No. 19-7661

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

REDINEL DERVISHAJ — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

REDINEL DERVISHAJ - 05723-748
(Your Name)

USP MCCREARY, P.O. BOX 3000
(Address)

Pine Knot, KY 42635
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I. May The Second Circuit Court Of Appeals Determine That The Underlying Offense Of Hobbs Act Extortion, Threatening Physical Violence In Furtherance Of A Plan To Extort, Categorically Qualify As A Crime Of Violence Under The Force Clause Of Title 18 § 924(c)(3)(A)?

II. May The Second Circuit Court Of Appeals Hold That Petitioner's Preserved Issue Was Waived Although It Was Not Objected To At Trial But Was Preserved During Sentencing And, If It Was Not Forfeited, Did The Court Of Appeals Err In Not Reviewing It under The Plain Error Standard of Federal Rules Of Criminal Procedure 52(b)?

III. May The Second Circuit Court Of Appeals Flatly Disregard A Meritorious Claim Of Subordination Of Perjury By Government Witnesses Throughly Supported By Competent Evidence?

IV. May The Second Circuit Court Of Appeals Ignore The Strictures Regarding Federal Agents Executing A Daytime Seizure And Search Warrant In The Nighttime?

V. May The Second Circuit Court of Appeals Permit The Government To use Highly Prejudicial Evidence, With No Probative Value, That Was Wholly Irrelevant And Unrelated To The Case?

VI. May The Second Circuit Court Of Appeals Find Brady Violation Claims To Be Without Merit Without Addressing The Claims?

VII. May The Second Circuit Court Of Appeals Permit Petitioner To Be Tried For A Firearms Related Offenses When No Firearm Was Involved Nor Presented or Proven At Trial?

VIII. May The Second Circuit Court Of Appeals Accept, And Ultimately, Grant An Untimely Filed Brief Where Tolling Did Not Apply?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[X] reported at 17-2570 _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

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[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 18, 2019.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 5, 2019, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5

No person shallbe held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in Jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assisance of Counsel for his defense.

Title 18 U.S.C. § 921

Title 18 U.S.C. § 924

Title 18 U.S.C. § 1951

Rules

F.R.Cr.P. 12

F.R.Cr.P. 41

F.R.Cr.P. 52

Local Rule 31.2

Other

1 George E. Al., McCormick On Evidence § 190 (Kenneth S. Brown & Robert P. Mosteller eds., 7th ed. 2013 & Supp.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968

STATEMENT OF THE CASE

Redinel Dervishaj (Dervishaj) appeals from a judgment entered on August 13, 2017, in the United States District Court for the Eastern District of New York, convicting him, after a jury trial, of conspiring and attempting to extort three individuals. He was convicted of four crimes: 1) conspiracy to extort in violation of 18 U.S.C. § 1951(a) (John Doe #1-Count One; John Doe #2-Count Five; John Doe #3-Count Nine); 2) attempted extortion of the victim, in violation of 18 U.S.C. § 1951(a) (John Doe #1-Count Two; John Doe #2-Count Six; John Doe #3-Count Ten); 3) threatening physical violence in furtherance of a plan to extort the victim, in violation of 18 U.S.C. § 1951(a) (John Doe #1-Count Three; John Doe #2-Count Seven; John Doe #3 Count Eleven); and brandishing a firearm in furtherance of crimes of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii)(namely the crimes charged in Counts One through Three-Count Four; those charged in Counts Five through Seven-Count Eight; those charges in Counts nine through Eleven-Count Twelve).

The district court sentenced Dervishaj to one day of imprisonment on Counts One through Three, Five through Seven, and Nine through Eleven, to run concurrently; and, on the mandatory-consecutive terms on the Section 924(c) charges, to seven years' imprisonment on Count Four, 25 years' imprisonment on Count Eight, and 25 years' imprisonment on Count Twelve. Dervishaj is currently serving his total term of 57 years and one day of imprisonment.

