No. 18-

IN THE

Supreme Court of the United States

MARK N. KIRSCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether pressuring a construction contractor to enter into a union contract meets the definition of generic extortion such that a racketeering act premised on a State extortion statute for that conduct can serve as a racketeering conspiracy predicate pursuant to this Court's decisions in *Scheidler v. National Organization for Women Inc.*, 537 U.S. 393 (2003), and *Sekhar v. United States*, 570 U.S. 729 (2013), holding that the object of a generic extortion racketeering predicate under State law must be transferable and obtainable property, and that mere coercion can not serve as a racketeering predicate.

TABLE OF CONTENTS

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

Page

Cases

Statutes and Other Authorities

Cited Authorities

Petitioner Mark N. Kirsch respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the Second Circuit Court of Appeals is reported at 903 F.3d 213. Underlying decisions of the District Court are unreported, but appear at 2015 WL 1472122 and Pet. App. 43a, and 2013 WL 6196292 and Pet. App. 68a.

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 18 U.S.C. §3231 and entered judgment on September 16, 2016. The Second Circuit had jurisdiction pursuant to 28 U.S.C.§1291 and entered judgment on September 12, 2018. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant statutory provisions are codified at 18 U.S.C. §§1961(1) and 1962(c) and (d), as well as New York Penal Law §§ 155.40(2) and 135.60.

Title 18 U.S.C. §1961(1) provides, in relevant part,

As used in this chapter--

> (1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing

> in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; . . .

Title 18 U.S.C. §1962(c) and (d) provide, in relevant part,

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

New York Penal Law §155.40(2) provides, in relevant part,

A person is guilty of grand larceny in the second degree when he steals property and when: . . .

> 2. The property, regardless of its nature and value, is obtained by extortion committed by instilling in the victim a fear that the actor or another person will (a) cause physical injury to some person in the future, or (b) cause damage

> to property, or (c) use or abuse his position as a public servant by engaging in conduct within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

Grand larceny in the second degree is a class C felony.

New York Penal Law §135.60 provides, in relevant part,

> A person is guilty of coercion in the third degree when he or she compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he or she has a legal right to engage, or compels or induces a person to join a group, organization or criminal enterprise which such latter person has a right to abstain from joining, by means of instilling in him or her a fear that, if the demand is not complied with, the actor or another will:
>
> 1. Cause physical injury to a person; or
>
> 2. Cause damage to property; or
>
> 3. Engage in other conduct constituting a crime; or . . .
>
> 6. Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed coercive when the act or

> omission compelled is for the benefit of the group in whose interest the actor purports to act; or . . .

Coercion in the third degree is a class A misdemeanor.

STATEMENT OF THE CASE

Petitioner stands convicted of racketeering conspiracy based on two predicate acts of extortion under the New York Penal Law. Those predicates charge that Petitioner, as president and business manager of the International Union of Operating Engineers – Local 17 ("Local 17"), attempted to force two contractors to sign agreements with Local 17, under which Local 17 members would earn wages and benefits for their work. Specifically, the charges alleged that Petitioner sought to obtain "property of construction contractors consisting of wages and benefits to be paid pursuant to labor contracts with Local 17 at construction projects in Western New York." Petitioner's conviction is based on evidence that he demanded the two contractors sign with Local 17, while other Local 17 members picketed the contractors and engaged in threats, equipment tampering and vandalism on those picket lines.

In an Indictment returned in December 2007, and subsequently in a Second Superseding Indictment in January 2012, Petitioner was charged with racketeering conspiracy, conspiracy to commit extortion under the Hobbs Act, and multiple attempted substantive extortion charges under the Hobbs Act. Count 1, the racketeering conspiracy charge, alleged six racketeering acts against Petitioner. Certain of those racketeering acts were predicated on New York Penal Law extortion, and others

contained sub-predicates alleging New York Penal Law extortion and Hobbs Act extortion alternatively. Those predicates and sub-predicates presented four distinct property allegations as the object or goal of the extortion attempt.

Petitioner moved to dismiss the charges pursuant to *United States v. Enmons*, 410 U.S. 396, on the ground the conduct alleged was undertaken in pursuit of legitimate labor objectives. The Magistrate Judge recommended that the motion be granted, but the District Court denied the motion. Following this Court's decision in *Sekhar v. United States*, 570 U.S. 729, Petitioner again moved to dismiss the charges. The District Court granted the motion in part, striking two of the four property allegations from the Indictment as not alleging transferrable, obtainable property. At trial, Petitioner was found guilty of racketeering conspiracy, with a finding of just two racketeering acts (count 1), Hobbs Act conspiracy (count 2), and two counts of attempted extortion under the Hobbs Act (counts 5 and 6), and acquitted of the remaining charges.

After trial, the District Court granted Petitioner's motion for judgment of acquittal in part and vacated his convictions for attempted Hobbs Act extortion (counts 5 and 6) as well as the Hobbs Act sub-predicate racketeering acts underlying his racketeering conspiracy conviction (count 1).

The District Court sentenced Petitioner to 36 months' imprisonment on count 1, and 36 months' imprisonment on count 2, to run concurrently. Petitioner's motion for continuation of release during the pendency of his appeal was granted.

Petitioner appealed the two remaining convictions – count 1, racketeering conspiracy resting on just two sub-predicate racketeering acts under New York Penal Law extortion, and count 2, Hobbs Act conspiracy. The Second Circuit Court of Appeals agreed with Petitioner's argument that there was insufficient evidence at trial in support of count 2 and found that judgment of acquittal must be entered as to that count.

Petitioner also argued, in relevant part, that judgment of acquittal should have been granted as to count 1 because the property at issue in that charge is not transferrable or obtainable under *Sekhar v. United States*, and thus the count 1 racketeering acts under the New York Penal Law did not satisfy the requisite generic definition of extortion under *Wilkie v. Robbins*, 551 U.S. 537 and *Scheidler v. Nat'l Org. For Women, Inc.*, 537 U.S. 393. The Court of Appeals rejected that argument and remanded the case to the District Court for re-sentencing under Count 1.

Thus, the sole remaining count for which Petitioner stands convicted and faces re-sentencing is count 1, racketeering conspiracy premised on just two racketeering acts, each a charge of New York Penal Law extortion alleging that Petitioner sought to obtain "property of construction contractors consisting of wages and benefits *to be paid pursuant to labor contracts* with Local 17 at construction projects in Western New York."

The remaining racketeering acts are designated 4B and 5B. Racketeering act 4B involves the alleged attempted extortion of environmental contractor Ontario Specialty Contracting ("OSC"). As related by the Court of Appeals, the evidence at trial was that Petitioner met with

an OSC representative for lunch and demanded that OSC use Local 17 workers for an upcoming project, and at a later meeting threatened to stop the project. OSC refused. During subsequent picketing of OSC at that project site, picketers blocked trucks from entering and exiting the site, damaged property, threatened OSC representatives, pushed over a gate injuring a guard, and threw coffee over a gate hitting an OSC employee. Racketeering Act 5B involves the alleged attempted extortion of environmental remediation contractor Earth Tech. The trial evidence was that Earth Tech refused to sign an agreement with Local 17 to hire union workers for a certain project. During subsequent picketing of that work site, picketers blocked entrances, damaged truck tires, threatened an Earth Tech project manager and surrounded his car preventing him from leaving the site for an hour.

The Court of Appeals found that the property at issue, "property of construction contractors consisting of wages and benefits *to be paid pursuant to labor contracts* with Local 17 at construction projects in Western New York" is transferrable within the rule established in *Sekhar v. United States*. Petitioner argues that a contractor's decision about whether to sign a union contract is not transferrable property.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly been called upon to rein in both federal prosecutors and the lower courts who have respectively pursued and allowed the expansion of criminal liability for extortion in federal courts beyond the scope of the racketeering and/or extortion statutes. See, *United States v. Enmons,* 410 U.S. 396; *Scheidler v. Nat'l*

Org. For Women, Inc., 537 U.S. 393; and *Sekhar v. United States*, 570 U.S. 729. In the most recent of these decisions, this Court limited the scope of extortion liability under the Hobbs Act to conduct aimed at obtaining transferrable property, distinguishing extortion from coercion. *Sekhar, supra.*

Unless corrected, the decision of the Court of Appeals in the present case threatens to undermine this distinction between extortion and coercion in prosecutions for racketeering conspiracy premised on State Law extortion predicates by allowing prosecutors to draft property allegations that would extend the term property to coerced decisions. The Court of Appeals erred in finding the property alleged here, the "property of construction contractors consisting of wages and benefits *to be paid pursuant to labor contracts* with Local 17 at construction projects in Western New York," to be transferrable. The allegations and trial proof showed that what Petitioner was accused of doing was attempted coercion, endeavoring to force the contractors' decisions about entering into union contracts. While wages and benefits would ultimately be earned by union workers if the contractors decided to sign with the union, that decision is not transferrable property. Holding otherwise invites prosecutors to avoid the holding in *Sekhar* by drafting references to attenuated future economic benefits into the property allegations of indictments, and imposing federal criminal liability for racketeering conspiracy and extortion for what is actually coercion.

ARGUMENT

Petitioner was accused in count 1, racketeering acts 4B and 5B, with attempting to force two contractors to sign with Local 17. Based on that conduct, he was charged with racketeering conspiracy predicated on New York Penal Law extortion. The Court of Appeals erred in finding that the property at issue in those charges was "transferable," and therefore that those allegations met the definition of generic extortion. Because the contractors' decisions are not transferrable property, this Court should find that the racketeering acts 4B and 5B are merely coercion and not generic extortion, and that judgment of acquittal should be entered on count 1.

Under this Court's jurisprudence, racketeering acts based on State extortion statutes must meet a generic definition of extortion. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 123 S.Ct. 1057 (2003), this Court considered racketeering predicates charging extortion under state law. "The jury also found that petitioners had committed extortion under various state-law extortion statutes, a separate RICO predicate offense." 537 U.S. at 409, 123 S.Ct. at 1068. The Court held the racketeering count could not rest independently on those state law extortion allegations for the same reason that the Hobbs Act allegations were invalid, the absence of obtainable, transferable property. In order for the state law extortion allegations to serve as racketeering predicates, the Court held the RICO statute requires that they exhibit the same "generic" extortion features as are required for Hobbs Act liability:

> [F]or a state offense to be an "act or threat involving . . . extortion . . . which is chargeable under state law," as RICO requires, see 18 U.S.C. §1961(1), the conduct must be capable of being *generically classified* as extortionate.

Id. (italics added). Such generic classification includes an "obtaining" as defined for the Hobbs Act. "[S]uch generic extortion is defined as obtaining something of value from another with his consent by the wrongful use of force, fear or threats." *Id.* (internal citations and quotations omitted). Therefore, in order to serve as a racketeering predicate, a state law offense must exhibit the same element of obtaining as defined under the Hobbs Act:

> Accordingly, where as here the Model Penal Code and a majority of States recognize the crime of extortion as requiring a party to obtain or seek to obtain property, as the Hobbs Act requires, the state extortion offense for purposes of RICO must have a similar requirement.

537 U.S. at 4010, 123 S.Ct. at 1069. Thus, the Court found that the state law extortion predicates in *Scheidler* were fatally flawed for the same reason as the Hobbs Act allegations, the property at issue was not transferrable; "Because petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed." *Id.*

In 2013, while the prosecution of Petitioner was ongoing, this Court again addressed the requirement

of transferability for extortion liability under the Hobbs Act in *Sekhar, supra.* At issue in *Sekhar* was once again what it means to "obtain" or attempt to obtain property for extortion liability. Specifically, the issue before the Court was "whether attempting to compel a person to recommend that his employer approve an investment constitutes 'the obtaining of property from another' under" the Hobbs Act. *Sekhar*, 570 U.S. at 730, 133 S.Ct. at 2723. The analysis in *Sekhar* focused on the term "obtaining" which had also been central to its previous decision in *Scheidler, supra.* As in *Scheidler*, the Court in *Sekhar* found that the applicable principle was that a Hobbs Act defendant "must pursue something of value from the victim that can be exercised, transferred, or sold." 570 U.S. at 736, 133 S.Ct. at 2726. The Court found that a valid charge under the Hobbs Act must allege that the property the defendants sought to obtain must be "*transferrable* - that is, capable of passing from one person to another." *Sekhar*, 570 U.S. at 734, 133 S.Ct. at 2725. Absent that element, the conduct amounts to coercion rather than extortion.

The *Sekhar* Court noted that Congress chose a term in drafting the Hobbs Act, "extortion" which had a well established meaning under the common law. "Extortion required the obtaining of items of value, typically cash, from the victim." 570 U.S. at 733, 133 S.Ct. at 2724. Extortion was, moreover, always distinguished from mere coercion and did not encompass, for example, "the deprivation of free liberty to sell [one's] wares in the market according to law." 570 U.S. at 733, 133 S.Ct. at 2724-25, quoting *King v. Burdett*, 1 Ld. Raym. 149, 91 Eng. Rep. 996 (K. B. 1696)(dictum)(internal quotations omitted). Such deprivation was, instead, treated as coercion.

Turning to the text and genesis of the Hobbs Act itself, the Court noted that "Congress borrowed, nearly verbatim, the New York statute's definition of extortion." *Sekhar*, 570 U.S. at 734-35, 133 S.Ct. at 2726. Congress chose not to include the distinct New York crime of coercion in the Hobbs Act. The Court found that this omission of coercion must have been deliberate, indicating Congress' intention not to enact or include a federal crime of coercion in the Hobbs Act. *Id.* Significantly, the Court recognized that the New York courts "had consistently held that the sort of *interference* with rights that occurred here was coercion" as opposed to extortion. *Id.* In support of that conclusion, the Court cited a New York case, *People v. Scotti*, 266 N.Y. 480, 195 N.E. 162 (App. Div. 1934), the relevant facts of which were apparently identical to the charges against Kirsch here, "(compelling victim to enter into agreement with union)." *Sekhar*, 570 U.S. at 735, 133 S.Ct. at 2725-2726. Therefore, the Court held that the New York law which Congress adopted nearly verbatim as the Hobbs Act treated forcing an employer to agree to a union contract as coercion, and not extortion.

