904 F.3d 102
United States Court of Appeals, First Circuit.

UNITED STATES of America, Appellee,
v.
José A. GARCÍA-ORTIZ, Defendant, Appellant.

No. 16-1405
|
September 17, 2018

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Puerto Rico, Daniel R. Domínguez, J., of Hobbs Act robbery, unlawful carrying and use of firearm during crime of violence, and felony murder. Defendant appealed. The Court of Appeals, 528 F.3d 74, affirmed in part, vacated in part, and remanded for resentencing. After resentencing, defendant again appealed. The Court of Appeals, 657 F.3d 25, affirmed in part, vacated firearm conviction and sentence, and remanded for resentencing. The District Court again resentenced defendant to 36-month prison term on Hobbs Act robbery offense, and consecutive 240-month prison term for felony murder, and ordered him to pay $60,000 in restitution. Defendant appealed. The Court of Appeals, 792 F.3d 184, affirmed in part, vacated in part, and remanded. On remand, the United States District Court for the District of Puerto Rico, Daniel R. Domínguez, J., formally imposed restitution order for $30,000. Defendant appealed.

Holdings: The Court of Appeals, Kayatta, Circuit Judge, held that:

[1] conviction for Hobbs Act robbery categorically constituted "crime of violence" under force clause of Armed Career Criminal Act (ACCA);

[2] Hobbs Act robbery qualified as "crime of violence" under force clause of Mandatory Victim Restitution Act (MVRA);

[3] any error by district court was harmless in treating modification of Sentencing Guidelines commentary for mitigating-role reduction as failing to rise to level of "dramatic" change in controlling legal authority to permit court to recalculate defendant's offense level; and

[4] prior determination that district court was within its discretion to impose consecutive sentences had to be affirmed.

Affirmed.

West Headnotes (13)

[1] **Weapons**
Crimes of violence

Conviction for Hobbs Act robbery categorically constituted "crime of violence" under force clause of Armed Career Criminal Act (ACCA), since offense of Hobbs Act robbery had use or threatened use of physical force capable of causing injury to person or property as element. 18 U.S.C.A. §§ 924(c), 1951(a).

6 Cases that cite this headnote

[2] **Federal Courts**
Subsequent Appeals

The Court of Appeals usually does not entertain on a subsequent appeal issues that exceed the scope of its remand mandate; nevertheless, the Court recognizes an exception when the controlling law materially changes after the case is remanded.

Cases that cite this headnote

[3] **Criminal Law**
Habitual and second offenders

Court of Appeals could overlook defendant's failure to anticipate Supreme Court overruling itself on constitutional principle, and therefore defendant's failure to timely raise his argument before district court that Hobbs Act robbery did not qualify under definition of "violent felony" under residual clause of Armed Career Criminal Act (ACCA)

APPENDIX A

did not limit Court of Appeals to plain error review on basis of forfeiture. 18 U.S.C.A. §§ 924(c)(3), 1951(a).

Cases that cite this headnote

[4] **Robbery**

⇦ Force

Robbery

⇦ Putting in fear

Hobbs Act robbery, even when based upon a threat of injury to property, requires a threat of violent force capable of causing physical pain or injury; a threat to devalue an intangible economic interest does not constitute the type of "injury" described in the Hobbs Act's robbery provision "by means of actual or threatened force, or violence, or fear of injury" because the "fear of injury" contemplated by the statute must be like the "force" or "violence" described in the clauses preceding it according to the canon of noscitur a sociis. 18 U.S.C.A. § 1951(a).

Cases that cite this headnote

[5] **Robbery**

⇦ Intent

Mens rea required to commit Hobbs Act robbery was not less than that required to constitute "use, attempted use, or threatened use of physical force." 18 U.S.C.A. § 1951(a).

3 Cases that cite this headnote

[6] **Extortion**

⇦ Threat or duress

A threat to poison someone involves the threatened use of force capable of causing physical injury, and thus does involve violent force under the Hobbs Act. 18 U.S.C.A. § 1951(a).

Cases that cite this headnote

[7] **Robbery**

⇦ Force

Robbery

⇦ Putting in fear

The offense of Hobbs Act robbery requires as an element the intentional threat of physical force. 18 U.S.C.A. § 1951(a).

Cases that cite this headnote

[8] **Robbery**

⇦ Intent

The elements of Hobbs Act robbery include an implicit mens rea element of general intent or knowledge as to the actus reus of the offense. 18 U.S.C.A. § 1951(a).

Cases that cite this headnote

[9] **Weapons**

⇦ Crimes of violence

A conviction for aiding and abetting a Hobbs Act robbery can categorically constitute a "crime of violence" under the force clause of the Armed Career Criminal Act (ACCA); an aider and abettor is punishable as a principal, and thus no different for purposes of the categorical approach than one who commits the substantive offense. 18 U.S.C.A. § 1951(a).

3 Cases that cite this headnote

[10] **Sentencing and Punishment**

⇦ Restitution

Hobbs Act robbery qualified as "crime of violence" under force clause of Mandatory Victim Restitution Act (MVRA). 18 U.S.C.A. §§ 16, 1951(a), 3663A(c)(1)(A)(i).

6 Cases that cite this headnote

[11] **Sentencing and Punishment**

⇦ Discretion of court

Restitution is mandatory under the Mandatory Victim Restitution Act (MVRA). 18 U.S.C.A. § 3663A.

Cases that cite this headnote

[12] **Criminal Law**

Sentencing and Punishment

Any error by district court was harmless in treating modification of Sentencing Guidelines commentary for mitigating-role reduction as failing to rise to level of "dramatic" change in controlling legal authority to permit court to recalculate defendant's offense level, even if issue could be considered on remand. U.S.S.G. § 3B1.2.

Cases that cite this headnote

[13] **Criminal Law**

Subsequent Appeals

Prior determination by Court of Appeals that district court was within its discretion to impose consecutive sentences had to be affirmed on appeal after remand, where defendant did not reference any newly discovered evidence or intervening legal authority that required Court of Appeals to reconsider, and failure to depart from law of case would not work manifest injustice.

Cases that cite this headnote

*104 APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, [Hon. Daniel R. Domínguez, U.S. District Judge]

Attorneys and Law Firms

Rachel Brill, San Juan, PR, for appellant.

John P. Taddei, with whom Margaret A. Upshaw, Washington, DC, Attorney, United States Department of Justice, and Rosa Emilia Rodríguez-Vélez, United States Attorney, were on brief, for appellee.

Before Thompson, Kayatta, and Barron, Circuit Judges.

Opinion

KAYATTA, Circuit Judge.

In his fourth time before our court, defendant-appellant José García–Ortiz ("García") asks us to vacate one of his convictions stemming from an armed robbery committed in Puerto Rico in the year 2000. He argues that his conviction for felony murder under 18 U.S.C. § 924(j) must be vacated because armed robbery committed in violation of the Hobbs Act, 18 U.S.C. § 1951, does not qualify as a "crime of violence" under 18 U.S.C. § 924(c). He also disputes the imposition of a restitution order and raises other issues outside the scope of this court's limited remand in United States v. García-Ortiz, 792 F.3d 184, 186 (1st Cir. 2015) ("García III"). For the following reasons, we affirm García's conviction and sentence.

I.