SUMMARY ARGUMENT

Petitioner raised substantive issues on appeal. He had filed a pretrial motion pursuant to Johnson v. United States, 135 US 2551 (2015), contending that attempt and conspiracy to commit Hobbs Act extortion (the charges in the 2nd Superseding Indictment) did not qualify as crimes of violence under the force clause of 924(c). Realizing the legal landscape would not support that finding, the Government filed a 3rd Superseding Indictment where it isolated the means of committing the offense of either Hobbs Act robbery or extortion, and charged petitioner with threatening physical violence in furtherance of a plan or purpose to extort, in an effort to mimic the lauguage of the force clause of 924(c) to then suggest that threatening physical violence in furtherance of a plan or purpose to extort is categorically a crime of violence under the force clause of 924(c).

On appeal, petitioner raised a Double Jeopardy claim that he attempted to preserve, for appeallate purposes, at sentencing. Petitioner asserted that the 3rd superseding indictment is multiplicitous at counts 2 & 3, 6 & 7, 10 & 11. The Government, in its appellate brief, claimed that the issue was forfeited. The Second Circuit ruled, wrongly, that the issue was waived, irrespective of the fact that petitioner had not deliberately relinquished or abandoned the issue.

Also on appeal, petitioner claimed that the Government suborned the perjurious testimony of its witnesses at the Grand Jury and at trial. Petitioner, proved, through competent evidence, that the evolution of testimony from when retelling how incidents transpired initially to local law enforcement, to when the recounting of incidents were told to federal authorities had so diametrically changed as to only contain mere vestiges of the original narrative.

Petitioner also argued on appeal, that federal agents intentionally executed a daytime warrant in the nighttime. After he was arrested, agents obtained a seizure and search warrant that authorized the seizure and search of his car between the hours of 6:00 am and 10:00 pm. The seizure of the car occurred at 5:47 am, the nighttime. Petitioner contended that the seizure violation was intentional because, not only did agents have the keys to the car, but they also had complete and total dominion and control of the car. Therefore, there was no reason for agents to have conducted the seizure and search when they did.

Concomitantly on appeal, petitioner raised the issue they used highly prejudicial and inflammatory evidence that had no probative value and was irrelevant to the case. At trial, the Government sought to introduce, and the district court admitted, a photo of a gun from someone else's cell phone, who was not on trial, to suggest to the jury that the picture of the gun, in no way related to the case, meant petitioner was guilty of the 924(c) counts when, in actuality, the Government admitted "No firearms were

seized from any of the defendants in this case."

Petitioner made several Brady violation claims on appeal. The first was that the Government, inexplicably, withheld the transcripts from the 3rd superseding indictment. It was inexplicable, because the transcripts of the 1st and 2nd superseding indictments were provided. Petitioner requested the 3rd's transcripts to showcase Government witness perjury, on appeal, between Grand Jury testimony and trial testimony. The next Brady violation occurred by the Government's intentional withholding of information regarding how cell phone records contained in an affidavit to obtain cell phone records covered the exact same time frame. Petitioner contended that the information was obtained illegally. The third Brady violation occurred when the Government withheld a picture of a BB gun seized from a co-defendant's apartment. The picture was relevant to prove that there were no "firearms" involved in this case.

Petitioner argued on appeal that the district court permitted him to be tried for firearms related offenses when no firearm was introduced nor proven at trial. Pursuant ot Title 18 U.S.C. § 921, the Government was required to meet the definition of a firearm in order to meet that element to convict petitioner. As previously stated, the Government admitted no firearms were seized from any of the defendants in this case. However, a BB gun was.

