

PETITIONER'S APPENDIX A

14-4133

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of February, two thousand nineteen.

PRESENT: JON O. NEWMAN
DENNIS JACOBS,
Circuit Judges,
LEWIS A. KAPLAN,*
District Judge.

UNITED STATES OF AMERICA,
Appellee,

* Judge Lewis A. Kaplan, of the United States District Court for the Southern District of New York, sitting by designation.

1
2 -v,-

14-4133

4 XING LIN,
5 Defendant-Appellant

-----X

20 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,
21 ADJUDGED AND DECREED that the judgment of the district court be
22 AFFIRMED.

23 Xing Lin was convicted after a jury trial on four counts, including murder
24 through use of a firearm during and in relation to a crime of violence, in violation
25 of 18 U.S.C. § 924(j). We assume the parties' familiarity with the underlying
26 facts, the procedural history, and the issues presented for review.

27 Section 924(j) prescribes certain penalties if a defendant causes the death of
28 a person while violating 18 U.S.C. § 924(c). 18 U.S.C. § 924(j). Section 924(c)
29 punishes “any person who, during and in relation to any crime of violence . . . for
30 which the person may be prosecuted in a court of the United States, uses or
31 carries a firearm, or who, in furtherance of any such crime, possesses a firearm.”
32 *Id.* § 924(c)(1). Section 924(c)(3) defines the “crime of violence” element of

1 section 924(c)(1)(A) as a felony that "(A) has as an element the use, attempted
2 use, or threatened use of physical force against the person or property of another,
3 or (B) that by its nature, involves a substantial risk that physical force against the
4 person or property of another may be used in the course of committing the
5 offense." Id. § 924(c)(3).

6 Lin argues that the extortion underlying his section 924(j) conviction, as it
7 was committed, was not a "crime of violence." We disagree.

8 Section 924(c)(3)(B) is not unconstitutionally vague because it applies to a
9 defendant's case-specific conduct, "with a jury making the requisite findings
10 about the nature of the predicate offense and the attending risk of physical force
11 being used in its commission." United States v. Barrett, 903 F.3d 166, 178 (2d
12 Cir. 2018). If the conduct-specific determination was not made by the jury, we
13 review the omission of the element from the jury charge for harmless error. Id.
14 at 184. We reverse if "the record contains evidence that could rationally lead to
15 a contrary finding with respect to the omitted element." Id. (quoting Neder v.
16 United States, 527 U.S. 1, 15 (1999)).

17 Violence was integral to Lin's extortion scheme; no rational juror would
18 have concluded otherwise. The jury heard that Lin extorted \$2,000 a month
19 from Huo Guang Chen by threatening him with violence. And when Chen later
20 ceased the payments on instruction from Chan Qin Zhou, Lin ordered Zhou
21 killed, and then ordered Chen to resume payments. Accordingly, Lin's
22 extortion "involve[d] a substantial risk that physical force against the person or
23 property of another may be used in the course of committing the offense," 18
24 U.S.C. § 924(c)(3)(B), and the failure to submit the section 924(c)(3) inquiry to the
25 jury is harmless error beyond a reasonable doubt.

26 For the foregoing reasons, and finding no merit in Lin's other arguments,
27 we hereby **AFFIRM** the judgment of the district court.

28 FOR THE COURT:
29 CATHERINE O'HAGAN WOLFE, CLERK


Catherine O'Hagan Wolfe

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

Date: February 14, 2019
Docket #: 14-4133cr
Short Title: United States of America v. Lin (Lin)

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 1:11-cr-114-1
DC Court: SDNY (NEW YORK
CITY)
DC Judge: Cedarbaum

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

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VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature