Supreme Court Docket No.
First Circuit Court of Appeals Docket No. 18-1027

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

Jambulat Tkhilaishvili
Petitioner-Appellant

v.

United States of America
Respondent-Appellee

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

PETITION FOR A WRIT OF CERTIORARI

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ISSUE PRESENTED

I. **This Court has held in *Sekhar* and *Scheidler* that, to be guilty of extortion, the defendant must take physical possession of the victim's property. In this case, the Defendant was alleged to have directed the victim to transfer his property to third parties. Is the Defendant entitled to a judgment of acquittal?**

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Jambulat Tkhilaishvili respectfully petitions this Honorable Court for a writ of certiorari to review the order of the United States Court of Appeals for the First Circuit affirming his convictions.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, entered on June 5, 2019, appears at Appendix A to the petition. The

judgment of the district court, entered on December 19, 2017, appears at Appendix B to the petition.

JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the First Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Procedural History

On May 11, 2016, the Petitioner was charged in a two-count indictment. Count one alleged a conspiracy to commit Hobbs Act extortion, in violation of 18 U.S.C. § 1951. Count two alleged an attempted Hobbs Act extortion, also in violation of 18 U.S.C. § 1951. According to the indictment, the victim of this failed extortion was John Doe A, later identified as Victor Torosyan. The Government charged that the property the Petitioner sought to obtain was his "ownership interest in the [Allied Health] Clinic." See JA[1] 27-28.

The case went to trial on May 1, 2017 and concluded on May 8. JA 12-13. The Petitioner moved for judgment of acquittal after the Government's case and at the close of all evidence. The motions were taken under advisement. On May 8, the Petitioner was convicted on both counts. On December 19, the Court denied the motion for judgment of acquittal and

[1] Joint Appendix to the First Circuit briefs

sentenced the Petitioner to nine months each on Counts 1 and 2, to be served consecutively. JA 17.

Notice of appeal was timely filed on January 2, 2018. JA 22. On January 10, the case was docketed in the First Circuit Court of Appeals. On June 5, 2019, the First Circuit affirmed the Petitioner's convictions.

Statement of Facts

A. The Alleged Crime

The Petitioner Jambulat Tkhilaishvili ("James"), his brother and co-defendant David Tkhilaishvili ("David") and the complaining witness Victor Torosyan ("Victor")[2] were partners and co-owners of the Allied Health Clinic ("the Clinic"), a Quincy, MA company which administered suboxone, an opioid replacement therapy, to those who were struggling with drug addiction. JA 198, 204.

The idea for the clinic came from David, who approached Victor for financing. In December 2014, Victor agreed to invest a six-figure sum in the Clinic. Because of the size of his investment, he insisted upon "a special consent authority" which provided that, until his loan was repaid, he would have the deciding vote if the three men (David, the Petitioner and Victor) could not agree on a particular course of action for the business. JA 220. He also asked David to sign over a pizza shop as collateral, which David agreed to do. JA 220-21.

[2] The petition will use the defendants' and witness' first names as that is how they were referred to at trial and on appeal.

In August of 2015, David asked Victor to release his security interest in the pizza restaurant so that David could sell it. Victor agreed. JA 247-48. Victor testified at trial that, shortly after signing the security release, the brothers began to make demands and threaten him. JA 248. Specifically, he claimed that they threatened to hurt him and his family if he did not surrender a percentage of his ownership stake in the business to a friend of David's named "Saba" and an unidentified third party, as well as agree to turn over clinic profits to David. See e.g., JA 271 ("The first, you have to give your 5 percent to Saba right now, and the other 5 percent later on we will tell you who to give to…And then the second thing is the amount of the funds, that he wants the 40 percent back to him from day one from when we start receiving the money from the insurance companies.").[3]

In November 2015, Victor reported the threats to his business attorney who reached out to the U.S. Attorney's Office. JA 294-95. Shortly thereafter, Victor met with the FBI and agreed to record meetings with the defendants. During several of the recorded meetings, according to the Government, David again threatened Victor to give up some of his ownership interests in the clinic. JA 295-98. Although Victor recorded one conversation with James, he agreed that no threats were made at that time. JA 552.

While these disputes between Victor and David were ongoing, Victor began to more closely scrutinize the Clinic's financials. Although David was entitled to a bi-weekly salary, Victor alleged that several of the payments

[3] The "40 percent" was not charged in the indictment as the property sought to be obtained.

David had made from Clinic funds were improper. James, however, did not earn even one dollar from the Clinic. JA 394-95.

In January 2016, Victor exercised a "Duty of Loyalty" clause in the Clinic's operating agreement and informed David and James that they had "forfeited their interest in the Clinic and in Health Management through their misconduct." JA 369, Exhibit 21. He alleged that the misconduct included "misappropriating funds" for personal benefit and "threatening" the Clinic and Victor personally. JA 585.

In April, James and David filed a lawsuit in Suffolk Superior Court challenging their expulsion from the business. JA 527, 737. The lawsuit was still pending at the time of the criminal trial. JA 527. In May 2016, the brothers were arrested and indicted soon thereafter.