Lastly, petitioner argued on appeal that the Second Circuit accepted the Government's untimely filed appellate brief. The Government filed its brief out of time. In arguing that it was timely filed because the time was tolled, the Government argued that, since it filed a dispositive motion against petitioner's **co-defendant**, the time to respond to **petitioner's** appeal was tolled. The Governemnt cited a Local Rule in support, however, the Local Rule cited did not support their position.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Erred In Affirming on the Basis That Threatening Physical Violence In Furtherance of a Plan to Extort Qualified Categorically as a Crime of Violence Under the Force Clause of title 18 § 924(c)(3)(A)

II. The Court of Appeals Erred In Affirming by Finding Petitioner Waived a Preserved Issue

III. The Court of Appeals Erred In Disregarding a Meritorious Claim of Subordination of Perjury by Government Witnesses That was Thoroughly Supported by Competent Evidence

IV. The Court of Appeals Erred In Ignoring the Strictures Regarding Federal Agents Executing a Daytime Warrant in the Nighttime

V. The Court of Appeals Erred In Permitting the Government to Use Highly Prejudicial Evidence, With no Probative Value, That was Wholly Irrelevant and Unrelated to the Case

VI. The Court of Appeals Erred In Finding Petitioner's Brady Violation Claims to be Without Merit Without Addressing Them

VII. The Court of Appeals Erred In Permitting Petitioner to be Tried for a Firearms Related Offense When No Firearm was involved Nor Proven at Trial

VIII. The Court of Appeals Erred In Accepting, and Ultimately Granting, the Government's Untimely Filed Brief Where Tolling did not Apply

IX. The Questions Raised In this Case are Important and Unresolved

ARGUMENT

Petitioner is a layman in the law and respectfully requests the Court construe his submissions to raise the strongest arguments they suggest, and construe his pro se pleadings liberally, because pro se litigants are to be held "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 US 519, 520, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972)(per curiam).

I. The Court Of Appeals Erred In Affirming On The Basis That Threatening Physical Violence In Furtherance Of A Plan To Extort Qualified Categorically As A Crime Of Violence Under the Force Clause Of Title 18 § 924(c)(3)(A)

At counts Three, Seven, and Eleven, the Government has failed to state an offense. The Hobbs Act is a divisible statute that proscribes two alternative offenses, namely, Robbery and Extortion. 18 U.S.C. § 1951(b)(1), (2). Once the offense is determined, it is not further divisible. The disjunctive language appearing in the statute's definition of extortion does not further make the statute divisible. Those terms are not alternative elements, but rather represent different means of proving the same element.

On January 27, 2016, petitioner filed a pretrial motion to dismiss the three counts charging the firearms violations brought under 924(c). They were constitutionally proscribed in the Third Superseding Indictment after Johnson v. United States, 135 US 2551 (2015). After the motion was fully briefed, the Government filed its 3rd superseding indictment which added three counts of threatening physical violence in furtherance of a plan to extort in violation of § 1951(a). The 3rd superseding indictment was filed because the Government presaged that petitioner's motion to dismiss would be granted. On March 3, 2016, the district court denied the dismissal motion. In the Order denying the Johnson motion, the district court stated:

> "In this case, the government does not contend that the predicate acts of conspiracy to and attempt to commit Hobbs Act extortion are, by their nature, crimes of violence within the meaning of subsetion (A) of the firearms statute, which is commonly referred to as the force clause. The debate here is whether the alleged predicate crimes satisfy subsection (B), the statute's residual clause. (Gov't Mem. 2, ECF No. 141; Def. Reply Mem. 1, ECF No. 143)."

Threatening physical violence in furtherance of a plan to extort is not a predicate offense under the Hobbs Act. What are the means for committing the offense? What are the elements? The district court charged the jury, with respect to the counts of threatening and committing physical violence in furtherance of an extortion plan as follows:

> "The government must prove the following elements beyond a reasonable doubt: first, that the defendant threatened (or, for count 11, committed) physical violence to any person or property; second, that the physical violence threatened of committed furthered a plan or purpose to commit Hobbs act extortion, the elements of which I have already explained to you; and third, that the plan or purpose to commit Hobbs Act extortion, if successful, would have in any way or degree obstructed, delayed, or affected [interstate] commerce or the movement of any article or commodity in commerce. You do not have to find

that the defendant was aware of the plan or purpose to commit extortion. It is sufficient for you to find that the defendant's actions furthered the plan or purpose to commit extortion." (Gov't App. Brief, pg. 89)(emphasis added).