The New York Penal Law racketeering acts of count 1 should also be analyzed under the rule of lenity. This Court has repeatedly emphasized that the rule of lenity has particular application in this context. *Scheidler*, 537 U.S. at 408, 123 S.Ct. at 1067-68, quoting *United States v. Enmons*, 410 U.S. 396, 411; and see *Sekhar*, 570 U.S. at 743, 133 S.Ct. at 2730. (Alito, J. concurring)."When there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Scheidler*, 537 U.S. at 409, 123 S.Ct. at 1068. Applying that rule directly to the Hobbs Act this Court concluded

"[i]f the distinction between extortion and coercion, which we find controls these cases, is to be abandoned, such a significant expansion of the law's coverage must come from Congress, and not from the courts." *Id.*

The distinction between extortion and coercion the *Scheidler* Court was referring to was the "distinction between extortion and coercion clearly drawn in New York law prior to 1946" when the Hobbs Act was drafted based on that New York law. *Scheidler*, 537 U.S. at 406, 123 S.Ct. at 1066. There remains, moreover, a distinction between extortion and coercion in New York Penal Law. Under the rule of lenity, the New York Penal Law racketeering acts must be interpreted as charging coercion, not extortion. Interestingly, the defendant in *Sekhar* was first charged in New York State court under a complaint alleging extortion under the New York Penal Law. Subsequently, a Grand Jury returned an indictment charging him with coercion, and not with extortion. *Brief for Petitioner* at 8-11, *Sekhar v. United States*, 570 U.S. 729, 133 S.Ct. 2720 (2003)(No. 12-357). A coercion offense under New York law, cannot serve as a predicate racketeering act for federal RICO liability, however, as this misdemeanor offense is not contained within the definition of racketeering activity in 18 U.S.C. §1961(1).

In this case, both of the racketeering acts at issue contained the same property description – "property of construction contractors consisting of wages and benefits *to be paid pursuant to labor contracts* with Local 17 at construction projects in Western New York." (emphasis added) The Court of Appeals concluded that "[Petitioner] sought to extort property that Local 17 members could clearly 'obtain': wages and benefits from contractors.

Wages and benefits are 'capable of passing from one person to another,' – in this case from the employer to the employee – and are therefore transferrable." *United States v. Kirsch*, 903 F.3d 213, 227 (2d Cir. 2018). The "wages and benefits" the Court refers to however, do not exist. Nor is there an actual employer or employee from whom such wages and benefits might actually transfer. This is because the Court of Appeals ignores the actual property allegation, which refers not to any actual wages and benefits, but instead to wages and benefits "to be paid pursuant to labor contracts with Local 17." Stated otherwise, if the contractor signed an agreement with Local 17, and then hired Local 17 members to work on the project, and the members then worked for the contractor and thus earned wages and benefits, then there would be property transferred from the contractor to those members. What the Indictment actually alleges then, is that Petitioner sought to coerce the contractors to enter into contracts with Local 17.

That economic benefits might later flow from coercing a decision, assuming a series of further contingencies obtains, does not convert an allegation into transferrable property. As was noted in the concurring opinion in *Sekhar*, ". . . the term 'property' does not reach everything that a person may hold dear: nor does it extend to everything that might in some indirect way portend the possibility of future economic gain." 570 U.S. at 740, 133 S.Ct. at 2728. The property allegations here make clear that Petitioner was charged with and convicted of attempting to coerce a decision, and not of attempting to obtain property. The "wages and benefits" are merely contingent and prospective; they might eventually exist in the future as they are "to be paid pursuant to contracts with Local 17" if the contractors enter into such contracts.

Consistent with the reasoning of the Court of Appeals here, the general counsel's recommendation in *Sekhar* could be transformed into transferrable property if the prosecutor simply alleged that the defendant in that case attempted to obtain "fees to be paid to the funds pursuant to a commitment resulting from the general counsel's recommendation."

Under *both Scheidler* and *Sekhar*, the contractors' decisions whether to enter into union contracts, are not obtainable, transferrable property. Therefore, the property allegations in racketeering acts 4B and 5B of Count 1 do not meet the definition of generic extortion and judgment of acquittal should be granted as to Petitioner's conviction under count 1.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Buffalo, New York
December 11, 2018

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED SEPTEMBER 12, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 16-3329-cr

UNITED STATES OF AMERICA,

Appellee,

v.

MARK N. KIRSCH,

Defendant-Appellant,

CARL A. LARSON, MICHAEL J. CAGGIANO, JEFFREY C. LENNON, GERALD H. FRANZ, JR., JAMES L. MINTER, III, JEFFREY A. PETERSON, KENNETH EDBAUER, GEORGE DEWALD, MICHAEL J. EDDY, THOMAS FREEDENBERG, GERALD E. BOVE,

Defendants.[*]

Appeal from the United States District Court for the Western District of New York. No. 07-cr-00304 — William M. Skretny, *Judge*.

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* The Clerk of Court is directed to amend the caption as set forth above.

Appendix A

September 25, 2017, Argued
September 12, 2018, Decided

Before: LOHIER and DRONEY, *Circuit Judges*, and RAKOFF, *District Judge*.**.

DRONEY, *Circuit Judge*:

In 2016, Appellant Mark N. Kirsch was convicted of Hobbs Act extortion conspiracy and racketeering conspiracy based on predicate acts of New York Penal Law extortion violations. The jury concluded that Kirsch, the president of the local chapter of a labor union, used threats of violence and destruction of property in an attempt to force contractors to hire members of his union.

On appeal, Kirsch argues that *United States v. Enmons*, 410 U.S. 396, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973), shields him from Hobbs Act liability, requiring that his Hobbs Act conspiracy conviction be reversed. In *Enmons*, the Supreme Court held that a union official could not be convicted of Hobbs Act extortion if the official's conduct was undertaken in pursuit of "legitimate union objectives." *Id.* at 400. With respect to the racketeering conspiracy conviction, Kirsch contends that an *Enmons*-like exception exists under New York law that shields him from New York Penal Law extortion liability, also requiring the reversal of that count of conviction. He also maintains that (1) the property he was charged with extorting—wages and benefits for union members—was

** Judge Jed. S. Rakoff, United States District Court for the Southern District of New York, sitting by designation.

not "transferable," as required by *Sekhar v. United States*, 570 U.S. 729, 133 S. Ct. 2720, 186 L. Ed. 2d 794 (2013); (2) the Government presented insufficient evidence of his involvement in the charged Hobbs Act conspiracy; and (3) the district court's instructions regarding the required mental state for threats for the extortion charges were incorrect.

We hold that (1) under New York Penal Law, there is no *Enmons*-like exception for extortion committed in pursuit of a legitimate labor objective; (2) the property Kirsch was convicted of extorting was "transferable" as required by *Sekhar*; (3) the district court's instructions with respect to extortion under the New York Penal Law were correct; but (4) the Government presented insufficient evidence of Kirsch's involvement in the charged Hobbs Act conspiracy. Because we hold that the government presented insufficient evidence to support the Hobbs Act conviction, we need not reach Kirsch's argument that *Enmons* shields him from Hobbs Act liability. As a result, Kirsch's conviction for racketeering conspiracy is affirmed, and his conviction for Hobbs Act extortion conspiracy is reversed.

BACKGROUND

Kirsch was the president and business manager of the International Union of Operating Engineers — Local 17 ("Local 17") from 1997 to 2008. Local 17 operated in the Buffalo, New York area. At trial, the government presented evidence that Kirsch instructed Local 17 members to "turn or burn" contractors who did not employ

them, meaning that non-union contractors would have to hire Local 17 members ("turn") or the union would obstruct their work ("burn"). Union members, at the direction of Kirsch, picketed and blocked construction sites, threatened construction managers, tampered with equipment, and destroyed property.

Kirsch was charged with multiple counts of unlawful conduct with respect to numerous contractors. However, after the jury's verdict and his motion for judgment of acquittal was granted in part, Kirsch remains convicted only of Racketeering Conspiracy (18 U.S.C. § 1962(d)) under Count 1 for his role in attempting to extort two contractors—Ontario Specialty Contracting ("OSC") and Earth Tech—and Hobbs Act extortion conspiracy (18 U.S.C. § 1951(a)) under Count 2 with respect to conduct directed at a third contractor, Amstar Painting ("Amstar").[1] Accordingly, we limit our review to those two

1. The jury acquitted Kirsch of two counts, but found Kirsch guilty of racketeering conspiracy, Hobbs Act conspiracy, and two counts of attempted Hobbs Act extortion. As to the racketeering conspiracy count, the jury found that Kirsch had conspired to commit four predicate acts: (1) attempted Hobbs Act extortion ("Racketeering Act 4A") and (2) attempted extortion in violation of New York law ("Racketeering Act 4B") as to the OSC project, and (3) attempted Hobbs Act extortion ("Racketeering Act 5A") and (4) attempted extortion in violation of New York law ("Racketeering Act 5B") as to the Earth Tech project. After trial, the district court granted in part Kirsch's motion for a judgment of acquittal, acquitting Kirsch of the two counts of attempted Hobbs Act extortion. The Government did not cross-appeal the district court's dismissal of those counts. As discussed below, the district court also concluded that the related predicate acts,

counts of conviction and the circumstances involving those three contractors. We briefly summarize the evidence presented at trial as to those contractors.[2]

I. OSC

OSC is an environmental contractor that provides soil remediation services. In June 2005, OSC began a project at the waterfront in Buffalo to prepare the site for later construction. Before such construction could begin, OSC was tasked with excavating contaminated material and transporting it to a disposal facility.

Before the contract was awarded to OSC, a Local 17 representative invited the owner of OSC, Jon Williams, to have lunch with him and Kirsch. Williams testified at trial that at the meeting, Kirsch stated that if OSC did not use Local 17 members for the project, OSC would not "get the project, and if [it] did get the project, [it]'d never get it done." Gov't App. 15. Despite Kirsch's demand that OSC employ Local 17 members, OSC refused. At a meeting before the project's ceremonial ground-breaking, Kirsch again threatened to stop the project. Local 17 then began

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Racketeering Acts 4A and 5A, could not support the racketeering conspiracy count of conviction, but denied Kirsch's motion on that count because Racketeering Acts 4B and 5B were sufficient to sustain the conviction.

2. While Count 2—Hobbs Act Conspiracy—alleges conduct with respect to contractors other than those three, the Government does not specifically rely on that other conduct to support Kirsch's conviction under Count 2.

picketing the site. During the picketing, Local 17 members prevented trucks from entering or leaving the worksite, and placed metal "stars" to puncture truck tires in the entranceway of the worksite. Additionally, on multiple occasions, OSC workers discovered upon arrival in the morning that padlocks on the entrances to the site had been tampered with so that they could not be unlocked.[3]

II. EARTH TECH

In 2005, Earth Tech, also an environmental remediation company, entered into a $10 million contract to remove contaminated soil from a school in the Buffalo area. When Earth Tech refused to sign an agreement to hire Local 17 workers, Local 17 members began picketing the job site. In addition, Local 17 members blocked entrances to the site and placed metal stars and roofing nails by its entrance to damage tires of vehicles. As a result of this conduct, Earth Tech obtained an injunction to prevent further disruption at the worksite. When an Earth Tech project manager notified the picketers of the injunction, one of the Local 17 members threatened him. Later, as the project manager was leaving for the night, his car was surrounded by picketers; about an hour passed before he was permitted to leave.

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3. There was evidence of additional instances of unlawful conduct by Local 17 directed at OSC employees: picketers told an OSC employee that they knew where he lived and threatened to throw a brick at his residence; a security guard was injured when picketers pushed a gate over on top of him; and a picketer threw a cup of hot coffee over the fence of the job site, hitting an OSC employee in the face.

III. AMSTAR

In September of 2003, Amstar, a painting contractor, was involved in a bridge rehabilitation project in Buffalo. After the project had begun, a Local 17 member, Edward Perkins, asked John Lignos, the vice president of Amstar, to assign a Local 17 worker to operate a compressor at the job site. The compressor did not actually require an operator, as "operating" it simply required turning it on in the morning and turning it off at the end of the day.[4] Lignos refused to hire a Local 17 member for that purpose.

When the Amstar employees arrived on the morning after Lignos told Perkins he would not hire a Local 17 member, they discovered that the diesel fuel line in the compressor had been cut, causing diesel fuel to spill into the asphalt, resulting in substantial cleanup and repair costs.

PROCEDURAL HISTORY

On December 18, 2007, a grand jury in the United States District Court for the Western District of New York indicted five members of Local 17—not including Kirsch—on charges of Hobbs Act extortion and conspiracy. On April 1, 2008, the grand jury returned a superseding indictment, adding additional counts and additional defendants, including Kirsch. A second superseding indictment—the operative indictment at trial—was returned on January

4. Had Lignos hired a Local 17 "operator," Amstar would have had to pay him for eight hours of work.

10, 2012. It included racketeering conspiracy and Hobbs Act extortion conspiracy charges.

Kirsch and his codefendants moved to dismiss the indictment, arguing—as relevant here—that the alleged threatening and violent conduct was undertaken to achieve legitimate union objectives and thus could not constitute extortion under either the Hobbs Act or New York Penal Law. *See Enmons*, 410 U.S. at 400.[5] The district court concluded that *Enmons* did not shield Kirsch and his codefendants from liability, and denied the motion to dismiss.

Shortly after the Supreme Court decided *Sekhar*, and still before trial, Kirsch and his codefendants again moved to dismiss the indictment. Their second motion argued that the property that the indictment alleged was extorted was not "transferable," as required for Hobbs Act extortion by *Sekhar*. *See Sekhar*, 570 U.S. at 734. The district court concluded that while certain of the forms of property that the indictment alleged was extorted failed to satisfy *Sekhar*, two other forms of property alleged in the indictment satisfied *Sekhar*. The district court denied the motion to dismiss as to those two types of property.

After the motion was granted in part and denied in part, only the following two types of property remained charged in the indictment:

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5. As discussed later in the opinion, certain of the racketeering predicate acts were based on violations of the New York Penal Law.

- "Property of construction contractors consisting of wages and benefits to be paid pursuant to labor contracts with Local 17 at construction projects in Western New York."

- "Property of construction contractors consisting of wages and employee benefit contributions paid or to be paid by said contractors for unwanted, unnecessary, and superfluous labor."

Kirsch's App. 373.

The New York state extortion predicate racketeering acts in Count 1 (identified as Racketeering Acts 4B and 5B) defined the property extorted in the first of these ways; Racketeering Acts 4A and 5A of Count 1, and Count 2 (Hobbs Act conspiracy) defined the property in the second manner.