As we detailed in United States v. García-Ortiz, 528 F.3d 74 (1st Cir. 2008) ("García I"), García participated in the armed robbery of a grocery store manager and his security guard escort as they were delivering around $63,000 in cash to a bank. Id. at 77. During an exchange of gunfire in the course of the robbery, the security guard shot and killed one of García's collaborators. Id. In 2004, a jury convicted García of aiding and abetting a Hobbs Act robbery (count one),[1] aiding and abetting the use or carrying of a firearm during and in relation to a crime of *105 violence (count two),[2] and aiding and abetting felony murder in the course of using or carrying a firearm in relation to a crime of violence (count three).[3] Id. at 78-79.

1 In violation of 18 U.S.C. §§ 2, 1951(a), (b)(1).

2 In violation of 18 U.S.C. §§ 2, 924(c)(1)(A).

3 In violation of 18 U.S.C. §§ 2, 924(j).

In García I, we remanded the case back to the district court so that it could modify an erroneous life sentence imposed for count one, for which the statutory maximum was twenty years. Id. at 85. After resentencing, García appealed again. We then reversed on double jeopardy grounds the conviction on count two (aiding and abetting the use or carrying of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 2, 924(c)(1)(A)) because that count was a lesser included part of count three. United States v. García-Ortiz, 657 F.3d 25, 28–29 (1st Cir. 2011) ("García II"). In García's subsequent resentencing, the district court imposed, for the first time,

a restitution order. García appealed again, challenging among other things the imposition of the restitution order. García III, 792 F.3d at 188–94. We affirmed García's convictions and sentences on the remaining counts (one and three). We nevertheless ordered a limited remand of "only the restitution portion of his sentence" because the district court had mistakenly "continued" a restitution order that it had neglected to impose in the first instance. Id. at 186, 192. On remand following Garcia III, the district court formally imposed a restitution order for $30,000, a reduction from the initial order of $60,000.

At present, García stands convicted of aiding and abetting a robbery committed in violation of the Hobbs Act, 18 U.S.C. § 1951(a) (count one) and aiding and abetting felony murder in the course of using or carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. §§ 2, 924(j) (count three). His current sentence consists of 36 months' imprisonment for count one to run consecutively with a 216-month term for count three, plus $30,000 in restitution.

García raises several issues in this most recent appeal. Claiming a change in controlling law since we decided his third appeal, he first urges us to find unconstitutionally vague the so-called "residual clause" of 18 U.S.C. § 924(c)(3)(B). That clause treats as a "crime of violence" any felony offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." García reasons that because section 924(c)'s residual clause is unconstitutional, and because his Hobbs Act robbery conviction does not alternatively qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A)'s so-called "force clause," his felony murder conviction, which relies on section 924(c)'s definition of "crime of violence," must be vacated. Second, García argues that the district court impermissibly imposed the restitution order to punish him for his success on appeal. Finally, in an effort to resuscitate and reconstitute arguments from previous appeals, García also argues that the district court should have considered an amendment to the United States Sentencing Guidelines (the "Guidelines") when considering whether to apply a mitigating role adjustment, and should not have imposed the terms of imprisonment consecutively for counts one and three. For the following reasons, we reject each of these arguments and affirm García's convictions and sentence.

II.

A.

[1] García's conviction for felony murder rests on the proposition that his offense *106 that led to a death—armed robbery in violation of the Hobbs Act—is a "crime of violence" under section 924(c). At the time of García's conviction, there was apparently little reason to doubt that such an offense satisfied the definition of a crime of violence contained in the residual clause of section 924(c), as García raised no objection in this vein in any of his prior appeals. García now points to two subsequent decisions of the United States Supreme Court, Johnson v. United States, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) ("Johnson II") and Sessions v. Dimaya, — U.S. —, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018), which García claims compel the conclusion that section 924(c)'s residual clause is unconstitutionally vague.

[2] We usually do not entertain on a subsequent appeal issues that exceed the scope of our remand mandate. See United States v. Wallace, 573 F.3d 82, 88 (1st Cir. 2009). Nevertheless, we recognize an exception when the controlling law materially changes after the case is remanded. Id. at 89. We will assume that Dimaya and Johnson II brought about such a change.

[3] Overcoming the limited scope of our remand mandate still leaves García with another procedural hurdle: His failure to timely raise before the district court his argument that Hobbs Act robbery does not qualify under the residual clause of section 924(c)(3) would normally constitute a forfeiture, limiting us to plain error review. In similar circumstances, however, we recently overlooked such a forfeiture where, as here, a defendant failed to anticipate the Supreme Court overruling itself on a constitutional principle. See Lassend v. United States, 898 F.3d 115, 122 (1st Cir. 2018) (noting that Johnson II "expressly overruled" two prior Supreme Court cases "in relation to the [Armed Career Criminal Act]").

Turning to the merits, we find that any possible infirmity of section 924(c)'s residual clause provides García with no exculpation because his Hobbs Act robbery still qualifies as a crime of violence under the force clause of section 924(c). Our reasoning for finding the force clause satisfied follows.

The parties agree that García's conviction concerned Hobbs Act robbery (not extortion). So, our task at the outset is to compare the statutory language describing the elements of Hobbs Act robbery to the definition of a "crime of violence" in the force clause, section 924(c)(3)(A). See United States v. Faust, 853 F.3d 39, 50–51 (1st Cir.), reh'g denied, 869 F.3d 11 (1st Cir. 2017) (describing this categorical approach). The relevant Hobbs Act language states:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall [be fined or imprisoned.]

18 U.S.C. § 1951(a). The term "robbery" means:

> [T]he unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

Id. § 1951(b)(1) (emphasis added). The force clause, in turn, defines a "crime of violence" as "an offense that is a felony ***107** and ... has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Id. § 924(c)(3)(A).

It would seem that the "actual or threatened force, or violence, or fear of injury" required as an element of the robbery offense satisfies the "use, attempted use, or threatened use of physical force" element of the definition of a crime of violence as long as we construe robbery's "force, or violence, or fear of injury" as requiring the use or threat of "physical force." García advocates against such a construction. He points out that the required "physical force" need be "violent force," Johnson v. United States, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (Johnson I). As an example of a robbery without such force, he posits that a person can commit Hobbs Act robbery by threatening to "devalue some intangible economic interest like a stock holding or contract right." This, however, sounds to us like Hobbs Act extortion.[4] García points to no actual convictions for Hobbs Act robbery matching or approximating his theorized scenario. And the Supreme Court has counseled that we need not consider a theorized scenario unless there is a "realistic probability" that courts would apply the law to find an offense in such a scenario. See Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007).

4 "[T]he 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).

[4] We also find ourselves unpersuaded that a threat to devalue an intangible economic interest constitutes the type of "injury" described in the Hobbs Act's robbery provision—"by means of actual or threatened force, or violence, or fear of injury." 18 U.S.C. § 1951(b)(1). Cf. United States v. Melgar-Cabrera, 892 F.3d 1053, 1066 (10th Cir. 2018) (putting someone in "fear of injury" requires the threatened use of physical force). Applying the canon of noscitur a sociis, the "fear of injury" contemplated by the statute must be like the "force" or "violence" described in the clauses preceding it. See Yates v. United States, — U.S. —, 135 S.Ct. 1074, 1085, 191 L.Ed.2d 64 (2015) (stating that canon as "a word is known by the company it keeps"). This reading and García's inability to point to any convictions for Hobbs Act robbery based upon threats to devalue intangible property convince us that Hobbs Act robbery, even when based upon a threat of injury to property, requires a threat of the kind of force described in Johnson I, that is, "violent force ... capable of causing physical pain or injury." 559 U.S. at 140, 130 S.Ct. 1265.