That instruction does not appear in the Modern Jury Instructions. Petitioner asks the Court to take note that he is actually innocent of counts three, seven, and eleven because, the jury ignored the third element of the instruction which required "the plan or purpose to commit Hobbs Act extortion," to be successful.

This Court requires a jury to find a defenedant guilty of all the elements of an offense. In Neder v. United States, 527 US 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), since the jury did not find him guilty of each of the elements of the offenses with which he was charged, its verdict is no more fairly described as a complete finding of guilt of the crimes for which the defendant was sentenced than is the verdict here. Id. 527 US at 31. (Scalia, J., concurring in part and dissenting in part)("[S]ince all crimes require proof of more than one element to establish guilt...it follows that trial by jury means determination by a jury that all elements were proved. The Court does not contest this.").

Petitioner contends that the harmless error analysis applies because this is not the equivalent of a verdict of guilt on an offense greater than the one for which the jury convicted him. Instead, the jury ignored an element all together and rendered a guilty verdict on counts three, seven, and eleven that was never in fact rendered, in violation of the jury-trial guarantee.

A. United States v. Xing Lin Is Controlling In This Case

Xing Lin appealed form the judgment of the United States District Court for the Southern District of New York. A jury convicted Lin of extortion, racketeering, conspiracy to commit racketeering, and murder through the use of a firearm during and in relation to a crime of violence, but acquitted him of conspiracy to commit extortion. United States v. Lin, 683 Fed. Appx. 41 (2d Cir. 2017)(Lin I). Lin argued he was convicted of using a firearm "in relation to a crime of violence" 18 U.S.C. § 924(c)(1)(A), (j), on appeal and that the predicate crime, Hobbs Act extortion, is not a "crime of violence." The Second Circuit held, in relevant part, § 924 defines a "crime of violence" as a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Id. § 924(c)(3)(B)...the residual clause of 924(c). The clause the court of appeals should have reviewed petitioner's counts under 924(c). Lin argued that the "ordinary case" of Hobbs Act extortion does not involve a substantial risk of the use of physical force.

In denying Lin's appeal, the appellate court held, "It is far from clear that the "ordinary case" of Hobbs Act extortion could not entail a substantial risk of the use of physical force." Ibid. It concluded, "Therefore, even if the district court

did err, such error was not'clear or obvious.'"

Lin appealed to this Honorable Court, and on May 14, 2018, it GVR'd the case back to the Second Circuit in light of its decision in Sessions v. Dimaya, 584 US ___, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018); Xing Lin v. United States, 138 US 1982, 210 L.Ed.2d 242 (2018). On remand, the Second Circuit held that:

> "Section 924(c)(3)(B) is not unconstitutionally vague because it applies to a defendant's case-specific conduct, 'with a jury making the requisite findings about the nature of the predicate offense and the attending risk of physical force being used in its commission.' United States v. Barrett, 903 F.3d 166, 178 (2d Cir. 2018). If the conduct-specific determination was not made by the jury, we review the omission of the element from the jury charge for harmless error. Id., at 184. We reverse if 'the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.' Id. (quoting Neder, 527 US at 15." See also United States v. Lin, 75 Fed. Appx. 106 (2d Cir. 2019).

In affirming, the Second Circuit held, "Violence was integral to Lin's extortion scheme; no rational juror would have conlcuded otherwise." Id., at 107. On June 24, 2019, this Honorable Court rejected that position in United States v. Davis, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019), in holding that "§ 924(c)(3)(B) was unconstitutionally vague since even if it was possible to read the statute to impose additional punishment, it was impossible to say that Congress intended that result or that the law gave defenddants fair warning that the mandatory penalties of 924(c) would apply to their conduct." Id., 139 US at 2319.