Kirsch and four of his codefendants proceeded to trial. The codefendants were acquitted of all charges. Kirsch, however, was convicted of racketeering conspiracy (Count 1) and Hobbs Act conspiracy (Count 2).[6] With respect to Count 1, the jury found that Kirsch committed Racketeering Act 4, subparts A and B—attempted extortion of OSC in violation of the Hobbs Act and New York Penal Law, respectively—and Racketeering Act 5,

6. Kirsch was also convicted under Count 5 (attempted Hobbs Act extortion of OSC), and Count 6 (attempted Hobbs Act extortion of Earth Tech), but was acquitted of the remaining charges. The district court set aside the convictions on Counts 5 and 6 after the verdict, and those counts are not subjects of this appeal.

subparts A and B—attempted extortion of Earth Tech in violation of the Hobbs Act and New York Penal Law, respectively.

After the verdict, Kirsch moved for a judgment of acquittal (or a new trial) on all the counts of which he was convicted. With respect to Racketeering Acts 4A and 5A (based on Hobbs Act extortion) of Count 1 (racketeering conspiracy) and Count 2 (Hobbs Act extortion conspiracy), Kirsch argued that the Government had not presented sufficient evidence that he had attempted to extort "wages and benefits to be paid . . . for unwanted, unnecessary, and superfluous labor." Kirsch's App. 435. Unlike in his motion to dismiss, he did not argue that *Enmons* shielded his conduct; rather, he argued that the Government *chose* to define the property related to the Hobbs Act violations as "wages and benefits to be paid . . . for unwanted, unnecessary, and superfluous labor," and had not proven attempted extortion of such property.[7] Kirsch's argument was that Local 17's goal had been to replace non-union laborers with Local 17 laborers who would perform actual and necessary work, and that the labor therefore would not be "superfluous." The district court agreed with this argument as applied to Racketeering Acts 4A and 5A of Count 1, and entered a judgment of acquittal with respect to those Hobbs Act-based racketeering acts.[8] But as to Racketeering Acts 4B and 5B of Count 1, which alleged predicate act violations of New York extortion statutes, the

7. It would appear that the Government chose this language in an attempt to ensure compliance with *Enmons*.

8. The Government does not cross-appeal from this ruling.

district court denied the motion for judgment of acquittal. For those racketeering acts, the Government defined the property not as "superfluous" labor, but rather as "wages and benefits to be paid pursuant to labor contracts with Local 17." Kirsch's App. 373. The district court concluded that the Government proved that Kirsch attempted to extort such wages and benefits. As to Count 2 (Hobbs Act extortion conspiracy), the district court concluded that the Amstar incident constituted an attempt to extort wages for labor that would have been superfluous—as the indictment charged—and denied the motion with respect to that count.

After the district court's decision on the post-trial motions, but before Kirsch's sentencing, the Supreme Court issued its decision in *Elonis v. United States*, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015). Kirsch filed a motion for a new trial based on *Elonis*, arguing that the district court's instructions regarding threats, which focused on the perception of the recipient rather than the intent of the maker of the threats, were improper under *Elonis*. The district court denied that motion.

Kirsch was sentenced to 36 months' imprisonment on Count 1, and 36 months' imprisonment on Count 2, with the sentences to run concurrently, followed by two years of supervised release. He was also ordered to pay a total of $198,121.50 in restitution to OSC and Amstar.

Appendix A

DISCUSSION

I. NO *ENMONS*-LIKE EXCEPTION EXISTS UNDER NEW YORK PENAL LAW

As to Count 1, following the district court's decision on the post-trial motions, only the two predicate acts based on New York Penal Law extortion violations remained to support a racketeering violation under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). RICO provides that "[i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a). Racketeering under 18 U.S.C. § 1962 requires a "pattern of racketeering activity," *id.* § 1962(a), which requires the Government to prove at least two acts of racketeering activity committed within ten years of one another, *id.* § 1961(5). Those acts are defined to include a number of criminal offenses under both state and federal law. *See id.* § 1961(1). As relevant here, "racketeering activity" includes Hobbs Act extortion, as well as "any act or threat involving . . . extortion . . . chargeable under State law and punishable by imprisonment for more than one year." *Id.* § 1961(1)(A)-(B). Kirsch argues that an *Enmons*-like exception exists under New York Penal Law and that as a result he could not be convicted of extortion based on those predicate acts because his conduct was committed

in pursuit of a lawful union objective. He challenges the denial of his pre-trial motion to dismiss on this ground.[9]

We review *de novo* the denial of a motion to dismiss the indictment. *United States v. Yannotti*, 541 F.3d 112, 121 (2d Cir. 2008).

We hold that no *Enmons*-like exception applies to the extortion provisions of the New York Penal Law. But before we examine the current New York statutes (i.e., those in effect at the time of the trial), we discuss *Enmons* and its interpretation of the Hobbs Act.

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9. As we explain further later in the opinion, in order for conduct to serve as a state law RICO extortion predicate act, it must (1) violate a state extortion statute and (2) satisfy the "generic" definition of extortion. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003). Kirsch argued before the district court both that an *Enmons*-like exception exists under New York Penal Law and that an *Enmons*-like exception exists with respect to the "generic" definition of extortion. Succeeding on either argument would require that his conviction be reversed. However, on appeal, he argues only that an *Enmons*-like exception exists under New York Penal Law extortion, and does not reference the "generic" definition of extortion in the context of his *Enmons* argument. We therefore deem any argument related to the applicability of *Enmons* to the "generic" definition of extortion abandoned. *See United States v. Chen*, 378 F.3d 151, 162 n.7 (2d Cir. 2004) ("[T]he court does not ordinarily consider issues not adequately raised in an opening brief."); *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995) (explaining that arguments not raised in an appellate brief are abandoned).

Appendix A

The Hobbs Act prohibits robbery or extortion—including conspiracy and attempt—that affects interstate commerce. 18 U.S.C. § 1951(a). The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by *wrongful* use of actual or threatened force, violence, or fear." *Id.* § 1951(b)(2) (emphasis added).

In *United States v. Enmons*, the Supreme Court concluded that the use of "wrongful" in the Hobbs Act meant that the Hobbs Act could apply only to threats and violence used to obtain an objective that is itself unlawful, thus limiting the scope of Hobbs Act extortion liability in labor disputes. 410 U.S. at 400. In *Enmons*, union employees destroyed equipment belonging to their employer, a utility company, in an effort to obtain a new collective bargaining agreement. *Id.* at 397-98.

The *Enmons* Court held that this conduct did not violate the Hobbs Act, as the Act "does not apply to the use of force to achieve legitimate labor ends," such as "higher wages in return for genuine services." *Id.* at 400-01. Accordingly, the Hobbs Act is not violated unless threats or force are used to obtain an illegitimate objective in a labor dispute, such as personal payoffs or "no-show" jobs.[10] *Id.* at 400.

In reaching that conclusion, the *Enmons* Court relied on both the language of the statute and the legislative history of the Hobbs Act. With respect to the language

10. We refer to this interpretation of the Hobbs Act by the Supreme Court as the "*Enmons* exception."

of the statute, the Court reasoned that "'wrongful' has meaning in the [Hobbs] Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *Id.* Indeed, "it would be redundant to speak of 'wrongful violence' or 'wrongful force' since . . . any violence or force to obtain property is 'wrongful.'" *Id.* at 399-400.

As to the legislative history, the Court concluded that Congress enacted the Hobbs Act in response to the Court's decision in *United States v. Local 807*, 315 U.S. 521, 62 S. Ct. 642, 86 L. Ed. 1004 (1942). *Id.* at 401-02. As the *Enmons* Court explained, *Local 807* held that the predecessor to the Hobbs Act—the Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979 (amended by Hobbs Act, ch. 537, 60 Stat. 420 (1946))—did not prohibit the conduct of "members of a New York City truck drivers union who, by violence or threats, exacted payments for themselves from out-of-town truckers in return for the unwanted and superfluous service of driving out-of-town trucks to and from the city." *Enmons*, 410 F.3d at 402 (citing *Local 807*, 315 U.S. at 526). Congress enacted the Hobbs Act, the Court explained, to ensure that this type of conduct—extorting wages for "imposed, unwanted, and superfluous services"—was criminalized under the amended statute. *Id.* at 403. However, the Court also made clear that Congress did not intend the Hobbs Act to reach extortion committed to achieve *legitimate* union objectives. *Id.* at 402-07.[11]

11. Comments by legislators regarding the Hobbs Act emphasized that the Act was not intended to "interfere in any way

As described above, *Enmons* was based on the interpretation of the particular language of the Hobbs Act, as well as its legislative history. The question, then, is whether that interpretation informs our reading of the New York extortion statute, and whether a similar exception exists under that statute. Under the New York Penal Law prior to 1965, section 850 defined the offense of extortion in a manner similar to the Hobbs Act. Specifically, section 850 provided that "[e]xtortion is the obtaining of property from another . . . with [the victim's] consent, induced by a *wrongful* use of force or fear." N.Y. Penal Law § 850 (1909 (emphasis added). That definition closely tracked the language of the Hobbs Act by including the use of the word "wrongful." Accordingly, were that statute still in force today, the *Enmons* Court's observation that "it would be redundant to speak of 'wrongful violence' or 'wrongful force' since . . . any violence or force to obtain property is 'wrongful,'" *Enmons*, 410 U.S. at 400-01, would also guide us in our interpretation of that version of the New York Penal Law extortion statute.[12]

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with any legitimate labor objective or activity," *id.* at 404 (citation omitted), and Congressman Hobbs, the bill's sponsor, "explicitly refuted the suggestion that strike violence to achieve a union's legitimate objectives was encompassed by the Act," *id.* at 404-05.

12. The Supreme Court noted that the legislative history of the Hobbs Act indicated that Congress intended that the Act "d[o] no more than incorporate New York's conventional definition of extortion—'the obtaining of property from another . . . with his consent, induced by a wrongful use of force or fear . . . .'" *Enmons*, 410 U.S. at 406 n.16 (citation omitted). Referring to the pre-1965 version of the New York extortion statute and citing only New York cases decided prior to 1965, the Supreme Court stated that

In 1965, however, the New York extortion statute was amended. That amendment—which remains in effect today—reformulated the definition of extortion and removed the word "wrongful." *See* N.Y. Penal Law §§ 155.05, 155.40 (McKinney 1967). Under the current New York Penal Law,

> [a] person is guilty of . . . larceny . . . when he steals property and . . . 2. the property . . . is obtained by extortion committed by instilling in the victim a fear that the actor or another person will (a) cause physical injury to some person in the future, or (b) cause damage to property . . . .

N.Y. Penal Law § 155.40.[13]

"[j]udicial construction of the New York statute reinforces the conclusion that, however militant, union activities to obtain higher wages do not constitute extortion." *Id.* Even though *Enmons* was decided in 1973, it is clear that the Supreme Court was referring to the "[j]udicial construction" of the pre-1965 extortion statute, which contained nearly identical language to the Hobbs Act, and was not considering the version in effect when *Enmons* was decided and still in effect today. Indeed, the Supreme Court was simply indicating that New York courts had interpreted the "conventional definition of extortion" to *not* include union violence "to obtain higher wages" at the time Congress passed the Hobbs Act, and that in adopting this "conventional definition," Congress likely intended the same result. *Id.* However, as we have explained, New York has abandoned the "conventional definition of extortion" in favor of the definition currently in effect.

13. Extortion is a type of Grand Larceny in the Second Degree, a class C felony. N.Y. Penal Law § 155.40.

The statute also explains that "[a] person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will," in relevant part:

> (i) Cause physical injury to some person in the future; or
>
> (ii) Cause damage to property; or
>
> . . . .
>
> (vi) Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act . . . .

N.Y. Penal Law § 155.05(2)(e).

New York's amended definition of extortion thus eliminates the word "wrongful," but also provides a separate exception for certain union activities. We address the implication of each of those changes below.

First, the elimination of "wrongful" renders the Supreme Court's statutory interpretation analysis in *Enmons* irrelevant to interpreting the current New York

extortion statute. The Supreme Court's *Enmons* analysis relied on the presence of that word in the Hobbs Act, and its absence in the New York statute suggests that New York has not incorporated the Supreme Court's exception for labor activities into its own current law. Moreover, in contrast to the legislative history of the Hobbs Act, the legislative history of the 1965 amendment to the New York Penal Law extortion statute does not indicate an intent to exempt the use of threats of force by members of a labor union to achieve a legitimate union objective from the prohibitions of the statute.[14] Accordingly, *Enmons* does not guide us in interpreting the current version of the New York Penal Law extortion statute.

We therefore turn to the language of New York's revised definition of extortion and its exemption for certain union activities. The plain language of the current New York extortion statute prohibits threats of violence, even in labor disputes. Section 155.05(2)(e) of the New York Penal Law broadly prohibits "instilling [in the victim] a fear that" if the victim does not deliver the property, the actor will, as relevant here, injure a person or damage property. For example, subsection (e)(i) prohibits "instilling [in the victim] a fear" of personal harm, and subsection (e)(ii) prohibits "instilling [in the victim] a fear" of property damage.

Subsection 155.05(2)(e)(vi) of the New York statute also prohibits extortion carried out by "instilling [in

14. *See generally* Legislative History compiled by the New York Legislative Service, Inc., 1965, Ch. 1030.

the victim] a fear" of "strike, boycott or other collective labor group action injurious to some person's business," but provides limited circumstances under which such conduct does not constitute extortion, namely "when the property is demanded or received for the benefit of the group in whose interest the actor purports to act." That exception to extortion liability does not, however, create an *Enmons*-like exception applicable to the New York extortion statute as a whole. The exception is contained only within subsection (vi), and thus it does not shield union members who violate other subsections of the statute—such as by threatening to commit violent acts against persons or property in violation of subsections (e)(i) and (ii)—from extortion liability. Rather, it protects only union members who threaten to perform *certain* union activities taken to benefit a labor group.

In addition, and unlike the Hobbs Act, the protected activity is clearly defined and cannot be read to encompass threats to cause personal injury or damage property. As we have noted, the statute lists "strike[s], boycott[s] or other collective labor group action[s]" as permissible threats only where "the property is demanded or received for the benefit of the group in whose interest the actor purports to act." N.Y. Penal Law § 155.05(2)(e)(vi). The only basis to argue that the statute permits threats to cause property damage or personal injury in the labor dispute context is the language authorizing threats for "other collective labor group action" undertaken to benefit a labor group. But the context here demonstrates that "other collective labor group action" does not include such threats. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843,

136 L. Ed. 2d 808 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). Rather, the terms that precede "other collective labor group action"—"strike" and "boycott"—demonstrate that the term can only be understood as permitting threats to undertake traditional union organizing and collective action activities. As the Supreme Court has explained, a "word is known by the company it keeps," and here, that principle compels an interpretation that maintains the New York Penal Law's categorical prohibition against extortion that threatens personal injury or property damage. *See also United States v. Williams*, 553 U.S. 285, 294, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) ("[A] word is given more precise content by the neighboring words with which it is associated."). As a result, New York's extortion statute does not shield Kirsch from criminal liability.