[5] [6] We likewise reject García's related claim that Hobbs Act robbery can be committed with a degree of force against a person falling short of "violent" force. To support this claim, García imagines a scenario in which a culprit threatens to poison someone, and claims that such an action would not involve the use or threatened use of violent force. But a threat to poison someone involves the threatened use of force capable of causing physical injury, and thus does involve violent force. See United States v. Edwards, 857 F.3d 420, 427 (1st Cir.), cert. denied, — U.S. —, 138 S.Ct. 283, 199 L.Ed.2d 181 (2017) (suggesting that the knowing use of poison to cause physical harm involves physical force satisfying Johnson I). A threat to poison another imposes a "fear of injury," 18 U.S.C. § 1951(b)(1), to one's person, and Johnson I short-circuits any argument that placing someone in fear of bodily injury ***108** does not involve the use of physical force, if "force" encapsulates the concept of causing or threatening to cause bodily injury. 559 U.S. at 140, 130 S.Ct. 1265; cf. United States v. Castleman, 572 U.S. 157, 134 S.Ct. 1405, 1417, 188 L.Ed.2d 426 (2014) (Scalia, J., concurring in part and concurring in judgment) (rejecting the argument that Johnson I "requires force capable of inflicting 'serious' bodily injury," as opposed simply to "force capable of causing physical pain or injury, serious or otherwise").

García also posits that perhaps the threat of injury under a Hobbs Act robbery prosecution might take the form of threatening to withhold medication from the victim, or threatening to lock a person up in a car on a hot day. But he fails to identify any convictions, or even prosecutions, matching these scenarios, nor do they strike us as realistically probable. See Edwards, 857 F.3d at 427 (noting the need for a realistic probability of hypothetical conviction, rather than mere "imaginative thinking").

[7] García next argues that the offense of Hobbs Act robbery does not require as an element the "intentional threat of physical force," so it fails to satisfy the mens rea required under section 924's force clause. We have previously rejected similar arguments. In United States v. Ellison, the defendant argued that his conviction for federal bank robbery was not a "crime of violence" under the force clause of Guidelines section 4B1.2(a) (the "career offender guideline") because a conviction under the bank robbery statute [5] could be founded upon "intimidation" that the culprit did not intend—that is, it could be founded merely upon behavior a reasonable person would have experienced as intimidating. 866 F.3d 32, 38 (1st Cir. 2017). We said that because the federal bank robbery statute does require general intent, i.e., knowledge on the part of the defendant that his actions were objectively intimidating, it "has as an element the use, attempted use, or threatened use of physical force against the person of another," U.S.S.G. § 4B1.2(a), such that a conviction for federal bank robbery satisfies the mens rea component of the career offender guideline's force clause. Id. at 38–40; see also United States v. Frates, 896 F.3d 93, 99 (1st Cir. 2018); cf. Carter v. United States, 530 U.S. 255, 268–70, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (characterizing the offense under the federal bank robbery statute as a general intent crime, i.e., one requiring proof of knowledge of the actus reus).

5 18 U.S.C. § 2113(a), which reads:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association ... [s]hall be fined under this title or imprisoned not more than twenty years, or both.

[8] The elements of Hobbs Act robbery similarly include "an implicit mens rea element of general intent—or knowledge—as to the actus reus of the offense." Frates, 896 F.3d at 98 (quoting Ellison, 866 F.3d at 39); see also United States v. Tobias, 33 F. App'x 547, 549 (2d Cir. 2002) (summary order) (observing that the term "robbery," as in 18 U.S.C. § 1951, "implies knowing and willful conduct"); United States v. Gray, 260 F.3d 1267, 1283 (11th Cir. 2001) (noting that circuit precedent suggested a "knowing" mens rea standard for Hobbs Act robbery and rejected a requirement of specific intent to commit the crime); United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999) (knowing or ***109** willing conduct is an "implied and necessary element" of Hobbs Act robbery). We therefore reject any contention by García that the mens rea required to commit Hobbs Act robbery is less than that required to constitute the "use, attempted use, or threatened use of physical force." 18 U.S.C. § 924(c)(3)(A).

[9] In a supplemental pro se brief, García next argues that a conviction for aiding and abetting a Hobbs Act robbery

cannot categorically constitute a "crime of violence" under section 924's force clause because a defendant can be convicted of aiding and abetting the crime "even when he has not personally committed all the acts constituting the elements of the substantive crime aided." United States v. Sosa, 777 F.3d 1279, 1293 (11th Cir. 2015) (quoting United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004)). This argument simply states the mandate of 18 U.S.C. § 2, which makes an aider and abettor "punishable as a principal," and thus no different for purposes of the categorical approach than one who commits the substantive offense. See Lassend, 898 F.3d at 132-33.

Having rejected García's arguments, we therefore hold that because the offense of Hobbs Act robbery has as an element the use or threatened use of physical force capable of causing injury to a person or property, a conviction for Hobbs Act robbery categorically constitutes a "crime of violence" under section 924(c)'s force clause. We therefore affirm García's conviction under 18 U.S.C. § 924(j).

B.

[10] The foregoing conclusion also largely resolves García's challenge to his restitution order. The Mandatory Victim Restitution Act, 18 U.S.C. § 3663A(c)(1)(A)(i), required the district court to impose such an order once García was convicted of any "crime of violence" as defined in 18 U.S.C. § 16. For the same reasons we conclude that Hobbs Act robbery qualifies as a "crime of violence" under section 924(c)'s force clause, we conclude that Hobbs Act robbery also qualifies as a "crime of violence" under section 16(a)'s force clause, which similarly defines "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). The only difference between the two provisions is that section 924's definition requires that the crime be a felony, while section 16(a) requires only "an offense," and this minor difference does not alter our conclusion because Hobbs Act robbery is certainly a felony.

[11] García's claim that the restitution was a "punitive" response to his successful appeal is twice mistaken: Restitution is mandatory under section 3663A, which states that the district court "shall order ... restitution" for convictions for crimes of violence, 18 U.S.C. § 3663A(a)(1), and García offers no specific allegation, beyond mere assertion, of an improper motive by the district court. Moreover, he does not challenge the amount of restitution required or any other aspect of the order; he just challenges the fact of its existence. Without passing on the details or amount of the restitution order, which remain unchallenged, we cannot say, under any standard of review, that the district court erred in ordering restitution as required by Congress.

C.

[12] García next argues that Amendment 794 to the Guidelines, which modified the application notes for Guidelines § 3B1.2 (authorizing reductions for a defendant's mitigating role in the offense) ***110** and which came into effect in 2015 after García III, should have caused the district court to "award[ ] a reduction" in his Guidelines calculation. While recognizing the limited nature of the remand in García III, García argued below and suggests now that Amendment 794's adjustments to the commentary for the mitigating-role reduction constituted a significant change in controlling legal authority permitting the district court to recalculate García's offense level, even though consideration of the issue exceeded the scope of remand. See United States v. Bell, 988 F.2d 247, 250-51 (1st Cir. 1993) (a district court may, in its discretion, go beyond the mandate on remand when a party shows a dramatic change in controlling legal authority, unearths significant new evidence previously unavailable, or convinces the court that blatant error left uncorrected will perpetuate a serious injustice). The district court recognized that it had "a mandate as to only one aspect [of García's sentence]," as this court had "already affirmed [the] other part of the decision" and "sent this case to [the district court] only for restitution purposes." It nonetheless stated that even if it were to "consider[ ] the downward departure for a minor [role in the offense]," it would "deem[ ] that this case does not warrant that." The district court found no reason to impose the minor-role reduction because, as the court noted on the record, there was no dispute that García participated in the crime, the crime resulted in a death, García sustained a bullet wound in his back, and no co-defendants were arrested or charged against which García's relative culpability could be compared. We therefore need not decide whether the district court erred in treating the modification of the Guidelines commentary for section 3B1.2 as failing to rise to the

level of a "dramatic" change in controlling legal authority. Any error was harmless. See generally United States v. Tavares, 705 F.3d 4, 25–26 (1st Cir. 2013) (applying harmless error analysis to procedural error in Guidelines range calculation).