After Davis was decided, Lin appealed again to this Honorable Court, again, GVR'd the case back to the Second Circuit "for further consideration in light of United States v. Davis, 588 US ___, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019); see Xing Lin v. United States, 205 L.Ed.2d 3 (2019). As of the filing of this petition, the Second Circuit has not decided the remand. However, the difference in the holding in the instant case and Lin evinces a clear intercircuit conflict.

B. Government Agreed Lin Is Controlling

In finding that counts three, seven, and eleven were predicate offenses under the Hobbs Act to support petitioner's 924(c) convictions, the Second Circuit stated:

> "We need not consider whether Dervishaj's convictions are crimes of violence under the Residual Clause because his Hobbs Act violence-in-furtherance-of extortion convictions are plainly crimes of violence under the Elements Clause." (Panel Decision, pg. 5)(PD).

That holding was created out of whole cloth because the Second Circuit cited to no binding Supreme Court or Circuit law in support. On the contrary, the Government acknowledged Lin as controlling in stating:

> "Alternatively, this sentencing challenge portion of the appeal should be stayed pending the resolution of United States v. Lin, 14-4133. There,

> Lin's 924(c) conviction and sentence, predicated on Hobbs act extortion, was upheld in an initial summary affirmance. As relevant, applying plain error review, the Court held that Hobbs Act extortion did not clearly fall outside the scope of Section 924(c)'s risk of force clause. Xing Lin, 683 F. at Appx. 43-44...Assuming that the Court in Lin affirms, finding no error, that holding may control the resolution of Dervishaj's appellate challenge to his three Section 924(c) convictions also based on Hobbs Act extortion." (Gov't App. Br., pg. 100).

With regards to counts three, seven, and eleven, the third superseding indictment charged petitioner with "knowingly and intentionally committing physical violence..." The Government's aim was to phrase the charging language to line up with the language of the force clause of 924(c); which reads:

> A crime of violence is a felony that:
>
> (A) has as an element the use, attempted use, or threatened us of physical force against the person or property of another; or

to suggest that since the phrasing lines up, the counts are "categorically" violent crimes under the force clause. The argument is legally inapt because of the "categorical approach". That approach is used to determine whether an offense qualifies as a violent felony or crime of violence. The counts can only fall under the Residual Clause of 924(c)(3)(B). This Court has agreed with the Fifth Circuit Court of Appeals' conclusion that 924(c)(3)(B) is unconstitutionally vague. 924(c)(3)(B) doesn't ask about the risk that "a particular crime posed" but about the risk that "offense...by its nature, involves."

To amplify the tacit implication that "charging phrasing" makes a crime a categorical match to the force clause, the PD reads:

> "For the jury to convict Dervishaj on these counts, therefore, it had to find that Dervishaj threatened or committed physical violence to another's person or property. This element plainly meets § 924(c)(3)(A)'s definition of 'use, attempted use, or threatened use of physical force against the person or property of another.'" (PD, pg. 6).

The PD went on to note that the third superseding indictment goes on to further hold:

> "...to [John Doe #1, #2, and #3] in furtherance of a plan or purpose to obstruct, delay and affect commerce...by extortion, towit: a plan and purpose to obtain proceeds from [John Doe #1, #2, and #3], with [their] consent, which consent was to be induced by wrongful use of actual or threatened force, violence and fear of physical injury." (PD, pg. 6).

At footnote #2, the panel stated:

> "This crime is distince from the crimes of Hobbs Act extortion and Hobbs Act robbery. See Scheidler v. nat'l Org. for Women, 547 US 9, 22 (2006) (noting that the 'Hobbs Act crime of using violence in furtherance of' robbery or extortion is a 'separate' crime from Hobbs Act extortion and robbery."

The Hobbs Act seems, on its face, to describe three separate offenses: (1) robbery; (2) extortion; and (3) committing or threatening physical violence in furtherance of a plan or purpose to violate § 1951. However, in Scheidler, this Court held that the third putative offense does not creat a freestanding physical violence offense, but

rather must be read restrictively to proscribe only the commission or threat of violence in furtherance of a plan to commit robbery or extortion.