Here, the Government presented sufficient evidence to the jury that Kirsch "instill[ed] in the [victims] a fear" that Local 17 would cause personal injury in violation of subsection (e)(i), and cause property damage in violation of subsection (e)(ii), in connection with the OSC and Earth Tech episodes. Accordingly, Kirsch's challenge to the sufficiency of Predicate Acts 4B and 5B of Count 1 under subsections (e)(i) and (ii) of New York Penal Law § 155.05 fails.

II. THE PROPERTY SET FORTH IN RACKETEERING ACTS 4B AND 5B WAS "TRANSFERABLE"

As discussed above, the Count 1 racketeering conspiracy conviction was predicated upon New York state law predicate acts of extortion. Violations of state extortion statutes *may* qualify as RICO predicate acts, but only if such violations are also "'capable of being generically classified as extortionate.'" *Wilkie v. Robbins*, 551 U.S. 537, 567, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007) (quoting *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003)). "[S]uch 'generic' extortion is defined as 'obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats.'" *Scheidler*, 537 U.S. at 409 (quoting *United States v. Nardello*, 393 U.S. 286, 290, 89 S. Ct. 534, 21 L. Ed. 2d 487 (1969)). Thus, in order for conduct to serve as a state law RICO extortion predicate act, it must (1) violate a state statute and (2) satisfy that "generic" definition of extortion.

Relying on the Supreme Court's decision in *Sekhar v. United States*, 570 U.S. 729, 133 S. Ct. 2720, 186 L. Ed. 2d 794 (2013), Kirsch argues that the property that he was convicted of extorting was not transferable, and that the district court should have granted pre-trial dismissal of Counts 1 and 2 on that basis. Because we later conclude that the district court should have granted a judgment of acquittal with respect to Count 2 based upon insufficiency of the evidence, we need not reach Kirsch's argument that *Sekhar* provides a basis to set aside his conviction under Count 2. Accordingly, we address only whether the

reasoning of *Sekhar* requires us to vacate his conviction under Count 1 for racketeering conspiracy based on New York Penal Law extortion predicate acts.

In contrast to Kirsch's *Enmons*-based challenge to his Count 1 conviction, his *Sekhar*-based challenge to Count 1 addresses both the New York Penal Law definition of extortion as well as the "generic" definition applicable to all state law RICO extortion predicate acts. *See* Kirsch Reply Br. at 19 ("In order to serve as predicate racketeering acts for a federal RICO charge, . . . state law offenses must be capable of being generically classified as extortionate."). Accordingly, we address (1) whether *Sekhar*—a decision interpreting the Hobbs Act—also applies to the "generic" definition of extortion, and if it does (2) whether the property that Kirsch was convicted of extorting in Racketeering Acts 4B and 5B satisfies *Sekhar*.[15] We conclude that *Sekhar* applies to the "generic"

15. We need not separately address whether the property Kirsch extorted qualified as "property" under the New York Penal Law extortion statute. Kirsch's only property-based challenge to the New York Penal Law component of his Count 1 conviction is that a *Sekhar*-like "transferability" requirement also exists under New York Penal Law, and is not satisfied. Stated otherwise, Kirsch does not argue that the property he was convicted of extorting fails to qualify as "property" under New York law for some other reason. While we note that transferability does not appear to be a requirement under New York Penal law, *see People v. Garland*, 69 N.Y.2d 144, 147, 505 N.E.2d 239, 512 N.Y.S.2d 796 (1987) ("[A]n interest need not be transferable to constitute 'property' under [New York] Penal Law § 155.00(1)."), we need not directly address the issue, for we conclude below that the property at issue here was "transferable."

definition of extortion, but that the transferability of property requirement of *Sekhar* is satisfied with respect to the state law predicate acts.

The "generic" definition of extortion applicable to RICO state law extortion predicate acts and the Hobbs Act definition of extortion are nearly identical. *Compare Scheidler*, 537 U.S. at 409 ("'[G]eneric' extortion is defined as obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats." (internal quotation marks omitted)), *with* 18 U.S.C. § 1951(b)(2) (defining extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right"). That both definitions include the word "obtaining" is particularly relevant to our analysis.

In *Scheidler*, the Supreme Court, pointing to "obtaining" in the Hobbs Act definition of extortion, the history of the Act, and the common law crime of extortion, held that the Hobbs Act requires "that a person must 'obtain' property from another party to commit extortion." 537 U.S. at 404. The Court held that the generic "state extortion offense for purposes of RICO" also "require[s] a party to obtain or to seek to obtain property." *Id.* at 410.

Subsequently, in *Sekhar*, the Supreme Court further explained that "[o]btaining property requires 'not only the deprivation but also the acquisition of property.'" *Sekhar*, 570 U.S. at 734 (quoting *Scheidler*, 537 U.S. at 404). As a result, extortion "requires that the victim part with his

property, and that the extortionist gain possession of it." *Id.* (internal quotation marks and citation omitted). Thus, to summarize, "property extorted must . . . be *transferable*—that is, capable of passing from one person to another." *Id.*

Sekhar addressed only the Hobbs Act definition of extortion, not the "generic" definition of extortion for the purpose of analyzing state law RICO predicate acts. However, since *Sekhar*'s holding requiring transferability is a clarification of what it means to "obtain" property, *see id.* at 736 ("*Scheidler* rested its decision, as we do, on the term 'obtaining.'"), and the "generic" definition of extortion requires that property be obtained, *see Scheidler*, 537 U.S. at 410, we conclude that the requirement of transferability applies with equal force to "generic" state law RICO predicate extortion offenses. Accordingly, in order for a state extortion offense to serve as a RICO predicate act, the property extorted must be "transferable—that is, capable of passing from one person to another." *Sekhar*, 570 U.S. at 734 (emphasis omitted).

We next address whether the property that Kirsch was convicted of extorting under New York Penal Law in Racketeering Acts 4B and 5B—namely, "[p]roperty of construction contractors consisting of wages and benefits to be paid pursuant to labor contracts with Local 17 at construction projects in Western New York,"—is transferable. Kirsch's App. 373. We conclude that it is.

In *Scheidler*, anti-abortion activists attempted to close abortion clinics by interfering with doctors, nurses,

clinic staff, and women seeking access to the clinics. 537 U.S. at 400-01. The National Organization of Women and two clinics brought a civil RICO action against the anti-abortion activists, alleging a pattern of extortionate racketeering acts under the Hobbs Act and state law. *Id.* at 398. The Court characterized the property the defendants allegedly extorted as the "right to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their business." *Id.* at 399. In holding that such conduct was not extortionate, the Court stated that "even when [the] acts of interference and disruption achieved their ultimate goal of 'shutting down' a clinic that performed abortions, such acts did not constitute extortion because [the defendants] did not 'obtain' [plaintiffs'] property." *Id.* at 404-05. While "[the defendants] may have deprived or sought to deprive [the plaintiffs] of their alleged property right of exclusive control of their business assets, . . . they did not acquire any such property." *Id.* at 405. The Court observed that characterizing this type of behavior as extortion would "discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion." *Id.*

The Court reached a similar conclusion in *Sekhar*. In that case, the defendant was convicted of Hobbs Act extortion for attempting to force the general counsel for the New York State Comptroller to recommend investing in a fund managed by the defendant's company by threatening to expose the general counsel's alleged extramarital affair.

570 U.S. at 731. The Court characterized the property right as "the general counsel's intangible property right to give his disinterested legal opinion . . . free of improper outside interference." *Id.* at 737-38 (internal quotation marks omitted). The Court concluded that while the defendant could deprive the general counsel of this right, he could not possibly have "obtained" it for himself. *See id.* Accordingly, the property was not transferable, and the defendant's Hobbs Act attempted extortion conviction was reversed. *See id.*

In both *Scheidler* and *Sekhar*, the conduct did not constitute extortion because the defendants could not obtain the property for themselves; rather, they could merely "interfere" with the victims' use of it. Such conduct perhaps constituted the New York offense of coercion, but not extortion. *See Scheidler*, 537 U.S. at 404-08; *Sekhar*, 570 U.S. at 734-35; *see also* N.Y. Penal Law § 135.60 ("A person is guilty of coercion . . . when he or she compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in . . . .").[16]

16. In discussing the New York crime of coercion, the *Sekhar* Court stated that "[a]t the time [Congress enacted the Hobbs Act], New York courts had consistently held that the sort of interference with rights that occurred [in *Sekhar*] was coercion." 570 U.S. at 735 (emphasis omitted). In support, the Court included, *inter alia*, the following citation: "*People v. Scotti*, 266 N.Y. 480, 195 N.E. 162 (1934) (compelling victim to enter into agreement with union)." Based on that citation, Kirsch argues that his conduct constituted only the offense of coercion, not extortion. But neither *Scotti* nor the Supreme Court's citation to it can bear the weight Kirsch assigns to them. First, the property charged in Racketeering Acts 4B and 5B is "wages and benefits," not a union

In contrast, Kirsch sought to extort property that Local 17 members could clearly "obtain": wages and benefits from construction contractors. Wages and benefits are "capable of passing from one person to another,"—in this case, from the employer to the employee—and are therefore "transferable." *Sekhar*, 570 U.S. at 734. Indeed, when an employer pays wages and provides benefits to an employee, the employer "part[s] with" that property, and the employee "gain[s] possession" of it. *Id.* (citations omitted). Accordingly, Kirsch's conviction under Count 1 meets the requirement recognized in *Scheidler* and *Sekhar* that the targeted property be transferable.

III. SUFFICIENCY OF THE EVIDENCE FOR COUNT 2

Kirsch argues that his conviction for Count 2—Hobbs Act extortion conspiracy—must be reversed because the Government presented insufficient evidence that Kirsch agreed with others to extort wages for "unwanted, unnecessary, and superfluous labor." Specifically,

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agreement. Second, *Scotti*, a summary disposition of an appeal of four defendants' coercion convictions, conveys only that the defendants were convicted of using "threats and force [to] compel[] the complainant, a manufacturer, to enter into an agreement with a labor union of which the defendants were members," and that there was insufficient evidence to support the convictions of three of those defendants. *Scotti*, 266 N.Y. at 480. Accordingly, we do not know the type of agreement sought, and whether it would have qualified as "obtainable" or "transferable" property. We therefore decline to read *Sekhar*'s citation to *Scotti* as creating a broad rule that *any* type of agreement with a union is *per se* not property that may be extorted.

he contends that the Government failed to prove his involvement in the Amstar incident.

In granting in part and denying in part Kirsch's motion for judgment of acquittal, the district court ruled that only the Amstar incident was evidence of an attempt to extort wages for "unwanted, unnecessary, and superfluous labor," and upheld the jury's Count 2 verdict on that basis.[17] The court rejected the Government's argument that Kirsch's conduct with respect to other contractors qualified as such. On appeal, the Government defends the Count 2 conviction with two arguments. First, the Government contends that it presented sufficient evidence with respect to the Amstar incident to support the Hobbs Act conspiracy conviction. Second, the Government argues that the actions of Kirsch and Local 17 towards OSC and EarthTech constitute an attempt to extort wages for "unwanted, unnecessary, and superfluous labor" because Local 17 workers were not qualified to do the work at those job sites and therefore

17. Even assuming that the district court was correct that the Government presented sufficient evidence of Kirsch's involvement in the Amstar episode, its conclusion that a new trial was not warranted was incorrect. The district court decided that all of the non-Amstar evidence that the Government presented with respect to Count 2 did not prove a conspiracy to extort wages for "unwanted, unnecessary, and superfluous labor." The jury rendered only a general guilty verdict for Count 2. Accordingly, it is impossible to conclude that the jury relied on the Amstar incident in convicting Kirsch under Count 2. Rather, the jury's Count 2 verdict could have been based upon its belief that Kirsch committed unlawful conduct with respect to other contractors, conduct that the court later found did not qualify as attempts to extort wages for "unwanted, unnecessary, and superfluous labor."

could not have been substituted for the other workers.[18] Kirsch responds that the Government failed to prove that Local 17 workers lacked the requisite qualifications for the OSC and EarthTech work.

Before we more fully discuss the evidence the Government presented regarding Amstar, EarthTech, and OSC, we address the language of Count 2 of the indictment. Although the indictment curiously identifies 76 "overt acts in furtherance of Count 2," Kirsch's App. 394-411, proof of an overt act is not necessary to sustain a conviction for Hobbs Act conspiracy, *see United States v. Gotti*, 459 F.3d 296, 338 (2d Cir. 2006). However, that does not relieve the Government of its burden to prove the existence of the conspiracy charged in the indictment—in this case a conspiracy to extort wages for "unwanted, unnecessary, and superfluous" labor.

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18. As explained above, the district court rejected the Government's argument that the conduct with respect to EarthTech and OSC constituted attempts to extort wages for "unwanted, unnecessary, and superfluous labor" and accordingly granted judgment of acquittal with respect to Racketeering Acts 4A and 5A, and Counts 5 and 6 (all involving EarthTech and OSC). The Government does not cross-appeal from the judgment of acquittal, but challenges the district court's reasoning. But because the Government does not challenge the district court's reasoning "with a view either to enlarging [its] own rights thereunder or of lessening the rights of [its] adversary," *Jennings v. Stephens*, 135 S. Ct. 793, 798, 190 L. Ed. 2d 662 (2015) (quotation marks omitted), its failure to cross-appeal does not foreclose it from disputing the correctness of the district court's conclusion as to the Earth Tech and OSC incidents in arguing on appeal that Kirsch's conviction under Count 2 should be affirmed.

See In re Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 113 (2d Cir. 2008) ("To establish the existence of a criminal conspiracy, the government must prove that the conspirators agreed on the essence of the underlying illegal objective[s], and the kind of criminal conduct . . . in fact contemplated." (alterations in original) (internal quotation marks omitted)). The 76 "overt acts" are therefore properly viewed as incidents allegedly supporting Kirsch's membership in a Hobbs Act extortion conspiracy, not as overt acts that the Government was required to prove to sustain a conviction. Also, while the 76 "overt acts" are listed in the indictment, on appeal the Government has identified only those involving Earth Tech, OSC, and Amstar as providing evidentiary support for the conviction under Count 2.

