneys with power to *6 choose the judge to whom a particular case is assigned violates due process. Br. in Opp. 12. Similarly, the Seventh Circuit observed that a law permitting federal prosecutors to “designate the federal district judge to preside in criminal cases” would “raise profound issues under the due process clause.” [Tyson](#), 50 F.3d at 438 (emphasis added). Nor does respondent dispute that in [United States v. Pearson](#), 203 F.3d 1243 (10th Cir. 2000), the Tenth Circuit recognized that prosecutorial judge-shopping may violate the Due Process Clause. [Pearson](#), 203 F.3d at 1259 (citing [United States v. Gallo](#), 763 F.2d 1504, 1532 (6th Cir. 1985); [United States v. Erwin](#), 155 F.3d 818 (6th Cir. 1998)).

Respondent is thus misguided in asserting that the Ninth Circuit’s decision does not conflict with cases that have recognized due process concerns arising from prosecutorial judge-shopping. From the perspective of an African-American criminal defendant, transfer of venue to a forum where virtually no Afri-

can-Americans reside poses as significant a threat to the defendant’s prospects for a fair trial as the prosecution’s selection of a specific trial judge within a diverse forum. The Ninth Circuit’s decision to permit racial gerrymandering of Mr. McDonald’s case into Orange County cannot be reconciled with other courts’ expressions of due process concerns triggered by *race-neutral* judge-shopping. That the Ninth Circuit decision is unpublished neither renders the conflict less real nor serves as even an informal bar to certiorari. See e.g., [Eastern Associated Coal Corp. v. United Mine Workers of America](#), Dist. 17, 531 U.S. 57, 60 (2000) (noting that circuit decision reviewed was unpublished); [Behrens v. Pelletier](#), 516 U.S. 299, 304 (1996) (same).

2. Respondent urges this Court to leave standing a conspiracy conviction based on an admittedly erroneous jury instruction that omitted a critical element of the alleged crime. Br. in Opp. 16-17 While the other Circuits are in accord that when a jury instruction omits an *7 element, vacatur is required by the Due Process Clause (unless the error is otherwise harmless), the Ninth Circuit idiosyncratically declined to vacate. The panel based its decision solely on the inclusion of an instruction relating to the substantive crime of extortion under color of official right - a crime that applied not to Mr. McDonald but to his co-conspirators.

Respondent relies on three cases in which ambiguous jury instructions were deemed not to warrant reversal - but in none of those cases did the instructions omit an element of the crime charged. To the contrary, the instructions in those cases related to the explanation of defenses or the weight of the evidence. See [Middleton v. McNeil](#), 541 U.S. 433 (2004) (per curiam) (direct review of ambiguous instruction regarding the affirmative defense of “imperfect self defense”); [Estelle v. McGuire](#), 502 U.S. 62 (1991) (habeas review of instructions related to the operation of the California Evidence Code); [Boyde v. California](#), 494 U.S. 370 (1990) (habeas review of instructions regarding the mitigating evidence to be considered at sentencing).

Respondent urges that the prosecution did not rely on an impermissible theory in presenting its case and that the indictment accurately presented the charge. But this misses the point. It is the content of the jury instruction that matters for purposes of the Due Proc-

ess Clause's requirement that the government prove each element of the crime charged. Here, the conspiracy instruction unconstitutionally relieved the prosecution of the burden of proving a critical element of the crime charged: that petitioner *extorted* money "from another", in this case, Transportation Concepts - i.e., that Transportation Concepts knew it was paying money in return for official acts rather than paying money to petitioner pursuant to a legitimate services contract. Where such a flawed jury instruction would permit conviction on a legally impermissible basis, the conviction should be reversed, even where the jury might have convicted for a *8 permissible reason. See [Yates v. United States, 354 U.S. 298, 312 \(1957\)](#). The Ninth Circuit's radical departure from settled law calls for this Court's intervention.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, this Court should grant the petition for certiorari. The Court may wish to consider summary reversal with respect to the conspiracy conviction.

McDonald v. United States of America
2007 WL 26305 (U.S.) (Appellate Petition, Motion and Filing)

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