Finally, this Court drove the point home in holding:

> "We conclude that Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. It did intend to forbid acts of threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion (or related attempts or conspiracies). Scheidler, 547 US at 23.

Thus, this Court ruled that [the violence in furtherance clause is] when a defendant planned to commit robbery or extortion. Further, this Court, in Johnson v. United States, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010)(Johnson I), made clear whether an offense reaches the force clause in finding:

> "Nor is there any merit to the dissent's contention, post, at 4, that the term 'force' in § 924(e)(2)(B)(i) cannot be read to require violent force, because Congress specifically named 'burglary' and 'extortion' as 'violent felon[ies]' in § 924(e)(2)(B)(ii) notwithstanding that those offenses can be committed without violence. The point would have force (so to speak) if burglary and extortion were listed in § 924(e)(2)(B)(i), as felonies that have 'as an element the use, attempted use, or threatened use of physical force.' In fact, however, they are listed in § 924(e)(2)(B)(ii), as examples of felonies that 'presen[t] a serious potential risk of physical injury to another. The Government has not argued that intentional, unwanted touching qualifies under this latter provision. What the dissent's argument comes down to, then, is the contention that, since felonies that create a serious risk of physical injury qualify as violent felonies under subparagraph (B)(ii), felonies that involve a mere unwanted touching must involve the use of physical force and qualify as violent felonies under subparagraph (B)(i). That obviously does not follow." Id., 130 S.Ct. at 1272.

A fortiori, the Second Circuit has already established that Hobbs Act extortion is a crime of violence pursuant to the residual clause of 924(c) in Lin. ("Accordingly, Lin's extortion 'involve[d] a substantial risk that physical force against the person or property of another in the course of committing the offenses,' 924(c)(3)(B). Id., 752 Fed. Appx. at 107."). The contrary holding in this case...does not follow. If the substantive offense of Hobbs Act extortion falls under the residual clause of 924(c)(3)(B), how can the lesser included offense of threatening physical violence fall under the force clause of 924(c)(3)(A)?

C. Certiorari Is Required To Resolve A Deep And Abiding Circuit Split

The panel decision creates an intercircuit conflict. No issue facing federal circuit courts has generated as deep and abiding schism as this issue. The Eleventh Circuit took the opposite view of the Second Circuit. In his En Banc rehearing request, petitioner contended that this Court nor the Second Circuit had binding precedent governing whether violence in furtherance of Hobbs Act extortion is plainly a crime of violence under the Elements Clause. (Petitioner's Br, pg. 6). He requested the case be sent back to the district court to address it in the first instance as the Eleventh Circuit did in In re Hernandez, 2019 U.S. App. LEXIS 22590, No. 19-12606-A (July 30,

2019); and In re Echevarria, 2019 u.S. App. LEXIS 24696, No. 19-12812-J (August 19, 2019). The crux of the intercuit conflict comes from the disparate holdings between the Eleventh Circuit and the Second Circuit.

II. The Court of Appeals Erred In Affirming When It Failed To Address A Preserved Issue

Petitioner raised a Double Jeopardy claim below in that the indictment is multiplicitous at counts 2 & 3, 6 & 7, and 10 & 11. This issue was preserved. To be multiplicitous, an indictment must charge a defendant with a single offense in multiple counts. A multiplicitous indictment violates the Double Jeopardy Clause of the Fifth Amendment because it gives a jury more than one opportunity to convict the defendant for the same offense. United States v. Jones, 601 F.3d 1247, 1258 (11th Cir. 2010). The Circuit Court held that this issue was waived. (PD, at 4). This Court held in United States v. Olano, 507 US 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), "Waiver is the intentional relinquishment or abandonment of a known right." Id. 507 US at 733.

Although petitioner did not raise his Double Jeopardy claim by pretrial motion, he still sought to preserve the issue for appeal. On Friday, March 24, 2017, he went for sentencing. (See EX. #1). Petitioner is a layman to the law, and through that lens, he did what he thought would preserve his Double Jeopardy claim of multiplicity. He stated:

"I was given an overloaded indictment..." (See EX. #2).