D.

Finally, we dispose of García's argument that the terms of imprisonment for counts one and three should have run concurrently, rather than consecutively. We already decided this issue in García III and affirmed the consecutive imposition of his sentences. 792 F.3d at 193–94. In García III we noted that the district court understood that it possessed the discretion to impose the sentences for counts one and three concurrently or consecutively, and so exercised this discretion. Id. And we noted that García failed to identify any authority for the notion that the district court was required to impose concurrent sentences. Id. at 194.

[13] García identifies no reason to depart from the law of the case; he references "no newly discovered evidence or intervening legal authority that requires us to reconsider, and there can be no credible claim that our failure to do so would work a manifest injustice in this case." United States v. Wallace, 573 F.3d 82, 92 (1st Cir. 2009) (internal quotation marks omitted). We therefore affirm our own prior determination that the district court was within its discretion to impose consecutive sentences for counts one and three.

III.

We affirm the convictions and sentence imposed.

All Citations

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[ROBBERY] [EXTORTION] BY FORCE, VIOLENCE OR FEAR
18 U.S.C. § 1951(a) (Hobbs Act)

The defendant is charged in count_____with a violation of 18 U.S.C. section 1951(a), commonly called the Hobbs Act.

This law makes it a crime to obstruct, delay or affect interstate commerce by [robbery] [extortion].

To find the defendant guilty of this crime you must be convinced that the government has proved beyond a reasonable doubt that:

First: the defendant obtained [attempted to obtain] property from another [without][with] that person's consent;

Second: the defendant did so by wrongful use of actual or threatened force, violence, or fear; and

Third: as a result of the defendant's actions, interstate commerce, or an item moving in interstate commerce, was actually or potentially delayed, obstructed, or affected in any way or degree;

[Robbery is the unlawful taking of personal property from another against his or her will. This is done by threatening or actually using force, violence, or fear of injury, immediately or in the future, to person or property. "Property" includes money and other tangible and intangible things of value. "Fear" means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.]

[Extortion is the obtaining of or attempting to obtain property from another, with that person's consent, induced by wrongful use of actual or threatened force, violence, or fear. The use of actual or threatened force, violence, or fear is "wrongful" if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property.]

"Obstructs, delays, or affects interstate commerce" means any action which, in any manner or to any degree, interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in interstate commerce.

The defendant need not have intended or anticipated an effect on interstate commerce. You may find the effect is a natural consequence of his actions. If you find that the government has proved beyond a reasonable doubt that the defendant intended to take certain actions—that is, he did the acts charged in the indictment in order to obtain property—and you find those actions actually or potentially caused an effect on interstate commerce, then you may find the requirements of this element have been satisfied.

Comment

The extortion provision of the Hobbs Act requires not only the deprivation, but also the acquisition, of property. 18 U.S.C. §1951(b)(2). Thus, the property, whether tangible or intangible, must actually be "obtained" in order for there to be a violation. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (holding that by interfering with, disrupting, and in some instances "shutting down" clinics that performed abortions, individual and corporate organizers of antiabortion protest network did not "obtain or attempt to obtain property from women's rights organization or abortion clinics, and so did not commit "extortion" under the Hobbs Act).

The Tenth Circuit has consistently upheld the Hobbs Act as a permissible exercise of the authority granted to Congress under the Commerce Clause, both in the context of robbery, *United States v. Shinault*, 147 F.3d 1266, 1278 (10th Cir. 1998), and extortion, *United States v. Bruce*, 78 F.3d 1506, 1509 (10th Cir. 1996). It also has made clear that only a *de minimis* effect on commerce is required, *United States v. Wiseman*, 172 F.3d 1196, 1214-15 (10th Cir. 1999), and has upheld a trial court's refusal to instruct that a substantial effect is required, *United States v. Battle*, 289 F.3d 661, 664 (10th Cir. 2002).

The court seems to have struggled with the language that "commerce . . . was actually or potentially . . . affected" and that the government can meet its burden by evidence that the defendant's actions caused or "would probably cause" an effect on interstate commerce. In *United States v. Nguyen*, 155 F.3d 1219 (10th Cir. 1998), the court observed that use of the words probable and potential "while perhaps not the best way to explain to the jury the interstate commerce requirement, did not constitute error." *Id.* at 1229. In *United States v. Wiseman*, *supra*, the court upheld an instruction which stated, in pertinent part, that the government could meet its burden by evidence that money stolen for businesses "*could* have been used to obtain such foods or services" from outside the state, opposed to "would" have been so used. *Id.* at 1215 (emphasis in original). The court, citing *Nguyen*, held that the instruction was not prejudicial because only a potential effect on commerce is required. *Id.* at 1216. The Tenth Circuit continues to approve instructions requiring proof of actual, potential, *de minimis* or even just probable effect on commerce. *See United States v. Curtis*, 344 F.3d 1057, 1068-69 (10th Cir. 2003).

Use Note

When the government's evidence is that the robbery or extortion actually affected commerce, the words "potentially," "probably" and "could" can be eliminated from the instruction.

The instruction should be modified in the case of an "attempt." *See* Instruction 1.32.

2.73A

EXTORTION BY FORCE, VIOLENCE, OR FEAR 18 U.S.C. § 1951(a) (HOBBS ACT)

Title 18, United States Code, Section 1951(a), makes it a crime for anyone to obstruct, delay, or affect commerce by extortion. Extortion means the obtaining of or attempting to obtain property from another, with that person's consent, induced by wrongful use of actual or threatened force, violence, or fear.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant obtained [attempted to obtain] [conspired to obtain] property from another with that person's consent;

Second: That the defendant did so by wrongful use of actual or threatened force, violence, or fear; and

Third: That the defendant's conduct in any way or degree obstructed [delayed] [affected] commerce [the movement of any article or commodity in commerce].

The government is not required to prove that the defendant knew that his conduct would obstruct [delay] [affect] commerce [the movement of any article or commodity in commerce]. It is not necessary for the government to show that the defendant actually intended or anticipated an effect on commerce by his actions. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect commerce. If you decide that there would be any effect at all on commerce, then that is enough to satisfy this element.

The term "property" includes money and other tangible and intangible things of value.

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The term "fear" includes fear of economic loss or damage, as well as fear of physical harm.

It is not necessary that the government prove that the fear was a consequence of a direct threat; it is sufficient for the government to show that the victim's fear was reasonable under the circumstances.

The use of actual or threatened force, violence, or fear is "wrongful" if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property.

The term "commerce" means commerce within the District of Columbia [commerce within the Territory or Possession of the United States] [all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof] [all commerce between points within the same State through any place outside such State] [all other commerce over which the United States has jurisdiction].

Note

Interference with commerce is the "express jurisdictional element" of the Hobbs Act. *United States v. Robinson*, 119 F.3d 1205, 1215 (5th Cir. 1997).

That the defendant's conduct affected commerce is an essential element of the offense, and must be submitted to the jury for determination. *See United States v. Gaudin*, 115 S. Ct. 2310 (1995); *United States v. Hebert*, 131 F.3d 514, 521–22 (5th Cir. 1997); *United States v. Miles*, 122 F.3d 235, 239–40 (5th Cir. 1997).