HOW THE FEDERAL ISSUES WERE RAISED AND RESOLVED BELOW

Before both the district court and the First Circuit, the Petitioner challenged the sufficiency of the evidence as to both counts. He claimed that directing a transfer of property to a third-party was not "obtaining" that property within the meaning of the Hobbs Act. Thus, he argued, he did not agree to or attempt extortion by demanding that Victor transfer ownership interests to a third parties. Both courts rejected this argument.

REASONS FOR GRANTING THE WRIT

I. This Court held in *Sekhar* and *Scheidler* that, to be guilty of extortion, the defendant must obtain property for himself. Thus, the verdict in this case, which was based on the potential transfer of property from Victor to someone other than the defendants, cannot stand.

A conviction for conspiracy or attempt to commit extortion requires proof that the defendant agreed or tried "to obtain property" from another. Recent cases in the Supreme Court have correctly defined the scope of the word "obtain" in the statute. 18 U.S.C. § 1951. The Court has ruled that it does not cover the mere redirection of property from the victim to a third party, but instead requires that the defendant take personal possession of it. Thus, the verdict in this case, which was premised on an overly broad meaning of the word "obtain," cannot stand.

The Supreme Court has recently held that extortion under the Hobbs Act requires not only "that the victim part with his property," but also "that the *extortionist* gain possession of it." *Sekhar v. United States*, 133 S.Ct. 2720, 2725 (2013); *see also Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 403 (2003) ("in an extortion prosecution, the issue that must be decided is whether *the accused* 'receive[d] [money] from the complainant.") (citing *People v. Weinseimer*, 117 App. Div. 603, 616 (N.Y. App.Div. 1907) (brackets in original). Where the defendant did not obtain the complainant's property, but instead used "threats to compel another person to do or to abstain from doing an act which such other person has a legal right to do or

to abstain from doing," he is guilty of coercion, not extortion. *Sekhar*, 133 S.Ct. at 2725.

In *Scheidler*, the court overturned a conviction under the Hobbs Act because the defendants "did not obtain respondents' property." 537 U.S. at 405. The defendants there had engaged in a "nationwide conspiracy to shut down abortion clinics." *Id*. at 398. By their actions, the defendants "interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights." *Id*. at 404. Yet this did not constitute extortion because the defendants "did not acquire any such property," nor did they "pursue[] nor receive[] 'something of value from' respondents that they could exercise, transfer, or sell." *Id*. at 405 (*quoting United States v. Nardello*, 393 U.S. 286, 290 (1969)). "To conclude that such actions constituted extortion would effectively 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*. (emphasis added). The Court went on to note that the distinction between extortion and coercion is that in the former the extortionist must obtain the property, whereas in the latter the defendant does not obtain the property. *Id*. The court defined the word "obtain" as "to gain or attain possession or disposal of," and rejected the dissent's definition "to attain regulation of the fate of." *Id*. at 403 n. 8.

The Court sought to further clarify the difference between extortion and coercion in *Sekhar*, 133 S.Ct. at 2725. In that case, the Court noted, once again, that the distinction depends on whether property was obtained by the extortionist, since extortion is the "criminal acquisition of ... property," whereas coercion is "the use of threats to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing." *Id*.

This Court more recently addressed the meaning of obtaining in the forfeiture context in *Honeycutt v. United States*, 137 S. Ct. 1626, 1632–33 (2017). In that case, the question was whether the defendant was required to forfeit property "obtained" by his co-conspirator. *Id*. The Court noted that the statute at issue "limits forfeiture to property the defendant 'obtained ... as the result of' the crime." *Id*. The Court then discussed the meaning of "obtain":

> At the time Congress enacted § 853(a)(1), the verb "obtain" was defined as "to come into possession of" or to "get or acquire." Random House Dictionary of the English Language 995 (1966); see also 7 Oxford English Dictionary 37 (1933) (defining "obtain" as "[t]o come into the possession or enjoyment of (something) by one's own effort, or by request; to procure or gain, as the result of purpose and effort"). That definition persists today. See Black's Law Dictionary 1247 (10th ed. 2014) (defining "obtain" as "[t]o bring into one's own possession; to procure, esp. through effort"); cf. *Sekhar v. United States,* 570 U.S. ——, ——– – ———, 133 S.Ct. 2720, 2725, 186 L.Ed.2d 794 (2013) ("Obtaining property requires '... the acquisition of property' ").

Honeycutt, 137 S. Ct. at 1632–33. Based on the above analysis, the Court held that "[n]either the dictionary definition nor the common usage of the word

'obtain' supports the conclusion that an individual 'obtains' property that was acquired by someone else." *Id.*

The First Circuit recently addressed this issue in *United States v. Burhoe*, No. 15-1542, 2017 WL 3947056, at *4–5 (1st Cir. Sept. 8, 2017). In that case, the defendants were accused of, among other things, extorting fellow union members of wages and benefits. In determining that various convictions should be set aside, the Court discussed in detail the definition of the terms "property" and "obtain" within the meaning of the Hobbs Act. In doing so, the First Circuit noted that "[t]he Supreme Court has refined the property element of the Hobbs Act by focusing on the word 'obtain,' emphasizing that extortion under the Act requires not only that a victim be deprived of his or her property, but also that the perpetrator acquire it." *Id.* at 4, citing *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403-04 (2003).