We review the denial of a motion for a judgment of acquittal *de novo*. *United States v. Reyes*, 302 F.3d 48, 52-53 (2d Cir. 2002). To prevail on a motion for judgment of acquittal, the defendant must demonstrate that "no rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001) (internal quotation marks omitted). In evaluating whether a defendant has met this burden, "we consider all of the evidence, both direct and circumstantial, in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government." *United States v. Velasquez*, 271 F.3d 364, 370 (2d Cir. 2001) (internal quotation marks omitted).

We first address whether sufficient evidence connected Kirsch to the Amstar incident to support a Hobbs Act conspiracy conviction. Applying the Norris-LaGuardia Act ("NLGA"), we conclude that it does not. The NLGA limits the liability of union officers and members for the conduct of their fellow union members. 29 U.S.C. § 106. It provides that

> [n]o officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Id. The Hobbs Act specifically incorporates the limitations set forth in the NLGA. 18 U.S.C. § 1951(c) ("This section shall not be construed to repeal, modify or affect . . . sections . . . 101-115 of Title 29 . . . .").

In *United Brotherhood of Carpenters v. United States*, the Supreme Court held that the NLGA precludes liability of a union member for the unlawful conduct of a fellow union member "except upon clear proof that the particular act charged, or acts generally of that type and quality, had been expressly authorized, or necessarily followed from a granted authority, by the [union] or non-participating member sought to be charged or was subsequently ratified

by such [union] . . . or member after actual knowledge of its occurrence." 330 U.S. 395, 406-07, 67 S. Ct. 775, 91 L. Ed. 973 (1947). The Court added that "the custom or traditional practice of a particular union can . . . be a source of actual authorization of an officer to act for and bind the union." *Id.* at 410.

As a result, in order for the Amstar incident to support Kirsch's conviction on Count 2, the Government would have had to present evidence that Kirsch participated in, "expressly authorized," or "subsequently ratified" attempts to extort wages for "unwanted, unnecessary, and superfluous labor"—i.e., not replacement labor—or was responsible for "a custom or traditional practice" of extorting wages for such labor. It did not.

The evidence presented to the jury that Perkins, the Local 17 member who contacted Amstar about its compressor, was responsible for the destruction at the Amstar job site was scant. Additionally, the evidentiary link between Kirsch and that destruction was absent. There was no testimony that Kirsch was personally involved in the Amstar incident, directed unlawful conduct towards Amstar, or ratified it after it occurred. Accordingly, in order for Kirsch to be liable under the NLGA with respect to the Amstar incident, there would have to be evidence that (1) Kirsch was at least responsible for "a custom or traditional practice" of seeking such fictitious work that caused Perkins to make the request for the union employment that he made to Lignos of Amstar, and that (2) the "custom or traditional practice" resulted in cutting the fuel line. *See United Bhd. of Carpenters*,

330 U.S. at 410. The evidence presented to the jury did not support such a connection.

There was evidence that Kirsch referred to his general strategy for Local 17 as "turn or burn." Gov't App. 217-18. The "turn" part of that phrase refers to convincing contractors to sign collective bargaining agreements with Local 17 and to hire Local 17 workers. The "burn" refers to picketing at worksites and even vandalizing equipment if contractors refused Local 17's requests. As one Local 17 member testified, "turn or burn" indicated that contractors "would either become union or we would put them out of business." Gov't App. 417. However, that general strategy is insufficient to connect Kirsch to the particular threat and destruction of the Amstar property, and as we have stated, no other evidence connects Kirsch to the Amstar incident. Accordingly, no reasonable jury could find beyond a reasonable doubt that Kirsch was responsible for the Amstar incident.

Next, we turn to the Government's argument that Kirsch's conduct with respect to OSC and EarthTech constituted evidence of attempts to extort wages for "unwanted, unnecessary, and superfluous labor."

The Government argues that the employees at Earth Tech and OSC were "uniquely trained and qualified" to do the work that needed to be done at those sites—specifically "excavating contaminated earth, getting that earth safely into specially outfitted trucks, and then getting it to landfills quickly and with no spillage"—and that workers from Local 17 were unqualified to do such work. Gov't's

Br. at 41. Indeed, if Local 17 workers were not qualified and able to do the work they sought, the wages they would be paid would be for "superfluous" labor. However, the evidence did not establish that Local 17 members did not meet—or that it would be particularly difficult for them to meet—the OSC and Earth Tech job site requirements.

James Minter, a former Local 17 member and former Kirsch co-defendant, and a Government cooperating witness, testified that Local 17 members completed a 40-hour Occupational Safety and Health Administration training on handling hazardous materials as part of their apprenticeship program. Similarly, Kirsch's co-defendant Thomas Freedenberg testified that Local 17 members received the "training necessary to work on hazardous waste jobs, jobs where you have contaminated material and it needs to go to a disposal site." Tr. 4057-58.

There was no testimony regarding whether Local 17 members' hazardous materials training specifically qualified them to work with the contaminated soil at the two particular sites. However, testimony regarding the Earth Tech and OSC job sites did not show that Local 17 workers were unqualified to perform such general soil remediation work.

With respect to Earth Tech, William Lindheimer, the project manager for Earth Tech at the Buffalo site, testified regarding the qualifications necessary to work at that site:

> First of all, there's a lot of prequalifications that go into the employees that we have to hire. Our operators and laborers, they have to go through a pretty extensive physical process. They have to be first qualified. They have to have some proper training and certificates. They have to be suitable for the work. They have to wear respiratory protection. They have to be capable of performing their tasks in respirators. In addition, the kind of the prequalifications they, also—you know, we spend a great deal of time with our operators with our own what we would call standard operating procedures, how we like to excavate the soil, how we like to load that soil into the trucks, how we like to move the material on our particular job sites.

Gov't App. 290-91.

No further details were provided regarding how much effort it would have taken to train Local 17 workers on Earth Tech's "standard operating procedures." Furthermore, Lindheimer testified that he was unaware whether Local 17 employees had the requisite training and certificates to work on the Earth Tech job site. Kirsch Reply Br. App. 39-40. Thus, the Government failed to prove that Local 17 members were unqualified to work at the Earth Tech site, or that training them on the particular procedures of Earth Tech would have been so extensive as to preclude hiring them.

Regarding the qualifications needed to work at the OSC job site, Jon Williams, the founder of OSC, testified that

> [I]ndividuals that are on these job sites have to have a certain level of training that's mandated by the federal government, and in some cases, New York State Department of Labor. And most of that training is just to make sure that the employee has knowledge, understanding, and awareness of the contaminants.

Gov't App. 20. Like with Earth Tech, there was no testimony indicating how much of such training was required. More importantly, the Government provided no evidence that Local 17 workers were not already qualified to do the work at OSC's site.[19]

The trial record establishes that Local 17 members would have likely qualified for the work on the Earth Tech and OSC projects. Even if there were some particular steps needed to qualify for such work, those were minimal, and certainly would not make the Local 17 members' employment by those two companies "unwanted, unnecessary, and superfluous." Accordingly, we conclude that the Government presented insufficient evidence at trial of Kirsch's involvement in a conspiracy to extort wages for "unwanted, unnecessary, and superfluous"

19. On cross-examination, Williams testified that, like Lindhemer on the Earth Tech project, he did not know whether Local 17 members received the requisite training to do the work at OSC's job site.

labor to support his conviction under Count 2, and that therefore a judgment of acquittal must be entered with respect to that count.[20]

IV. THE JURY WAS PROPERLY INSTRUCTED WITH RESPECT TO THREATS UNDER NEW YORK PENAL LAW EXTORTION

Finally, Kirsch argues that the district court improperly instructed the jury with respect to the mens

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20. The Government also argues that *United States v. Robilotto*, 828 F.2d 940 (2d Cir. 1987), requires us to hold that Kirsch's conduct with respect to OSC and EarthTech constituted an attempt to extort wages for "unwanted, unnecessary, and superfluous labor." In *Robilotto*, a local union forced an employer to pay wages to a local union worker for a job already being performed by an out-of-state union member. *Id.* at 943. Because the employer had to "hire two workers for the same job," and "the work [was] performed . . . by the employee from [out-of-state]," *id.*, the Court concluded that "[i]t would be difficult to imagine a more obvious instance of imposed, unwanted, superfluous and fictitious labor services," *id.* at 945. The Government argues that *Robilotto* controls here because "it was the employer's determination to capitulate to the union's demand that put him in the position of now paying for two employees to do the work of one" that distinguishes the situation here from *Robilotto*, and that this is a distinction without legal significance. Gov't's Br. at 40. It appears to be the Government's position that if Kirsch's threats succeeded, the contractors would have had to pay wages to both the non-union workers and the Local 17 workers who replaced them. If this were true, *Robilotto* would be relevant. However, the Government cites no evidence that the contractors would have continued to pay the non-union workers after replacing them with Local 17 workers, as opposed to terminating the non-union workers.

rea required for the extortion threats, and that his racketeering conspiracy conviction (Count 1) and Hobbs Act conspiracy conviction (Count 2) must therefore be vacated. "We review a claim of error in jury instructions *de novo*, reversing only where, viewing the charge as a whole, there was a prejudicial error." *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003). Since we have already held that Kirsch's conviction for Count 2 must be vacated, we need only address his argument that the court's instructions with respect to Count 1, specifically Racketeering Acts 4B and 5B under New York law, were improper. We conclude that because the challenged instruction was given only with respect to Hobbs Act extortion, and that the court's instruction regarding New York Penal Law extortion complied with New York law, Kirsch is not entitled to a new trial on Count 1.

While instructing the jury on the elements of Hobbs Act extortion with respect to Counts 3 through 7, the district court stated that "[y]our decision whether a defendant used or threatened fear of injury involves a decision about the *victim's* state of mind at the time of the defendant's actions." Gov't App. 533 (emphasis added). Relying primarily upon *Elonis v. United States*, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015), Kirsch argues that that instruction was improper because it focused only on the victim's perception of the threat, rather than on the intent of the person who made the threat. In *Elonis*, the Court interpreted 18 U.S.C. § 875(c)—which criminalizes threats to injure a person when made in interstate commerce—to require that the Government prove that the defendant have the mental state of "transmit[ting] a communication

for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." 135 S. Ct. at 2012. The Court reversed Elonis's conviction because the jury was not so instructed. *Id.*

Neither the Supreme Court nor this court has decided whether *Elonis* extends beyond 18 U.S.C. § 875(c).[21] But even if it does and the district court's instructions were incorrect as to the Hobbs Act, any error with respect to the Hobbs Act extortion count instructions did not prejudicially affect the jury's verdict with respect to the New York Penal Law extortion racketeering predicate acts charged in Count 1, on which the jury was properly charged. *See Aina-Marshall*, 336 F.3d at 170 (We . . . revers[e] only where, viewing the charge as a whole, there was a prejudicial error.").

The New York extortion statute specifically proscribes "instilling in the victim . . . fear" in order to obtain property, N.Y. Penal Law § 155.40, thus appearing to focus the statute on the threat's effect on the recipient rather than the intent of its maker. Furthermore, in instructing the jury with respect to the New York Penal

21. Prior to *Elonis*, we stated that "[t]his Circuit's test for whether conduct amounts to a true threat 'is an objective one—namely, whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury.'" *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013) (alteration in original) (quoting *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006)). We need not address the effect, if any, of *Elonis* on Hobbs Act extortion because we need only consider the intent requirement under New York law.

Law racketeering predicate acts, the district court recited the New York model jury charge for the offense of extortion. Kirsch does not argue that the court's instructions with respect to New York Penal Law extortion failed to accurately and adequately instruct the jury on the elements of that offense. Nor does he explain how the threat instruction given in connection with the Hobbs Act counts could have affected the instruction given on New York Penal Law extortion.

Accordingly, we find that there was no error with respect to the court's instructions on New York Penal Law extortion for Count 1, and that any possible error with respect to the required mens rea for Hobbs Act extortion did not result in prejudicial error as to the New York Penal Law extortion charge.

V. KIRSCH'S SENTENCE

Kirsch was sentenced to 36 months' imprisonment on Count 1, and 36 months' imprisonment on Count 2, with the sentences to run concurrent to one another. Our decision vacates Count 2. In order "to give the district court an opportunity to reevaluate the sentence[] in this changed light," we remand the matter to the district court for resentencing on Count 1. *United States v. Petrov*, 747 F.2d 824, 832 (2d Cir. 1984) (remanding for resentencing after affirming only six of 11 counts with respect to which concurrent sentences were imposed).[22]

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22. In a letter submitted on June 5, 2018, pursuant to Federal Rule of Appellate Procedure 28(j), Kirsch argues that the Supreme

CONCLUSION

For the foregoing reasons, we **AFFIRM** Kirsch's conviction under Count 1, **REVERSE** Kirsch's conviction under Count 2, and **REMAND** the case to the district for entry of judgment of acquittal with respect to Count 2, and for resentencing with respect to Count 1.

Court's decision in *Lagos v. United States*, 138 S. Ct. 1684, 201 L. Ed. 2d 1 (2018), requires vacatur of the district court's restitution award. Since we remand this case for resentencing, we leave it to the district court to address this argument in the first instance, including the Government's contention that Kirsch forfeited it. On remand, the district court should also address the impact of our holding that Kirsch's involvement in the Amstar incident was not proved beyond a reasonable doubt on the restitution amount.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, FILED MARCH 31, 2015

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

07-CR-304S (6)

UNITED STATES OF AMERICA,

v.

MARK N. KIRSCH,

Defendant.

March 31, 2015, Decided
March 31, 2015, Filed

DECISION AND ORDER

I. INTRODUCTION

On March 7, 2014, a jury convicted Defendant Mark N. Kirsch of racketeering conspiracy, Hobbs Act conspiracy, and attempted Hobbs Act extortion. Kirsch now moves for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure or, alternatively, for a new trial under Rule 33. For the reasons discussed below, Kirsch's motion is granted in part and denied in part.

Appendix B

II. BACKGROUND

On December 18, 2007, a federal grand jury returned a four-count indictment alleging Hobbs Act extortion and conspiracy against five members of the International Union of Operating Engineers, Local 17, AFL-CIO ("Local 17"). (Docket No. 1.) Approximately 16 months later, on April 1, 2008, the grand jury returned an eight-count superseding indictment, which, among other things, added additional counts and additional Defendants, including Kirsch, the long-time president and business manager for Local 17. (Docket No. 4.)