"Commerce" is defined in § 1951(b)(3). The statute requires that commerce or the movement of goods in commerce be affected "in any way or degree." 18 U.S.C. § 1951(a). However, Fifth Circuit jurisprudence reveals tension regarding the degree of proof required to establish the element of effect on commerce. *See United States v. Mann*, 493 F.3d 484, 494 (5th Cir. 2007) ("A Hobbs Act prosecution requires the government to prove that the defendant committed, or attempted or conspired to commit, a robbery or act of extortion that caused an interference with interstate commerce."); *United States v. McFarland*, 311 F.3d 376 (5th Cir.

2002) (en banc) (affirming the constitutionality of the federal Hobbs Act robbery and extortion statute by an equally divided court); *United States v. Hickman*, 179 F.3d 230 (5th Cir. 1999) (en banc) (conviction affirmed by equally divided vote).

The Hobbs Act proscribes attempts and conspiracies as well as substantive offenses. In a prosecution for attempt or conspiracy, proof that a successful completion of the scheme would have affected commerce may suffice, but substantive convictions require proof that each act of robbery or extortion affected commerce. *See Mann*, 493 F.3d at 494–96; *United States v. Jennings*, 195 F.3d 795, 801–02 (5th Cir. 1999); *Robinson*, 119 F.3d at 1215.

It is not necessary to prove that the defendant caused the victim's fear by a direct threat, so long as the victim's fear was actual and reasonable, and the defendant took advantage of that fear to extort property. *See United States v. Rashad*, 687 F.3d 637, 642 (5th Cir. 2012); *United States v. Tomblin*, 46 F.3d 1369, 1384 (5th. Cir. 1995); *United States v. Quinn*, 514 F.2d 1250, 1266–67 (5th Cir. 1975).

For a discussion of the meaning of "wrongful," see *United States v. Enmons*, 93 S. Ct. 1007 (1973) (holding that the Hobbs Act "does not apply to the use of force to achieve legitimate labor ends").

Extortion requires not only deprivation, but also acquisition of property. The Supreme Court held that anti-abortion protesters did not violate the Hobbs Act by using violence or threats of violence against a clinic, their employees, or their patients because the defendants did not "obtain" property from the plaintiffs. *See Scheidler v. Nat'l Org. for Women, Inc.*, 123 S. Ct. 1057, 1066 (2003) (dismissing injunction because defendants "neither pursued nor received something of value from respondents that they could exercise, transfer, or sell").

The Hobbs Act does not apply where the federal government is the intended beneficiary of the alleged extortion. *See Wilkie v. Robbins*, 127 S. Ct. 2588, 2607 (2007) (holding that Congress did not intend to expose all federal employees "to extortion charges whenever they stretch in trying to enforce Government property claims").

This instruction addresses extortion by force, violence, or fear, not robbery. If the indictment charges robbery, the second element should be amended to replace "extortion" with "robbery." In that circumstance, the judge may also wish to define "robbery" pursuant to 18 U.S.C. § 1951(b)(1).

O70.1
Interference with Commerce by Extortion
Hobbs Act: Racketeering
(Force or Threats of Force)
18 U.S.C. § 1951(a)

It's a Federal crime to extort something from someone else and in doing so to obstruct, delay, or affect interstate commerce.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant caused [person's name] to part with property;

(2) the Defendant did so knowingly by using extortion; and

(3) the extortionate transaction delayed, interrupted, or affected interstate commerce.

"Property" includes money, other tangible things of value, and intangible rights that are a source or part of income or wealth.

"Extortion" means obtaining property from a person who consents to give it up because of the wrongful use of actual or threatened force, violence, or fear.

"Fear" means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.

"Interstate commerce" is the flow of business activities between one state and anywhere outside that state.

The Government doesn't have to prove that the Defendant specifically intended to affect interstate commerce in any way. But it must prove that the

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natural consequences of the acts described in the indictment would be to somehow delay, interrupt, or affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1951(a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce... by extortion [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In *United States v. Blanton*, 793 F.2d 1553 (11th Cir. 1986), the Eleventh Circuit upheld the District Court's refusal to instruct the jury that the Defendant must cause or threaten to cause the force, violence or fear to occur. The Court explained that the Defendant need only be aware of the victim's fear and intentionally exploit that fear to the Defendant's own possible advantage.

In *United States v. Kaplan*, 171 F.3d 1351, 1356-58 (11th Cir. 1999), the Eleventh Circuit held that under § 1951 the effect on commerce need not be adverse. The effect on commerce can involve activities that occur outside of the United States. *See, e.g., Kaplan*, 171 F.3d at 1355-58 (use of interstate communication facilities and claimed travel to carry out extortion scheme's object, which was the movement of substantial funds from Panama to Florida, constituted sufficient affect under § 1951).

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by evidence of an actual, de minimis impact on commerce. *Kaplan*, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial; it can be minimal. *See id.; see also United States v. Le*, 256 F.3d 1229 (11th Cir. 2001); *U. S. v. Verbitskaya*, 405 F.3d 1324 (11th Cir. 2005) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. White*, No. 07-11793, 2007 U.S. App. LEXIS 27819 (11th Cir. Nov. 29, 2007) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. Mathis*, 186 Fed. Appx. 971 (11th Cir. 2006); *U.S. v. Stamps*, 201 Fed. Appx. 759 (11th Cir. 2006).

In *U.S. v. Taylor*, 480 F.3d 1025 (11th Cir. 2007), the Eleventh Circuit held that the jurisdictional element is met even when the object of a planned robbery (i.e. drugs in a sting operation) or its victims are fictional.

O70.3
Interference with Commerce by Robbery
Hobbs Act – Racketeering
(Robbery)
18 U.S.C. § 1951(a)

It's a Federal crime to acquire someone else's property by robbery and in doing so to obstruct, delay, or affect interstate commerce.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt.

(1) the Defendant knowingly acquired someone else's personal property;

(2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future; and

(3) the Defendant's actions obstructed, delayed, or affected interstate commerce.

"Property" includes money, tangible things of value, and intangible rights that are a source or element of income or wealth.

"Fear" means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.

"Interstate commerce" is the flow of business activities between one state and anywhere outside that state.

The Government doesn't have to prove that the Defendant specifically intended to affect interstate commerce. But it must prove that the natural

consequences of the acts described in the indictment would be to somehow delay, interrupt, or affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1951(a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In *United States v. Thomas*, 8 F.3d 1552, 1562-63 (11th Cir. 1993), the Eleventh Circuit suggested that the Government need not prove specific intent in order to secure a conviction for Hobbs Act robbery. See also *United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001) (noting that the Court in *Thomas* suggested that specific intent is not an element under § 1951).

In *United States v. Kaplan*, 171 F.3d 1351, 1356-58 (11th Cir. 1999), the Eleventh Circuit held that under § 1951 the affect on commerce need not be adverse. The effect on commerce can involve activities that occur outside of the United States. *See, e.g., Kaplan*, 171 F.3d at 1355-58 (use of interstate communication facilities and claimed travel to carry out extortion scheme's object, which was the movement of substantial funds from Panama to Florida, constituted sufficient affect under § 1951).