The government in *Burhoe*, as it did here, relied on the case of *United States v. Green*, 350 U.S. 415, 420 (1956), in which the Supreme Court held that Hobbs Act extortion "in no way depends upon having a direct benefit conferred on the person who obtains the property." *Id.* Yet *Green* stands only for the proposition that proving <u>both</u> an obtaining and a direct benefit is unnecessary. It does not support the Government's contention that a conviction can stand on <u>neither</u> element being satisfied.

The First Circuit in *Burhoe* acknowledged that "*Scheidler* appears to have left *Green* intact," *Burhoe*, 2017 WL 3947056 at * 18, but nevertheless went on to reconcile the two. In doing so, the Court held that it is not enough for the Government to show that the defendant controlled the transfer of the property to a third party. Where the Government cannot show that the defendant personally took possession of the property at issue, it must prove, at a minimum, that the defendant "directly benefited from the deprivation of the victims' property." 2017 WL 3947056, at *18. An unidentifiable benefit is not sufficient under the Hobbs Act. *Id*.

The district court (Sorokin, J.) followed the logic of *Burhoe* in *United States v. Brissette*. In that case, the court indicated that it would instruct the jury on the definition of "obtain" as follows:

> To prove this element, the government must prove beyond a reasonable doubt that Crash Line was deprived of its property, and that the defendants acquired that property. A defendant "obtains" property for these purposes when he either: 1) takes physical possession of some or all of the property; 2) personally acquires the power to exercise, transfer, or sell the property; or 3) directs the victim to transfer the property to an identified third party and personally benefits from the transfer of the property.
>
> It is not enough for the government to prove that the defendants controlled the property by directing its transfer to a third party, nor is merely depriving another of property sufficient to show that the defendants "obtained" that property. Under the third theory of "obtaining," you must determine, based on all of the evidence before you, whether the defendants personally benefitted from the transfer of the property. …A defendant does not personally benefit from the transfer of property when he merely hopes to receive some future benefit, or when he receives a speculative, unidentifiable, or purely psychological benefit from it.

United States v. Brissette, No. 16-cr-10137-LTS, 2018 U.S. Dist. LEXIS 55526 (D. Mass. Mar. 19, 2018). Because the Government could not meet this standard, the case was dismissed.

On appeal, however, the First Circuit retreated from *Burhoe*, seemingly ignored *Sekhar*, *Scheidler* and *Honeycutt*, and reversed the dismissal. *United States v. Brissette*, 919 F.3d 670, 672 (1st Cir. 2019). The Court relied on the Model Penal Code's definition of extortion, cited in passing in a footnote in *Scheidler*, 537 U.S. at 408 n.13, which is: "bring[ing] about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another." Id., *quoting* Model Penal Code § 223.4, cmt. 2, at 182). Thus, the First Circuit ruled that the Code's "definition of 'obtaining'… expressly provides that it encompasses conduct in which a defendant brings about a transfer of property to a third party rather than to himself." *Brissette*, 919 F.3d at 677. The court followed this logic in the case at bar when if affirmed the Petitioner's convictions. See Appendix A.

The First Circuit in *Brissette* was correct that it is does not matter whether the defendant benefits from the transfer of property. As *Green* indicates, the Government need not prove any benefit at all because a benefit, direct or otherwise, is not an element of extortion. But what the Government must do, according to *Green*, *Sekhar, Scheidler*, and *Honeycutt*, is prove that the defendant took possession of the victim's property.[4]

[4] To the extent that the Hobbs Act is unclear about whether an actual transfer to the Defendant is necessary to satisfy the crime of extortion, the rule of lenity should apply.

In this case, the Government failed to present evidence that the defendants sought to personally take possession of the subject property. Instead, the undisputed evidence at trial was that the brothers sought to affect the transfer of Victor's interest in the Clinic to third parties, rather than themselves. The Government argued below, and the courts so far have apparently agreed, that the Hobbs Act provided a theory of liability covering mere transfer to a third party and that it need not prove that the defendants ever took physical possession of the property at issue. Based on the caselaw as outlined above and the plain language of the statute, a conviction premised on this theory cannot stand.

CONCLUSION

Because the decision of the trial court and the First Circuit directly conflicts with controlling Supreme Court precedent on the law of extortion and the meaning of the word "obtain", this Court should grant the Petition for Certiorari.

Scheidler, 537 U.S. at 408-409, *quoting United States v. Enmons*, 410 U.S. 396, 411 (1973) (under the rule of lenity, an ambiguous criminal statute "must be strictly construed ... in favor of" the defendant).

Respectfully Submitted,
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By his attorney

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PROOF OF SERVICE

I, Michael Tumposky, do swear or declare that on this the 3d day of September, 2019, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class

postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The name and address of the person served is as follows:

Solicitor General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W., Room 5616
Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.
Executed on

/s/ Michael Tumposky
Michael Tumposky

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2740 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 3, 2019

/s/ Michael Tumposky
Michael Tumposky