Although petitioner did not know how to express, in legal terms, what was wrong with the indictment, in that sense, "overloaded indictment" equals "multiplicitous indictment". In that regard, petitioner asserts that he preserved the issue for appeal.

Under Blockburger v. United States, 284 US 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932) (the Blockburger test), two charges are considered separate offenses if "[e]ach of the offenses created requires proof of a different element." Blockburger, 284 US at 304; see also United States v. Black, 918 F.3d 243, 276 (2d Cir. 2018). "[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Id. If the charges fail this test, they are to be considered to be the "same offense" for purposes of the Fifth Amendment's Double Jeopardy Clause, id., and the Sixth Amendment. Texas v. Cobb, 532 US 162, 173, 121 S.Ct. 1335, 149 L.Ed.2d 231 (2001): "it is not determinative whether the same conduct underlies the counts; rather it is critical whether the 'offense'--in the legal sense, as defined by Congress--complained of in one count is the same as that charged in another." United States v. Chacko, 169 F.3d 140, 146 (2d Cir. 1999).

The PD cited Chacko, supra, as the proposition that petitioner "waived" his multiplicitous claim by not raising it pretrial and referenced F.R.Cr.P. 12(b)(2) in support. However, in noting that that is not an absolute finding, it went on to further hold:

"However, the Advisory Committee Notes indicate that a double jeopardy

objection is not waived under Rule 12 if it is not made prior to trial: "In the other groups of objections...which the defendant at his option may raise by motion before trial,...are such matters as former jeopardy ...Fed.R.Crim.P. 12 advisory committee's note 1944 (emphasis added). While a double jeopardy challenge can be waived, for example, as part of a plea agreement or if not asserted at the district court level, see e.g. Securities and Exch. Comm'n v. Palmisano, 135 F.3d 860, 863 (2d Cir. 1998), we do not interpret Federal Rule of Criminal Procedure 12 to bar a double jeopardy argument qua multiplicity argument when it is made to the district court in a posture other than that of a pre-trial motion. It is an argument that "may" be made as part of a pre-trial motion or it can be made at a later time. See Fed.R.Crim.P. 12; see also Pacelli v United States, 588 F.2d 360, 363 n. 8 (2d Cir. 1978)(reviewing Advisory Committee Notes and holding that "Failure to raise a claim of former jeopardy before trial does not constitute a waiver under Rule 12(b)"). Id., 169 F.3d at 145.

The Advisory Committee's notes make clear that failure to raise a claim of double jeopardy before trial does not constitute a waiver under Rule 12(b).

The Blockburger test examines whether each charged offense is an element not contained in the other charged offense. See United States v. Dixon, 509 US 688, 696, 125 L.Ed.2d 556, 113 S.Ct. 2849 (1993)("In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same elements' test, the double jeopary bar applies."). Attendant to the Blockburger test, the Second Circuit has held that "When, as here, the same statutory violation is charged twice, the question is whether the facts underlying each count were intended by Congress to constitute separate 'units' of prosecution." United States v. Polouizzi, 564 F.3d 142, 154 (2d Cir. 2009) (quoting United States v. Ansaldi, 372 F.3d 118, 124 (2d Cir. 2004).

Notwithstanding petitioner preserved his multiplicity claim, he raised on appeal that the issue should be reviewed under plain error review pursuant to F.R.Cr.P. 52(b). Rule 52(b) provides that a plain error that affects substantial rights may be considered even though it was not brought to the district court's attention. Rosales-Mireles v. United States, 201 L.Ed.2d 376, 383 (2018). In United States v. Olano, 507 US 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), this Court established three conditions that must be met before a court may consider exercising its discretion to correct the error. "First, there must be an error that has not been intentionally relinquished or abandoned. Second, the error must be plain - that is to say, clear or obvious. Third, the error must have affected defendant's substantial rights." Molina-Martinez v. United States, 578 US ___, at ___, 136 S.Ct. 1338, 194 L.Ed.2d 444 (2016)(citations omitted). To satisfy this third condition, the defendnat ordinarily must "'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different." Ibid. Once those three conditions have been met, "the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings."