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by evidence of an actual, de minimis impact on commerce. *Kaplan*, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial; it can be minimal. *See id.; see also United States v. Le*, 256 F.3d 1229 (11th Cir. 2001); *U.S. v. Verbitskaya*, 405 F.3d 1324 (11th Cir. 2005) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. White*, No. 07-11793, 2007 U.S. App. LEXIS 27819 (11th Cir. Nov. 29, 2007) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. Mathis*, 186 Fed. Appx. 971 (11th Cir. 2006); *U.S. v. Stamps*, 201 Fed. Appx. 759 (11th Cir. 2006).

In *U.S. v. Taylor*, 480 F.3d 1025 (11th Cir. 2007), the Eleventh Circuit held that the jurisdictional element is met even when the object of a planned robbery (i.e. drugs in a sting operation) or its victims are fictional.

6.18.1951. INTERFERENCE WITH COMMERCE BY MEANS OF EXTORTION (18 U.S.C. § 1951) (Hobbs Act)

The crime of interference with commerce by means of extortion, as charged in [Count _____ of] the indictment, has three elements, which are:

One, the defendant induced (describe victim[s], e.g., John Jones, President of ABC Corp.) to part with [property] (describe property, e.g., $10,000.00 cash);

Two, the defendant voluntarily and intentionally did so by extortion -- that is, [through the wrongful use of actual or threatened force or violence] [through the wrongful use of fear] [under color of official right];[1]

Three, the defendant's action [obstructed] [delayed] [affected] [interstate] [foreign] commerce in some way or degree.[2]

["Fear" means a state of anxious concern, alarm or apprehension of harm. Fear includes fear of economic loss or injury, as well as fear of physical violence. Extortion by wrongful use of fear requires that the fear be reasonable under the circumstances.][3]

[Extortion "under color of official right" is the wrongful taking by a public officer of money or property not due him or his office, whether or not the taking was accompanied by force, threats or use of fear. So if a public official voluntarily and intentionally misuses his public office and power for the wrongful purpose of inducing a victim to part with property, such activity constitutes extortion.][4]

[Extortion is committed when property is obtained with the consent of the victim by the wrongful use of actual or threatened force, violence or fear or under color of official right.][5]

[You may find an [obstruction] [delay] [effect] on [interstate] [foreign] commerce has been proven if you find and believe from the evidence beyond a reasonable doubt: (describe effects on [interstate] [foreign] commerce alleged in the indictment on which proof was offered at trial, which demonstrate an actual effect on interstate commerce, e.g., that the John Doe Produce Distributing Co. shipped lettuce, tomatoes, string beans, and other produce from St. Louis, in the State of Missouri, to various points outside of the State of Missouri, including the states of Oregon, Wyoming and Kansas.)[6]]

Final Instructions: Elements of Offenses

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The proper theory of extortion charged in the indictment should be selected in the second element of the instruction.

2. If an attempt crime is charged, the instruction should be modified accordingly.

3. "Extortion" and "fear" must be defined. The statutory definition of "extortion" may be found at 18 U.S.C. § 1951(b)(2). The wrongful use of fear and a reasonable fear on the part of the victim is essential to a conviction of extortion by use of fear. *See United States v. Brown*, 540 F.2d 364, 373 n.6 (8th Cir. 1976); *Nick v. United States*, 122 F.2d 660 (8th Cir. 1941); *United States v. Margiotta*, 688 F.2d 108, 133-35 (2d Cir. 1982). See the discussion of extortion in *United States v. Foster*, 443 F.3d 978, 984 (8th Cir. 2006).

4. If possible, the instruction should be made to relate specifically to the charges and evidence in the case. In a case involving extortion by a police officer, an instruction similar to the following instruction was used:

> Extortion under color of official right by a law enforcement officer need not involve force or threats. If a victim reasonably feels compelled or induced to pay money to a law enforcement officer, because of that officer's wrongful use of his official position for the purpose of obtaining money, the requirement of the crime of extortion under color of official right is satisfied.

See United States v. Crowley, 504 F.2d 992, 995 (7th Cir. 1974). *See also United States v. Hathaway*, 534 F.2d 386 (1st Cir. 1976); *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976).

In "campaign contribution" cases, an instruction similar to the following language approved by the Eleventh Circuit, affirmed in *Evans v. United States*, 504 U.S. 255 (1992), may be appropriate:

> [T]he acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.
>
> However, if a public official demands or accepts money in exchange for a specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

504 U.S. at 258.

5. In a case where different theories of extortion are charged, it is appropriate to charge the jury in the disjunctive on extortion, i.e., a finding of guilt is supported by extortion under fear of economic loss or under color of official right. *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir. 1972); *United States v. Rabbitt*, 583 F.2d 1014, 1027 (8th Cir. 1978); *United States v.*

Brown, 540 F.2d 364, 377 (8th Cir. 1976). If both theories are submitted to the jury, they should be instructed that they may convict the defendant if they find unanimously and beyond a reasonable doubt that at least one of the theories was proven by the Government.

6. Although some courts have held that the jury may be instructed as a matter of law that interstate commerce has been shown if various facts were proven, this appears to be the safer instruction. *See generally* the definition of interstate and foreign commerce found in 6.18.1956J(2); *Hulahan v. United States*, 214 F.2d 441, 445, 446 (8th Cir. 1954); *United States v. Rabbitt*, 583 F.2d 1014, 1023 (8th Cir. 1978); *United States v. French*, 628 F.2d 1069, 1078 (8th Cir. 1980).

Committee Comments

The Hobbs Act is a constitutional exercise of Congress' power under the Commerce Clause. *United States v. Foster,* 443 F.3d at 982, rejecting a challenge under *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Farmer*, 73 F.3d 836, 843-44 (8th Cir. 1996).

If a public official is alleged to have extorted a campaign contribution "under color of official right," the jury must be instructed that receipt of such contribution violates section 1951 "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *McCormick v. United States*, 500 U.S. 257 (1991). A subsequent case, *Evans v. United States*, 504 U.S. 255 (1992), resolved the issue as to whether an affirmative act of inducement by a public official is required to support a conviction of extortion under color of official right by affirming a conviction based on an official's passive acceptance of a payment known to have been offered in exchange for a specific requested exercise of official power. *Evans* also held that the *quid pro quo* requirement of *McCormick* is met when "the public official receives payment [a campaign contribution] in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense." 504 U.S. at 256, 268-69.

Extortion under "color of official right" does not require compulsion or duress. Wrongful use of office to induce payments to or at the direction of a public official will make out an extortion. Because threats or coercion are not required, the facts of some cases will be fairly similar to the facts of a bribery case, in that the "victim" will be buying the influence of a public official, often with very subtle inducements on the part of the public official to make payoffs to him. *See United States v. Brown*, 540 F.2d 364 (8th Cir. 1976); *United States v. French*, 628 F.2d 1069 (8th Cir. 1980).

The term "property" has been broadly defined under the Hobbs Act, and includes not only tangible property, but includes "any valuable right considered as a source of wealth." *See United States v. Provenzano*, 334 F.2d 678 (3d Cir. 1964).

Fear of economic injury has also been held to include the fear of lost business opportunities, and the fear of loss of one's ability to compete in the marketplace. *United States v. Hathaway*, 534 F.2d 386, 393-94 (1st Cir. 1976).

It is not necessary that the Government prove that a defendant himself benefitted from any extortion. Extortion is proven if the payments are made to a third party, or entity, at the direction of the defendant. *United States v. Provenzano*; *United States v. Green*, 350 U.S. 415, 420 (1956).