After vigorous pretrial proceedings and the return of a second superseding indictment (Docket No. 280), five defendants went to trial on a seven-count trial indictment (Docket No. 589), beginning on January 13, 2014 (Docket No. 488). Count 1 charged Kirsch and another defendant with racketeering conspiracy, in violation 18 U.S.C. § 1962(d); Count 2 charged all five defendants with Hobbs Act conspiracy, in violation of 18 U.S.C. § 1951(a); Counts 3-7 charged various defendants with attempted Hobbs Act extortion, in violation of 18 U.S.C. §§ 1951(a) and (2).

The eight-week trial concluded on March 7, 2014. (Docket No. 585.) Upon the close of the government's proof, and again after the defendants rested, this Court reserved decision on the defendants' Rule 29 motions. (Docket Nos. 565, 578.) The jury subsequently found Kirsch guilty on Counts 1, 2, 5, and 6, but acquitted him

on Counts 3 and 7.[1] (Docket No. 590.) The jury acquitted Kirsch's co-defendants on all counts against them. (Docket No. 590.)

Following the verdict, Kirsch timely filed the instant motion for judgment of acquittal or, alternatively, for a new trial, on March 28, 2014. (Docket No. 610.) Kirsch seeks judgment of acquittal on all counts of conviction due to insufficiency of the evidence. He seeks a new trial due to improper jury instructions.[2]

III. DISCUSSION

A. Kirsch's Rule 29 Motion

1. Rule 29 of the Federal Rules of Criminal Procedure

Under Rule 29 (a), a court must, upon a defendant's motion, "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." A defendant may move for a judgment of acquittal after the government closes its evidence, after the close of all evidence, or after the jury has returned its verdict and been discharged. *See* Rule 29 (a) and (c)(1). A defendant may also renew a previously denied Rule 29 motion, so

1. Kirsch was not named in Count 4. (Docket No. 589.)

2. Kirsch also seeks judgment of acquittal or a new trial based on unsuccessful arguments he made in his pretrial motions to dismiss and various trial submissions. (*See* Docket No. 611, p. 3 and Exhibit A.) Those arguments are denied for the reasons previously stated.

long as renewal occurs within 14 days after the guilty verdict or discharge of the jury, whichever is later. *See* Rule 29 (c)(1).

The making of a motion for a judgment of acquittal before the court submits the case to the jury is not a prerequisite for making such a motion after the jury is discharged. *See* Rule 29 (c)(3). "[W]hen a motion for judgment of acquittal made at the close of the government's case-in-chief is denied and a defendant presents a case, then the evidence put in by the defense will also be considered in deciding a [Rule 29] motion made after the trial ends." *United States v. Truman*, 762 F. Supp. 2d 437, 445 (N.D.N.Y. 2011).

A defendant challenging the sufficiency of the evidence bears a heavy burden. *United States v. Hassan*, 578 F.3d 108, 126 (2d Cir. 2008); *United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001). "In evaluating whether the evidence was sufficient to convict a defendant, [a reviewing court] consider[s] all of the evidence, both direct and circumstantial, 'in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government.'" *United States v. Velasquez*, 271 F.3d 364, 370 (2d Cir. 2001) (quoting *United States v. Walker*, 191 F.3d 326, 333 (2d Cir. 1999)).

When considering the trial evidence, "the court must be careful to avoid usurping the role of the jury." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003). The court may not "substitute its own determination of . . . the weight of the evidence and the reasonable inferences to be

drawn for that of the jury." *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (internal quotation marks and citations omitted). Determining the witnesses' credibility falls strictly within the province of the jury. *Guadagna*, 183 F.3d at 129 (noting that the court must defer to the jury even if the evidence would also support, in the court's opinion, a different result).

A judgment of acquittal is warranted only if the court concludes that the evidence is non-existent or so meager that no rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Velasquez*, 271 F.3d at 370; *Guadagna*, 183 F.3d at 130. The court must consider the evidence "in its totality, not in isolation, and the government need not negate every possible theory of innocence." *United States v. Cote*, 544 F.3d 88, 98 (2d Cir. 2008); *see Guadagna*, 183 F.3d at 130 ("each fact may gain color from the others").

2. Racketeering Acts 4A and 5A of Count 1 and Counts 2, 5, and 6: "Unwanted, Unnecessary, and Superfluous Labor"

In Racketeering Acts 4A and 5A of Count 1 and Counts 2, 5, and 6, Kirsch is charged with extorting or attempting to extort property from various contractors or employers in the form of "wages and benefits to be paid . . . for unwanted, unnecessary, and superfluous labor." (Docket No. 589.) The parties agree that whether Kirsch's convictions on these counts are supported by sufficient evidence depends on the meaning of "unwanted, unnecessary, and superfluous labor."

Appendix B

The government's position (and its theory at trial) is that Kirsch used actual or threatened violence to force employers to replace non-union workers with union workers. This, according to the government, constitutes the extortion of wages and benefits to be paid by an employer or contractor for "unwanted, unnecessary, and superfluous labor," even though both the non-union worker and the replacement union worker performed tasks wanted by the employer and necessary to the completion of the job.[3]

Kirsch disagrees. He contends that "unwanted, unnecessary, and superfluous labor" does not extend beyond a union seeking to obtain wages from a contractor without the contractor receiving genuine services in return. In Kirsch's view, the simple replacement of a non-union worker with a union worker, both of whom perform tasks wanted by the employer and necessary to the completion of the job, does not constitute the extortion of "unwanted, unnecessary, and superfluous labor."

The phrase "unwanted, unnecessary, and superfluous labor" is drawn from the indictment at issue in *United States v. Green*, where the defendants were charged with attempting to obtain from two employers "money, in the form of wages to be paid for imposed, unwanted, superfluous, and fictitious services of laborers." 350 U.S.

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3. It is undisputed that but for evidence concerning the operation of a compressor for Amstar Painting (Count 2), the labor performed on the various job sites was necessary labor that the employers wanted and needed. None of the labor was excessive or non-essential.

415, 417, 76 S.Ct. 522, 100 L.Ed. 494 (1956). But *Green* does not define the phrase "imposed, unwanted, superfluous, and fictitious."

Green is instructive, however, on what "labor" means in the phrase "unwanted, unnecessary, and superfluous labor," as used in the indictment. At issue in *Green* was money paid for the *services* of laborers. *Id.* So too is the case here. With the allegations in *Green* as the genesis for the government's property allegations here, the term "labor" in the phrase "unwanted, unnecessary, and superfluous labor" must refer to the work to be performed (i.e., *services* of laborers) rather than to a particular laborer. In other words, the wages and benefits at issue must have been paid for *work* that was "unwanted, unnecessary, and superfluous," rather than to a particular *individual* who may have been "unwanted, unnecessary, and superfluous." *See Green*, 350 U.S. at 417.

Some two decades after *Green*, the United States Supreme Court shed light on the concept of "unwanted, unnecessary, and superfluous labor" in *United States v. Enmons*, 410 U.S. 396 (1973), when it discussed its pre-Hobbs Act decision in *United States v. Local 807 of Int'l Broth. of Teamsters, Chauffeurs, Stableman and Helpers of Am.*, 315 U.S. 521 (1942), and the Third Circuit's decision in *United States v. Kemble*, 198 F.2d 889 (3d Cir. 1952).

Local 807 involved the operation of delivery trucks to and from New York City. 315 U.S. at 525-26. Members of Local 807 stopped non-union truck drivers attempting to enter the city limits to deliver merchandise. *Id.* By use

of violence and threats of violence, Local 807 members extracted fees from non-union truck drivers to access the city. *Id.* The fees were equal to the regular union rates for a day's work. *Id.* In some instances, Local 807 members took over trucks at the city line, delivered the merchandise into the city, picked up return-trip merchandise, and then returned the truck to the non-union driver back at the city line. *Id.* at 526. In other instances, Local 807 members did not offer to perform any work (or the offer was rejected) or refused to work for the extracted fee when asked to do so. *Id.* In *Enmons*, the Supreme Court identified this type of work as "unwanted and superfluous" and "unneeded and unwanted." 410 U.S. at 402.

In *Kemble*, the Third Circuit Court of Appeals found that a union's insistence that one of its members be hired (or the day's wage of a union member be paid) to unload a truck that a non-union truck driver was already being paid to unload constituted "imposed, unwanted, and superfluous services." 198 F.2d at 892. The *Kemble* court distinguished this type of arrangement from "the normal demand for wages as compensation for services desired by or valuable to the employer." *Id.* at 892.

The Second Circuit addressed the concept of "imposed, unwanted, superfluous and fictitious labor services" in *United States v. Robilotto*, 828 F.2d 940 (1987). *Robilotto* involved a labor union's requirement that a film production company employ "cover drivers." Cover drivers were union members hired to "cover" driver jobs performed by non-union members. Cover drivers did not work yet were paid union wages. In discussing these cover drivers,

the *Robilotto* court found that "it would be difficult to imagine a more obvious instance of imposed, unwanted, superfluous and fictitious labor services." *Robilotto*, 828 F.2d at 945.

Against this backdrop is the Second Circuit's decision in *United States v. Mulder*, 273 F.3d 91 (2d Cir. 2001). *Mulder* involved a labor coalition known as Brooklyn Fight Back. Members of this coalition relied on their reputation for violence and other means to secure jobs for minorities, who were then required to pay a portion of their wages to the coalition as a kick-back. Coalition members also secured "no-show" jobs for themselves as "coalition coordinators," whose only function was to fend off rival labor coalitions. Coalition coordinators performed no actual work on the job site.

In determining whether the district court correctly instructed the jury on the *Enmons* labor exception to Hobbs Act liability, the court, citing *Enmons*, reiterated that "the use of force for 'the achievement of illegitimate objectives by employees or their representatives, such as the exaction of personal payoffs, or the pursuit of 'wages' for unwanted or fictitious services,' is not exempt from the [Hobbs] Act." *Mulder*, 273 F.3d at 104. The court further noted that the labor exception would not apply "if the coalition creates not only the spur to hire a minority worker but also the need to hire an otherwise unneeded worker or coconspirator by its violence or threats of violence." *Id.* at 105, n. 2. This is because the labor exception "assumes that the employer genuinely needs workers . . . ." *Id.*

Appendix B

The government relies principally on *Mulder* to support its position that "unwanted, unnecessary, and superfluous" includes replacing non-union workers with union workers. In doing so, it seizes on a passage in the court's discussion of the sufficiency of the evidence. There, the court recounted that the superintendent of a job site for Tully Construction hired two workers, one of which he laid off and replaced with another worker that he believed to be sent by the coalition. In another incident, Tully Construction replaced one coalition worker with another. Similar "replacement" occurred at Defoe Construction. The government ignores, however, that the replaced workers in *Mulder* were themselves unnecessary: the employer did not want to hire them to begin with but did so to stave off disruption. *See Mulder*, 273 F.3d at 111 (noting that the superintendent "hired two workers at Johnson's direction, *although he needed neither worker*, because sometimes they stop the job, they push people around) (emphasis added).[4] Thus, *Mulder* involves the replacement of one unwanted coalition worker performing unneeded work with another unwanted coalition worker performing unneeded work. It does not involve the replacement of a non-union worker with a union worker, each of whom fills

4. The government reads *Mulder* to suggest that Tully Construction did not want to hire these two workers because they were troublemakers. (Government Memorandum, Docket No. 620, p. 7.) But nothing in *Mulder* suggests that the two individual workers possessed undesirable traits. Rather, they were hired solely to avoid the consequences of not hiring them: job stoppage and intimidation by the coalition. *See Mulder*, 273 F.3d at 111. In other words, although he needed neither worker, the superintendent hired both so that the coalition would not stop the job or push people around. *Id.*

a genuine need of the employer, which was the proof in this case.

The government also relies on *Local 807* and *Kemble*. But as discussed above, those cases involved *additional* workers, not *replacement* workers. For example, the union truck drivers in *Local 807* did not replace the non-union drivers. Even in those instances when the union members took over the trucks and drove them into the city, they returned the trucks to the original drivers who then continued on. And in *Kemble*, the union member unloading the truck did not replace the truck driver; the truck driver remained and eventually continued on his way after the delivery. Nothing in *Local 807* or *Kemble* suggests that the temporarily displaced non-union worker was either replaced by a union member or not paid. Thus, the government's position is not supported by the cases it cites.

The government's theory also suffers because its acceptance would eliminate any difference between the two distinct property allegations in the indictment. If, as the government contends, "unwanted, unnecessary, and superfluous labor" includes wages paid to a union worker once he replaces a non-union worker, then there is no distinction from the other property allegation in the indictment—the wages and benefits to be paid by employers pursuant to labor contracts with Local 17. This is because, if the union is successful in wrongfully obtaining the replacement of a non-union worker with a union worker, then the wages and benefits obtained are pursuant to the union labor contract, not because it has

secured wages and benefits for unwanted, unnecessary, and superfluous labor.

Moreover, the government has defined the property at issue in these counts in the conjunctive. That is, wages for "unwanted, unnecessary, *and* superfluous labor." The use of extortion to force an unwilling employer to replace a non-union worker with a union worker falls outside of the *Enmons* exception and is punishable under the Hobbs Act. Indeed, the government's allegations in the state law predicates address this very type of activity by identifying the property at issue as the wages and benefits to be paid by contractors or employers pursuant to labor contracts with Local 17. The government, however, did not include that type of property allegation in its Hobbs Act charges. Instead, it alleged that the labor was "unwanted, unnecessary, *and* superfluous." Thus, even assuming that the replacement union workers were unwanted by the employer (perhaps because it had to pay higher wages and benefits), and even assuming that the union workers were unnecessary (perhaps because the employer already had a non-union employee performing the job), under no circumstances were the so-called replacement union workers in this case superfluous, because it is undisputed that the employers genuinely wanted and needed the work completed.[5]

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5. Although it is permissible for an indictment charged in the conjunctive to be proven in the disjunctive, *see United States v. Astolas*, 487 F.2d 275, 280 (2d Cir. 1973) and *United States v. Parker*, 165 F. Supp.2d 431, 447-48 (W.D.N.Y. 2001), that is not the circumstance here. The language at issue here is not statutory; it is the grand jury's identification and definition of the property Kirsch

Consequently, based on the relevant body of caselaw and the plain language of the property allegations in the indictment, this Court finds that "unwanted, unnecessary, and superfluous labor," as alleged in the indictment in this case, does not include the replacement of a non-union worker with a union worker to perform genuine, needed work. Because the government offered insufficient proof that Kirsch sought to obtain wages for unwanted, unnecessary, and superfluous work in Racketeering Acts 4A and 5A of Count 1 and Counts 2, 5, and 6, the evidence as to the property allegations is insufficient to sustain a conviction on those counts.[6] Kirsch is therefore entitled to a judgment of acquittal on Counts 5 and 6 under Rule 29. But Kirsch is not entitled to judgment of acquittal on Counts 1 and 2, as will be discussed further herein.