Further, only a minimal effect on interstate commerce is required to establish jurisdiction under the Hobbs Act because Congress intended to exercise the full scope of its power under the Interstate Commerce Clause of the United States Constitution. *United States v. Dobbs*, 449 F.3d 904, 912 (8th Cir. 2006) (robbery of stand-alone, "mom and pop" convenience store was a Hobbs Act violation, even though the store had only a de minimus connection to interstate commerce); *United States v. Farmer*, 73 F.3d at 843 (robbery of a single HyVee grocery store sufficient to support conviction where store was part of a national chain which received goods shipped in interstate commerce); *United States v. Quigley*, 53 F.3d 909 (8th Cir. 1995) (robbery of two individuals of a pouch of chewing tobacco and eighty cents while on way to purchase beer from store which received goods in interstate commerce not sufficient to support conviction). However, the effect on interstate commerce must be actual and not merely probable or potential, *United States v. Williams*, 308 F.3d. 833 (8th Cir. 2002), unless the case involves prosecution of an attempt crime. In such a case, a probable or potential impact is sufficient. *United States v. Foster*, 443 F.3d at 984.

If attempted extortion is charged, the instruction should be modified accordingly. Furthermore, in attempted extortion, the focus is on the defendant's intent, rather than on the state of mind of the victim. *United States v. Smith*, 631 F.2d at 104. An attempt to arouse fear is sufficient. *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977). The actual generation of fear is unnecessary. *United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972). "'The offense of attempted extortion is complete when the defendant has attempted to induce his victim to part with property.'" *United States v. Foster*, 443 F.3d at 985 (quoting *United States v. Frazier*, 560 F.2d at 887).

There is no requirement that the public official have the actual power to perform an act which is the basis of an extortionate scheme. As long as the victim holds a reasonable belief that the defendant's office included the apparent authority to do the acts which a defendant claims he can carry out, an extortion is proven. In cases involving apparent authority, the jury should be instructed on this issue in terms of the specific case involved. An example is as follows:

> You must find that Leo Victim reasonably believed that Senator Doe's official powers included the securing of leases for the State of Missouri. You need not find, however, that Senator Doe actually held this power.

See United States v. Mazzei, 521 F.2d 639, 643 n.2 (3d Cir. 1975); *United States v. Brown*, 540 F.2d 364, 372 (8th Cir. 1976). In *United States v. Loftus*, 992 F.2d 793, 796 (8th Cir. 1993), the court of appeals stated, "[a]ctual authority over the end result - rezoning - is not controlling if Loftus, through his official position, had influence and authority over a means to that end."

4.18.1951 **Interference with Commerce by Robbery or Extortion (Hobbs Act), 18 U.S.C. § 1951**

[Updated: 8/2/17]

[Defendant] is accused of obstructing, delaying or affecting commerce by committing [robbery][extortion]. It is against federal law to engage in such conduct. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] knowingly and willfully obtained property from [person or corporation robbed/extorted];

Second, that [defendant] did so by means of [extortion][robbery];

Third, that the [extortion] [robbery] affected interstate commerce.

The term "interstate commerce" means commerce between any point in a state and any point outside the state. It is only necessary that the government prove beyond a reasonable doubt that there is a realistic probability that the acts committed by [defendant] as charged in the indictment had some slight or minimal effect on interstate commerce. It is not necessary for you to find that [defendant] knew or intended that [his/her] actions would affect interstate commerce.

["Extortion" means obtaining property from another with his or her consent, but where that consent is obtained [by the wrongful use of actual or threatened force, violence or fear] [under color of official right.]] [Defendant] must know that he was not legally entitled to the property.

[To prove extortion by fear, the government must show: (1) that the victim believed that economic loss would result from failing to comply with [defendant's] demands and (2) that the circumstances made the fear reasonable. Economic loss may include the possibility of lost business opportunities. But the loss feared must be a particular economic loss, not merely the loss of a potential benefit.]

[To prove extortion under color of official right, the government must show that [defendant public official] obtained property to which [he/she] was not entitled and knew at the time that [he/she] was obtaining it in return for official acts. The government need not show that [defendant public official] initiated the transfer, nor does the government need to show that [defendant public official] actually had the ultimate authority to achieve the desired result. [If the property was obtained as a political or campaign contribution, the government must prove that the payment or other transfer was made in return for an explicit promise or understanding by [defendant] to perform or not to perform an official act. It is not necessary for the government to show that the official action or inaction actually occurred.]]

["Robbery" means unlawfully taking or obtaining personal property from another, against his or her will, by means of actual or threatened force, or violence, or fear of injury to his or her person or property, or property in his or her custody or possession, or the person or property of a relative or member of his family or of anyone in his or her company at the time of the taking or obtaining.]

APPENDIX F

To act "willfully" means to act voluntarily and intelligently and with the specific intent that the underlying crime be committed—that is to say, with bad purpose, either to disobey or disregard the law—not to act by ignorance, accident or mistake.

Comment

(1) The elements of the Hobbs Act offense are taken from the statute and from United States v. Cruzado-Laureano, 404 F.3d 470, 480 (1st Cir. 2005).

(2) There is no freestanding physical violence offense in the Hobbs Act. Rather, the Hobbs Act "forbid[s] acts or threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion (and related attempts or conspiracies)." Scheidler v. NOW, Inc., 547 U.S. 9, 23 (2006). The First Circuit has acknowledged a circuit split over whether the person charged with extortion must have received at least an indirect benefit, United States v. McDonough, 727 F.3d 143, 161 (1st Cir. 2013), but has declined to resolve the issue. In United States v. Green, 350 U.S. 415, 420 (1956), the Supreme Court said that extortion "in no way depends on having a direct benefit conferred on the person who obtains the property."

(3) In order to establish extortion or attempted extortion, the government must prove, by direct or circumstantial evidence, that the defendant knew that he was not legally entitled to the property that he either received or attempted to receive. United States v. DiDonna, 866 F.3d 40, 47 (1st Cir. 2017).

For extortion, "[t]he property extorted must . . . be *transferable*—that is, capable of passing from one person to another." Sekhar v. United States, 570 U.S. ___, 2013 WL 3196929, at *3 (2013) (emphasis original) (holding that attempting to compel a person to recommend that his employer approve an investment does not qualify).

(4) The color-of-official-right extortion definition is based on United States v. Rivera-Rangel, 396 F.3d 476, 484 (1st Cir. 2005) and Evans v. United States, 504 U.S. 255, 268 (1992). See also United States v. Cruz-Arroyo, 461 F.3d 69, 73-74 (1st Cir. 2006) (citations omitted):

> To establish guilt for extortion under color of official right, the prosecution must show only that the defendant, a public official, has received an emolument that he was not entitled to receive, with knowledge that the emolument was tendered in exchange for some official act. The government is not required to prove any affirmative act of inducement on the part of the corrupt official.

Accord United States v. Turner, 684 F.3d 244, 253-54 (1st Cir. 2012) (assuming without deciding that a *quid pro quo* is a requirement in non-campaign contribution cases); United States v. McDonough, 2013 WL 4459062 at *9 (quid pro quo not an element, but some courts require it).

A defendant may be convicted of conspiracy to commit Hobbs Act extortion, based on proof that he entered into a conspiracy that had as its objective the obtaining of property from another conspirator with his consent and under color of official right. Ocasio v. United States, 136 S. Ct. 1423 (2016). In Ocasio, Baltimore police officer Ocasio, and other police officers who

reported to the scene of automobile accidents, accepted payments from the owners of a local automobile repair shop, in exchange for persuading the owners of damaged cars to have their vehicles towed to the repair shop. Ocasio contended that the repair shop owners could not be members of a conspiracy that had as it aim obtaining money from the shop owners with their consent and under color of official right; Hobbs Act extortion required obtaining money "from another," and the shop owners did not have the objective of taking money from themselves. The Court disagreed and concluded that the shop owners had a criminal objective: that the petitioner and other police officers would obtain money from another. Under basic principles of conspiracy law, the government has no obligation, in a prosecution for Hobbs Act conspiracy to extort, to demonstrate that each conspirator agreed personally to commit, or even was capable of committing, the substantive offense of Hobbs Act extortion. Instead, it is sufficient to prove that the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it. In Ocasio, the shop owners, because they were not public officials, could not obtain property from another "under color of official right," but the police officers could do so, by obtaining money from the shop owners with their consent. The shop owners could conspire to commit Hobbs Act extortion by agreeing to help Ocasio and other police officers commit the substantive offense.

The political contribution instruction is based on McCormick v. United States, 500 U.S. 257, 273 (1991) and Evans, 504 U.S. at 268. "[W]here the payment takes the form of a campaign contribution, the government must prove a 'specific *quid pro quo*' between the public official and the payor." United States v. D'Amico, 496 F.3d 95, 101 (1st Cir. 2007) (citations omitted), vacated on other grounds, 552 U.S. 1173. The statute's treatment of extortion under color of official right "reaches anyone who actually exercises official powers, regardless of whether those powers were conferred by election, appointment, or some other method." Rivera-Rangel, 396 F.3d at 484 n.8 (quoting United States v. Freeman, 6 F.3d 586, 593 (9th Cir. 1993)).

(5) The "fear" element of extortion can include fear of economic loss. United States v. Sturm, 870 F.2d 769, 771-72 (1st Cir. 1989). "[T]he loss feared must be a particular economic loss, not merely the loss of a potential benefit." Rivera-Rangel, 396 F.3d at 483 (citation and internal quotations omitted). It is not necessary that there be an explicit threat; "it is enough if the victim understood the defendant's conduct as an implied threat." Id. at 484 n.7 (citation and internal quotations omitted).

"To establish extortion through fear of economic loss, the government must show that the victim believed that economic loss would result from his . . . failure to comply with the alleged extortionist's terms, and that the circumstances . . . rendered that fear reasonable." Rivera-Rangel, 396 F.3d at 483 (citation and internal quotations omitted); see also United States v. Capo, 817 F.2d 947, 951 (2d Cir. 1987) (quoted in Rivera-Rangel, 396 F.3d at 483) ("[T]he proof need establish that the victim *reasonably* believed: first, that the defendant had the power to harm the victim, and second, that the defendant would exploit that power to the victim's detriment."); accord Cruz-Arroyo, 461 F.3d at 74-75.

If the extortion is based on economic fear, the term "wrongful" must be defined to require that the government prove that the defendant did not have a claim of right to the property and that the defendant knew that he or she was not legally entitled to the property obtained. Sturm, 870 F.2d at 772-73, 774-75.

(6) The definition of "interstate commerce" should be modified according to the facts of the case within the range provided by 18 U.S.C. § 1951(b)(3). In United States v. McKenna, 889 F.2d 1168, 1171 (1st Cir. 1989), the First Circuit described the commerce element as a mixed question of law and fact. First, "[t]he district court must determine if, as a matter of law, interstate commerce could be affected. If the court determines it could be, the question is turned over to the jury to determine if, as a matter of fact, interstate commerce was affected as the district court charged it could have been." Id. Other circuits have stated explicitly that it is unnecessary to show that the defendant intended to affect commerce. See United States v. Cerilli, 603 F.2d 415, 424 (3d Cir. 1979) (the defendant does not need to intend to affect interstate commerce); United States v. Gupton, 495 F.2d 550, 551 (5th Cir. 1974) ("[T]he government need not show that the accused set out with the specific conscious purpose or desire to obstruct commerce." (citation omitted)). The term can include illegal commerce, such as drug dealing. United States v. Guerrier, 669 F.3d 1, 7-8 (1st Cir. 2011).

(7) To meet the jurisdictional requirement, "the government need show only that the conduct created a 'realistic probability' of a minimal effect on interstate commerce." United States v. Brennick, 405 F.3d 96, 100 (1st Cir. 2005); accord Turner, 684 F.3d at 259-60. See also Rivera-Rangel, 396 F.3d at 482; United States v. Capozzi, 347 F.3d 327, 335 (1st Cir. 2003). "The Hobbs Act's scope extends to the limit of Congress' Commerce Clause authority. Because of the statute's broad sweep, to prove a Hobbs Act violation, the government must show only that the [defendant's] extortionate conduct created a realistic probability of a *de minimis* effect on interstate commerce." Capozzi, 347 F.3d at 335 (citations and internal quotations omitted). "The commerce element may be satisfied where threatened or potential effects on commerce never materialize because extortionate demands are met or where the extortion has a beneficial effect on interstate commerce." United States v. Tormos-Vega, 959 F.2d 1103, 1113 (1st Cir. 1992) (citation and internal quotations omitted).

The First Circuit has described the required "*de minimis* effect" as "some slight impact on commerce," see United States v. Devin, 918 F.2d 280, 293 (1st Cir. 1990), and upheld an instruction that the jury must find the activity to have had a "minimal, slight or subtle effect" on interstate commerce, United States v. Butt, 955 F.2d 77, 80 n.2 (1st Cir. 1992). This standard survives the decision in United States v. Lopez, 514 U.S. 549 (1995). Capozzi, 347 F.3d at 335-36; United States v. Turner, 501 F.3d 59, 69-70 (1st Cir. 2007). Moreover, "[t]he government establishes a cognizable effect on interstate commerce if it shows that the extortionate conduct depleted the assets of a business engaged in interstate commerce." Cruz-Arroyo, 461 F.3d at 75. For a lengthy discussion of what suffices, see United States v. Rivera-Rivera, 555 F.3d 277, 286-89 (1st Cir. 2009). "When a business is the victim of a robbery, an effect on interstate commerce may generally be demonstrated by showing '(1) the business engaged in interstate commerce, and (2) that the robbery either depleted the assets of the business . . . or resulted in the business's temporary or permanent closure.'" United States v. Cabrera-Rivera, 583 F.3d 26, 32 (1st Cir. 2009) (citations omitted). See also United States v. Jiménez-Torres, 435 F.3d 3, 7-9 (1st Cir. 2006) (sufficient effect on interstate commerce from robbery and murder at house of gas station owner where station receipts were stolen and station closed permanently).

Where the victim is an individual, the government has a heightened burden of showing an effect on commerce "[b]ecause criminal acts that are directed at individuals rather than at businesses normally have a less substantial effect on interstate commerce." United States v. McCormack, 371 F.3d 22, 28 (1st Cir. 2004), vacated on other grounds, 543 U.S. 1098 (2005).

(8) To obtain property "entail[s] both a deprivation and acquisition of property." Scheidler, 537 U.S. at 404-05 (citing United States v. Enmons, 410 U.S. 396, 406 n.16 (1973)). Thus, depriving someone of a property right of exclusive control of a business asset, as by causing an abortion clinic to shut down, was insufficient where the person "did not acquire any such property." Id.

(9) Section 1951 includes prohibitions on conspiracy and attempt. A Hobbs Act conspiracy does not require an overt act. United States v. Franco-Santiago, 681 F.3d 1, 9 n.14 (1st Cir. 2012). Tormos-Vega, 959 F.2d at 1115. "The cases hold that attempts are lesser-included offenses of completed Hobbs Act violations." D'Amico, 496 F.3d at 99.