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allegedly extorted from the victims. *Cf. Astolas*, 487 F.2d at 280 ("An indictment may charge alternate ways of violating a statute in the conjunctive, and a conviction under such an indictment will be sustained if the evidence justifies a finding that the statute was violated in any of the ways alleged.") And the grand jury specifically defined that property as "the wages and benefits to be paid . . . for unwanted, unnecessary, *and* superfluous labor." All three.

6. In arguing that the evidence pertaining to Ontario Specialty Contracting (Count 5) and Earth Tech (Count 6) is nonetheless sufficient, the government suggests that the employers possibly having to train Local 17 members to perform necessary work already being performed by trained non-union members would constitute "superfluous labor" because the employer would have to pay twice for training. (Government's Memorandum, Docket No. 620, p. 16.) Again, however, the government ignores that the work performed would be nonetheless wanted by the employer and necessary to the job and thus not superfluous within the meaning of the property allegations in this indictment.

Kirsch is not entitled to judgment of acquittal on Count 2 because, as alluded to above, the government presented proof at trial that Kirsch conspired to obtain wages and benefits for "unwanted, unnecessary, and superfluous labor" from Amstar Painting. John Lignos, the Vice-President of Amstar, testified that a Local 17 member named Edward Perkins "asked" him to assign a Local 17 member to operate a compressor for a job in 2003. Lignos testified that he told Perkins that a Local 17 compressor operator was not needed because the union painters operated the compressor.[7] After Lignos declined to hire a Local 17 operator, the compressor was damaged, resulting in $14,000 worth of repair and cleanup costs.

Although Kirsch contends that Lignos's testimony is insufficient to sustain his conviction on Count 2, this Court must view the evidence in the light most favorable to the government and credit every inference that the jury may have drawn in the government's favor. *Walker*, 191 F.3d at 333. Applying that standard, the record evidence is sufficient to support the jury's verdict. Based on Lignos's testimony and other circumstantial evidence, a reasonable jury could find that Kirsch conspired to violate the Hobbs Act by seeking wages and benefits from Amstar for "unwanted, unnecessary, and superfluous labor" in the form of the compressor-operator position Judgment of acquittal is therefore precluded on Count 2.

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7. Operation of the compressor involved simply turning a switch on in the morning and off in the evening.

3. Count 1: Sufficiency of the Evidence

Kirsch also challenges his conviction on Count 1 based on the sufficiency of the evidence unrelated to the property allegations in the indictment. Kirsch argues that he is entitled to judgment of acquittal because there is insufficient proof that (1) Local 17 was a member of the enterprise, (2) he agreed to the commission of Racketeering Act 5, and (3) he extorted property owned by employers (sub-predicate acts 4B and 5B).

a. Local 17's Membership in the Enterprise

Kirsch first argues that the government failed to prove that Local 17 was a member of the enterprise charged in the indictment. He further contends that without the inclusion of Local 17, there was insufficient proof that the alleged enterprise had the requisite structure and continuity to qualify as an association-in-fact enterprise.

Kirsch's argument is not new. In pretrial motions, Kirsch and his co-defendants challenged the sufficiency of the allegations in the indictment as they related to the enterprise. *See United States v. Larson, et al.*, No. 07-CR-304S, 2011 U.S. Dist. LEXIS 139357, 2011 WL 6029985 (W.D.N.Y. Dec. 5, 2011). In denying the defendants' motion to dismiss, this Court held that the government is not required to prove the establishment of an enterprise to sustain a conviction on Count 1. *Larson*, 2011 U.S. Dist. LEXIS 139357, 2011 WL 6029985, at *5 (citing *United States v. Applins*, 637 F.3d 59 (2d Cir. 2011)). Rather, "for purposes of establishing a RICO conspiracy, 'the

government [is] required to prove only the existence of an agreement to violate RICO's substantive provisions. Thus, the government necessarily ha[s] to establish that [the defendant] agreed with his criminal associates to form the RICO enterprise.'" *Larson*, 2011 U.S. Dist. LEXIS 139357, 2011 WL 6029985, at *5 (citing *Applins*, 637 F.3d at 74-75, in turn quoting *United States v. Benevento*, 836 F.2d 60, 73 (2d Cir. 1987)). Consequently, the government was not required to prove that Local 17 was a member of the enterprise.

Additionally, Kirsch's contention that there was insufficient proof that the alleged enterprise had the requisite structure and continuity to qualify as an association-in-fact enterprise is equally unpersuasive. As an "association-in-fact enterprise," the Local 17 enterprise need only have (1) a purpose, (2) relationships among those associated with the enterprise, and (3) sufficient longevity to permit the associates to pursue the enterprise's purpose. *See Applins*, 637 F.3d at 73 (citing *Boyle v. United States*, 556 U.S. 938, 946, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009)); *see also United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) (describing an association-in-fact enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct").

Viewing the evidence in the light most favorable to the government and drawing all inferences in its favor, this Court finds that the government presented sufficient evidence at trial that the criminal enterprise's identity existed apart from the structure of Local 17. Although

Kirsch contends that the only relationship between the defendants was their common membership in Local 17, the government presented sufficient proof that the defendants, although perhaps meeting or knowing each other through their common membership in Local 17, operated together within the criminal enterprise apart from their membership in Local 17. Membership in Local 17 alone did not bind the defendants. The government introduced independent evidence of the criminal enterprise's purpose (extorting construction employers), the relationships among the associates (roles within the criminal enterprise), and longevity. Kirsch's request for a judgment of acquittal on this basis is therefore denied.

b. Kirsch's Commission of Racketeering Act 5B

With this Court's decision granting Kirsch judgment of acquittal on Racketeering Acts 4A and 5A, Kirsch's conviction on Count 1 now rests solely on the jury's finding that he committed Racketeering Acts 4B and 5B. Commission of both racketeering acts is required to sustain Kirsch's conviction. Kirsch argues that the government failed to present sufficient evidence that he was involved in the commission of Racketeering Act 5B, which pertains to the extortion of Earth Tech in relation to a construction project at the Fourth Street Remediation Site in Buffalo, N.Y., in 2005. Kirsch maintains that the government failed to introduce any direct evidence that he agreed to the commission of the acts taken against Earth Tech, and he contends that the circumstantial evidence presented by the government is insufficient to support his conviction. This Court disagrees.

Appendix B

Earth Tech employee William Lindheimer testified that he and fellow Earth Tech employee Luther Keyes met with Kirsch and former co-defendant James Minter in a trailer at the Fourth Street Remediation job on July 20, 2005. During the meeting, Kirsch demanded that the Fourth Street Remediation project be "100% union." Lindheimer refused this demand but offered a compromise position, which Kirsch refused, stating "we want it all." According to Lindheimer, Kirsch's tone was "direct and arrogant" but he was basically cordial and non-threatening.

The day after the meeting, former co-defendant George Dewald gouged Lindheimer's truck and former co-defendant Michael Eddy "belly-bumped" Lindheimer. Two days after the meeting, Minter made an ominous reference to Lindheimer's wife, Tara, and copies of threatening letters ("Dear Tara" letters) were sent to Lindheimer's wife and two other individuals associated with Earth Tech. Three days after the meeting, Earth Tech employees discovered that the fuel tank of a John Deere loader had been sawed open.

Contrary to Kirsch's argument, the circumstantial evidence presented at trial was not at least as consistent with innocence as with guilt. The government presented significant circumstantial evidence from which the jury could conclude beyond a reasonable doubt that Kirsch agreed to and/or participated in Racketeering Act 5B. *See United States v. Glenn*, 312 F.3d 58, 64 (2d Cir. 2002) ("the prosecution may prove its case entirely by circumstantial evidence so long as guilt is established

beyond a reasonable doubt"); *United States v. Sureff*, 15 F.3d 225, 228 (2d Cir. 1994) (finding that conviction may be based on circumstantial evidence). The jury could directly infer Kirsch's involvement in the racketeering act by considering the evidence demonstrating that immediately after Lindheimer refused Kirsch's all-or-nothing demand, the Fourth Street Remediation project suffered serious repercussions by members of the criminal enterprise. No inferential leap of any significant distance was required. *Cf. Glenn*, 312 F.3d at 70 (noting that "as the inferential leap between the fact and the proposition to be derived grows, the probative value of the [circumstantial] evidence diminishes"). And it is, of course, the jury's role, not this Court's, to weigh the evidence and determine credibility. *Guadagna*, 183 F.3d at 129.

Accordingly, Defendant's request for a judgment of acquittal on this basis is denied.

c. Ownership of Property

Finally, Kirsch argues that the government failed to sufficiently prove Racketeering Acts 4B and 5B, because it failed to prove that the employers owned the property at issue, *i.e.*, the wages and benefits to be paid pursuant to contracts with Local 17. According to Kirsch, Local 17 members would have owned the property because they would have earned it by performing work on the respective projects, thereby acquiring a superior claim to the wages and benefits. This Court disagrees.

Kirsch's argument assumes that the employers *would have* entered into legitimate contracts with Local 17 and that Local 17 members *would have* performed legitimate work, thereby earning the wages and benefits due under the contract. But Racketeering Acts 4B and 5B charged Kirsch with *Attempted* Extortion under the New York Penal Law. As such, his extortionate actions must be judged at the time that he took them. At that time, the employers had not entered into contracts with Local 17 and no Local 17 member was entitled to any wages or benefits. Rather, the employers owned and held the funds that Kirsch was attempting to secure for Local 17 members through the execution of contracts, *i.e.*, the funds to be paid for wages and benefits if contracts were entered into with Local 17. Thus, at the time of Kirsch's conduct, the employers owned the property at issue, as "owner" is defined under New York law. *See* New York Penal Law § 155.00(5) (defining "owner" as "any person who has a right to possession [of property that is taken, obtained or withheld by one person from another person] superior to that of the taker, obtainer or withholder.) Kirsch's request for judgment of acquittal on this basis is therefore denied.

* * *

Kirsch has failed to establish that insufficient evidence underlies his conviction on Count 1. His motion seeking a judgment of acquittal on that basis is therefore denied.

B. Kirsch's Rule 33 Motion

1. Rule 33 of the Federal Rules of Criminal Procedure

Rule 33 of the Federal Rules of Criminal Procedure provides that a court may grant a motion for a new trial "if the interest of justice so requires." A district court "has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, but it nonetheless must exercise the Rule 33 authority 'sparingly' and only in 'the most extraordinary circumstances.'" *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001) (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be manifest injustice . . . . There must be a real concern that an innocent person may have been convicted." *Ferguson*, 246 F.3d at 134. A reviewing court must be satisfied that "competent, satisfactory and sufficient evidence" in the record supports the jury verdict. *Sanchez*, 969 F.2d at 1414 (internal quotation marks omitted).

2. Jury Instructions

Kirsch argues that he is entitled to a new trial because this Court failed to charge the jury with certain instructions in the form he requested and omitted other of his proposed charges *in toto*.[8]

8. Kirsch also re-asserts the arguments he made under Rule 29 as the basis for a new trial under Rule 30. For the same reasons already stated, this Court finds that those arguments do not support

Appendix B

A defendant challenging jury instructions must demonstrate "error and ensuing prejudice." *United States v. Quinones*, 511 F.3d 289, 313-14 (2d Cir. 2007) (citation omitted). Error is found when, "viewed as a whole, [the jury instruction] 'either failed to inform the jury adequately of the law or misled the jury about the correct legal rule.'" *Id.* at 314 (citations omitted); *see also United States v. Sabhnani*, 599 F.3d 215, 247 (2d Cir. 2010). Kirsch argues that this Court erred by not instructing the jury on the *Enmons* exception to Hobbs Act and New York Penal Law liability and by not including other requested charges.[9]

This Court fails to detect any error. First, in a pretrial ruling, this Court fully explained why the *Enmons* exception to Hobbs Act and New York Penal law liability does not apply in this case. *See United States v. Larson*, 807 F. Supp. 2d 142, 151-163 (W.D.N.Y. 2011). This Court reiterated that ruling at the jury charge conferences after the close of proof. That being the case, instructing the jury concerning the *Enmons* exception was not warranted or required. Second, Kirsch does not elaborate on why the omission of his proposed charges, which he references only

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a finding of "manifest injustice" and are insufficient grounds to order a new trial under Rule 33. *Ferguson*, 246 F.3d at 134.

9. Kirsch also argues that this Court erred by not instructing the jury on the meaning of "unwanted, unnecessary, and superfluous labor," as that term is used in the indictment in Racketeering Acts 4A and 5A of Count 1 and Counts 2, 5, and 6. This argument is now moot, however, in light of this Court's resolution of that issue in the context of Kirsch's Rule 29 motion.

by number,[10] constitutes "error and ensuing prejudice." *Quinones*, 511 F.3d at 313-14. Many of these charges are ones that this Court gave, albeit not in the form Kirsch proposed. Kirsch does not, however, explain why the charges as given were erroneous. He conclusorily states only that "[a]ll of the requested charges accurately reflect the applicable law and would have formed the basis for a verdict of acquittal, had the jury been so instructed." (Kirsch's Memorandum of Law, Docket No. 611, p. 25.) And for those proposed charges that were omitted *in toto*, Kirsch fails to address how the omissions rendered the entire set of jury instructions erroneous. *See id.* (requiring that jury charges be considered as a whole). For these reasons, Kirsch has failed to demonstrate that he is entitled to a new trial based on erroneous jury instructions.

* * *

For purposes of Rule 33, the jury's verdict is fully supported by competent evidence and nothing Kirsch presents approaches manifest injustice or gives rise to a real concern that an innocent person may have been convicted. *See Ferguson*, 246 F.3d at 134. Kirsch is therefore not entitled to a new trial, and his request for one is denied.

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10. The proposed charges are 20, 39, 44, 49, 50, 52, 54, and 56, set forth in Docket No. 426.

IV. CONCLUSION

For the reasons stated above, Kirsch's Motion for a Judgment of Acquittal, or in the alternative, for a New Trial, is granted in part and denied in part. The Clerk of Court will be directed to enter a judgment of acquittal on Counts 5 and 6. Although this Court's ruling concerning the property allegation in Counts 5 and 6 extends to Racketeering Acts 4A and 5A of Count 1 and to Count 2, as fully explained herein, Kirsch is not entitled to a judgment of acquittal on those counts. Kirsch's conviction on Count 1 is sustained based on the jury's finding that he committed Racketeering Acts 4B and 5B; Kirsch's conviction on Count 2 is sustained because of the evidence relating to Amstar Painting. Kirsch's motion for a new trial will be denied.

V. ORDERS

IT HEREBY IS ORDERED, that the portion of Kirsch's Motion for a Judgment of Acquittal, or in the alternative, for a New Trial (Docket No. 610) requesting Judgment of Acquittal is GRANTED in part and DENIED in part, consistent with the foregoing Decision and Order.

FURTHER, that the Clerk of Court is directed to enter a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure for Counts 5 and 6.

FURTHER, that the portion of Kirsch's Motion for a Judgment of Acquittal, or in the alternative, for a New Trial (Docket No. 610) requesting a New Trial is DENIED.

SO ORDERED.

Dated: March 31, 2015
Buffalo, New York

/s/ William M. Skretny
WILLIAM M. SKRETNY
Senior United States District Judge

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, FILED NOVEMBER 27, 2013

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

07-CR-304S

1, 2, 4, 6, 7, 8, 9, 10, 11, 12

UNITED STATES OF AMERICA,

v.

CARL A. LARSON, *et al.*,

Defendants.

DECISION AND ORDER

I. INTRODUCTION

This is a criminal action brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*, and the Hobbs Act, 18 U.S.C. § 1951. Briefly, over the course of about eleven years, Defendants, members of a labor union known as "Local 17," are alleged to have engaged in threats, physical violence, and property damage in an attempt to force construction employers in Western New York to hire Local 17 members for their projects.

Appendix C

Defendants previously moved for dismissal of the Second Superseding Indictment on the ground that it did not contain sufficient allegations of extortable property as defined by the Supreme Court's recent ruling in *Sekhar v. United States*, 133. S. Ct. 2720, 186 L. Ed. 2d 794 (June 26, 2013). Those allegations were that Defendants attempted to extort:

a. Property of construction contractors consisting of wages and benefits to be paid pursuant to labor contracts with Local 17 at construction projects in Western New York.

b. Property of non-union construction laborers consisting of the jobs being performed by those non-union laborers and the wages and benefits associated with those jobs at construction projects in Western New York.

c. Property of construction contractors and businesses consisting of the right to make business decisions free from outside pressure at construction projects in Western New York.

d. Property of construction contractors consisting of wages and employee benefit contributions paid or to be paid by said contractors for unwanted, unnecessary, and superfluous labor.

(Sec. Sup. Indict. ¶ 8, Docket No. 280.)

Appendix C

This Court denied the motion in an October 9, 2013 Decision and Order on the ground that at least two of the four property allegations survived Sekhar, specifically the allegations that Defendants attempted to obtain by extortion the property of construction contractors consisting of wages and benefits to be paid pursuant to labor contracts, and the property of construction contractors consisting of wages and employee benefit contributions paid or to be paid by said contractors for unwanted, unnecessary, and superfluous labor. At least one of these two property allegations was alleged in connection with every predicate racketeering act and Hobbs Act charge. This Court agreed with Defendants, however, that the 'right to make business decisions free from outside pressure' did not constitute extortable property as defined by the Supreme Court. Left unresolved was the issue of whether the 'property of non-union construction laborers consisting of the jobs being performed by those non-union laborers and the wages and benefits associated with those jobs' constituted extortable property.

Presently before this Court is Defendants' joint motion for reconsideration of the October 9, 2013 Decision and Order. Familiarity with this prior order is assumed. Defendants have also jointly moved for a redaction of the Second Superseding Indictment.

This Court finds these matters fully briefed[1] and oral argument unnecessary.

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1. Defendants did not file reply papers in accordance with Local Rule of Criminal Procedure 12(b)(2).

Appendix C

II. DISCUSSION

A. Motion for Reconsideration

Although there is no express criminal procedure provision for a reconsideration motion, courts in this Circuit have applied the applicable civil standard to such motions in criminal cases. *United States v. Gundy*, No. 13 Crim. 8 (JPO), 2013 WL 4838845, *1(S.D.N.Y. Sept. 11, 2013); *United States v. Reyes*, No. 3:10-cr-120 (VLB), 2013 WL 1882305, *1 (D. Conn. May 3, 2013); *United States v. Briggs*, No. 10CR184S, 2012 WL 5449688, *2 (W.D.N.Y. Nov. 7, 2012). Reconsideration of a prior decision is generally justified where there is: (1) an intervening change in controlling law; (2) new evidence; or (3) the need to correct a clear error of law or to prevent manifest injustice. *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992), *cert denied*, 506 U.S. 820 (1992); *United States v. Kasper*, No. 10-CR-318S, 2012 WL 2573259, *1 (W.D.N.Y. June 29, 2012); *see also Shrader v. CSZ Trans., Inc.*, 70 F.3d 255, 257 (2d Cir.1995) ("reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court").

Defendants challenge this Court's prior conclusion that, even following the Supreme Court's recent ruling in *Sekhar v. United States*, 133. S. Ct. 2720, 186 L. Ed. 2d 794 (June 26, 2013), "wages and benefits pursuant to a labor contract" constituted extortable property. See

United States v. Larson, No. 07-CR-304S, 2013 WL 5573046, *5 (W.D.N.Y. Oct. 9, 2013). This conclusion relied in part on the fact that "a contract and contractual rights can be assigned, and therefore constitute something of value that can be exercised, transferred or sold." *Id.* Defendants argue that this Court "overlooked controlling Supreme Court precedent," specifically, *John Wiley & Sons, Inc. v. Livingston*, wherein the Supreme Court observed that " '. . . a collective bargaining agreement is not an ordinary contract.'" (Defs' Mem of Law at 2-3, Docket No. 383 (quoting *John Wiley & Sons*, 376 U.S. 543, 550, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964).) Contrary to Defendants' contention, however, *John Wiley & Sons* does not support a conclusion that rights under a labor contract cannot constitute obtainable property or that such rights are non-transferable. Instead, as noted by the Government, the Supreme Court held that, following an employer's merger with another company, an arbitration clause in a collective bargaining agreement may be enforced against the successor employer despite the latter entity's failure to sign or be a party to that agreement. *John Wiley & Sons*, 376 U.S. at 550-51. In other words, the Court recognized that the contractual obligation to arbitrate could under certain circumstances transfer to a third party even where an ordinary contractual provision would not. Further, the Court relied on the national labor preference for arbitration not to support a conclusion that the law governing ordinary contracts was inapplicable to collective bargaining agreements, but as evidence of the parties' intent to give the arbitration clause in such an agreement a broad scope. *John Wiley & Sons*, 376 U.S. at 550-51 n. 4. As such, this case does not call into question

the Court's prior conclusion that the contractual right to wages and benefits for the members of Defendants' union is an obtainable, and thus extortable, property right. Moreover, by securing a contract for Local 17, Defendants would obtain wages and benefits on behalf of union members. Defendants' motion for reconsideration is therefore denied.

B. Motion to Redact Indictment

Defendants also jointly moved to redact from the Second Superseding Indictment any allegations that they attempted to extort the "[p]roperty of non-union construction laborers consisting of the jobs being performed by those non-union laborers and the wages and benefits associated with those jobs." (Sec. Sup. Ind. ¶ 8(b).) Defendants argue that they could not have attempted to obtain wages and benefits that the non-union workers had not yet earned. (*See* Defs' Mem of Law at 4, Docket No. 384.) Defendants further argue that the non-union workers, as at-will employees, possess no protectable property interest in the jobs sought, but instead any interest is dependent on the contractor-employer's consent. (*Id*. at 5-6.)

With respect to this last argument, Defendant relies on the Second Circuit's pre-*Sekhar* decision in *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006), *cert denied*, 551 U.S. 1144 (2007). (Defs' Mem of Law at 5-6, Docket No. 384.) There, the Court recognized that "money and the right . . . to be an employee" constituted extortable property. *Gotti*, 459 F.3d at 326. The Court found that,

although the employment at issue was presumably at-will with no guaranteed right to continued employment, the employee "surely had the right to be employed there for as long as he sought the job and his employer would have him." *Id*. Defendants argue that because "[t]he extorable property interest identified in *Gotti* was expressly conditioned upon the employer's decision to continue to employ the at will employee," any coercive activity directed toward that interest would in essence be an attempt to obtain in whole or in part the employer's right to make business decisions. (Defs' Mem of Law at 6, Docket No. 384.) Defendants therefore argue that this portion of the *Gotti* decision does not survive the Supreme Court's analysis in *Sekhar*.

The Government responds that "there is a distinction between the generalized idea that compelling an employer to make any business decision free from outside property (rejected by this Court) and the long-standing conclusion that property such as 'noncompetition or non-exclusivity agreements' as discussed in *Gotti* and recognized as such by this Court . . . are obtainable property subject to extortion." (Gov's Mem of Law at 8, Docket No. 385.) Here, the Government argues, "the jobs, wages and benefits, however ephemeral and dependent on the employer's agreement," are intangible property interests that are capable of being extorted. (*Id*.)

The fact that the non-union workers' property interest in their at-will employment has been recognized is not, however, dispositive. *See Gotti*, 459 F.3d at 326. Extortion requires "'not only the deprivation but also the acquisition

of property.'" *Sekhar*, 133 S. Ct. at 2725 (quoting *Scheidler v. Nat'l Org. for Women, Inc.* ("*Scheidler II*"),[2] 537 U.S. 393, 400-1, 404, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003) (acts intended to cause employees to "give up" property right of performing job insufficient to establish extortion)). Thus, not every property right is extortable, instead "a defendant must pursue something of value from the victim that can be exercised, transferred or sold." *Sekhar*, 133 S. Ct. at 2726. By way of example, the Supreme Court majority in *Sekhar* noted that a member of the Pulitizer Prize Committee's right to recommend the recipient of the prize constitutes something of value, and therefore arguably falls within the broad definition of property. Sekhar, 133 S. Ct. at 2726 n. 5; *see generally United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969) (property is not limited to tangible items, "but includes, in a broad sense, any valuable right"). However, although the committee member could be forced or paid to give up that right, the member could not transfer it to someone else. *Sekhar*, 133 S. Ct. at 2726 n. 5.

Similarly, here, although defendants certainly could have "interfered with, disrupted, and in some instances completely deprived [non-union workers] of their ability to exercise their property rights" in continued employment, *Scheidler*, 537 U.S. at 404, the non-union workers themselves could not have transferred their jobs, wages and benefits to defendants. *See Sekhar*, 133

2. As noted by the Second Circuit in *United States v. Gotti*, 459 F.3d 296, 301 n. 1 (2d Cir. 2006), cert denied, 551 U.S. 1144 (2007), *Scheidler* was before the Supreme Court on three separate occasions: in 1994, 2003, and again in 2006.

S. Ct. at 2726 n. 5. These could have been obtained only from the contractor-employers. Accordingly, although the attempted "obtain[ing of] money[, i.e. wages and benefits] by threatening a third party [such as a non-union employee]" is still a permissible Hobbs Act charge, *See Sekhar*, 133 S. Ct. at 2725 n. 2, the allegation that Defendants attempted to obtain jobs, wages and benefits from nonunion workers is, at best, duplicative of the allegations of attempted extortion of the contractors. Redaction is therefore appropriate.

III. CONCLUSION

Because Defendants failed to raise any matter that would potentially alter this Court's prior decision denying the motion to dismiss, their joint motion for reconsideration is denied. Defendants' joint motion to redact from the Second Superseding Indictment allegations of the attempted extortion of the "property of non-union construction laborers consisting of the jobs being performed by those non-union laborers and the wages and benefits associated with those jobs at construction projects in Western New York" is granted.

IV. ORDERS

IT HEREBY IS ORDERED, that Defendants' Joint Motion for Reconsideration of this Court's October 9, 2013 Decision and Order (Docket No. 383) is DENIED;

FURTHER, that Defendants' Joint Motion for Redaction of the Second Superseding Indictment (Docket No. 384) is GRANTED.

SO ORDERED.

Dated: November 23, 2013
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
Chief Judge
United States District Court

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, FILED SEPTEMBER 16, 2016

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Case Number: 1:07CR00304-006
USM Number: 15930-055

UNITED STATES OF AMERICA

v.

MARK KIRSCH

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

***

☒ was found guilty on count(s) 1 & 2 of the Redacted Trial Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Appendix D

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. §1962(d) 18 U.S.C. §1963(a)	Racketeering Conspiracy	08/2005	1
18 U.S.C. § 1951 18 U.S.C. § 2	Hobbs Act Conspiracy	09/11/03	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

***

August 31, 2016
Date of Imposition of Judgment

/s/
Signature of Judge

Honorable William M. Skretny,
Senior United States District Judge
Name and Title of Judge

09/14/16
Date

Appendix D

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

36 months on Count 1 and 36 months on Count 2 with each count to run concurrent. The cost of incarceration fee is waived.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends designation to FCI Allenwood, if the Bureau of Prisons determines the facility is suitable for the defendant.

***

Appendix D

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

2 years on each of Counts 1 and 2 with both counts to run concurrent.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

***

Appendix D

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200	$ 0	$ 198,121.50

***

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Ontario Specialty Contracting	$184,078.89	$184,078.89	
Amstar Painting	$14,042.61	$14,042.61	
TOTALS	$198,121.50	$198,121.50	

***

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

***

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Appendix D

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

***

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

***

F ☒ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay a special assessment of $100 on Count 1 and $100 on Count 2 for a total of $200, which shall be due immediately. If incarcerated, payment shall begin under the Bureau of Prisons Inmate Financial Responsibility Program. Payments shall be made to the Clerk, U.S. District Court (WD/NY), 2 Niagara Square, Buffalo, New York 14202.

Pursuant to 18 U.S.C. § 3663A, it is ordered that the defendant make restitution to Ontario Specialty Contracting in the amount of $184,078.89 and Amstar Painting in the amount of $14,042.61, for a total of $198,121.50. The restitution is due immediately. Interest on the restitution is waived. Restitution will be joint and several with any other defendant(s), convicted in this case or any related case, who share the same victim(s) and losses. While incarcerated, if

the defendant is non-UNICOR or UNICOR grade 5, the defendant shall pay installments of $25 per quarter. If assigned grades 1 through 4 in UNICOR, the defendant shall pay installments of 50% of the inmate's monthly pay. After considering the factors set forth in 18 U.S.C. § 3664(f)(2), while on supervision, the defendant shall make monthly payments at the rate of 10% of monthly gross income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number),* Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

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