Molina-Martinez, 578 US, at ___ (internal quotation marks omitted).

In anticipation of losing the pretrial Johnson motion, the Government filed the third superseding indictment charging petitioner at counts three, seven, and eleven with "knowingly and intentionally commit[ing and threatening] physical violence...in furtherance of a plan and purpose to obstruct, delay and affect commerce...by extortion ..." Congress did not intend for multiple punishments for committing or threatening physical violence sanctioned in the Hobbs Act.

In relation to the plain error analysis, first, a Double Jeopardy violation is error. In Olano, this Court stated "If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection. Id., 507 US at 733. Second, the error is plain, that is clear or obvious. This Court has further held that a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law. Ibid. The Double Jeopardy Clause prohibits multiple punishment "where the two offenses for which the defendant is punished... cannot survive the 'same elements' test enunciated in Blockburger, 284 US 304. Under current law, the error in this case is plain. Third, the plain error affected petitioner's substantial rights. This Court has declared that in most cases it means that the error must have been prejudicial and affected the outcome of the district court proceedings. Ibid. Petitioner was prejudiced by the multiplcitous indictment in that he was exposed to multiple punishments. Which, in turn, affected his substantial rights because he was actually given multiple punishments.

In Rosales-Mireles v. United States, 138 S.Ct. 1897, 1907 (2018), this Court stated that an error that satisfies the first three Olano factors ordinarily satisfies the fourth and warrants relief under Rule 52(b) because such error usually establishes a reasonable probability that a defendant will serve a sentence that is more than necessary to fulfill the purpose of incarceration. From that standpoint, the Second Circuit stated:

> "And in any event, the district court sentenced Dervishaj concurrently-to one day's imprisonment-in each of the nine extortion-related counts. Because erroneous multiplicity, if any, in the indictment did not affect Dervishaj's term of imprisonment, any error did not seriously affect the fairnes of the proceeding below." (PD at 5).

That is an inaccurate representation of the facts. Multiplicitous count 3, threatening physical violence, is the predicate which anchors count 4, the 924(c) count. Count 7, threatening physical violence, is the predicate which anchors count 8, the second 924(c) count. And count 11, committing physical violence, is the predicate which anchors count 12, the third 924(c) count. Therefore, without the multiplicitous counts, the Government could not create an anchor for the 924(c) counts and, thereby,

eliminating petitioner's exposure to the added 57 years to his sentence.

A. Government Acknowledges Petitioner's Forfeited Claim

In addressing petitioner's multiplicity claim, the Government stated the following:

> "Dervishaj asserts that attempted extortion in violation of 18 U.S.C. § 1951, and threatening or committing violence in furtherance of an extortion plan or purpose, also in violation of 18 U.S.C. § 1951, are not separate offenses because both crimes are charged under the same statute. As an initial matter, Dervishaj forfeited this claim by not raising it in the distric court." (Government's Brief (GB), pg. 85)(emphasis added)

The Government further, reminded the Second Circut that it may review the forfeited error under plain error reivew pursuant to United States v. Danson, 115 F. Appx. 486, 488 (2d Cir. 2004)(GB) Ibid. The Government merely stated that "the [Appellate] Court should decline to exercise its discretion to review the forfeited claim." (GB, pg. 86).

B. Government's Argument Against Multiplicity Is Fallacious

The Government contends that this Court has held that the Hobbs Act "...includes a separate offense for committing or threatening physical violence in furtherance of an extortion plan or purpose. See Scheidler v. Nat'l Org. for Women, 547 US, 9 22 (2006)." Petitioner's position is adverse. The statute is clear. The word "furtherance" means: a furthering, or helping forward; advancement; promotion (Webster's New World College Dictionary Fourth Edition pg. 575). In referencing Scheidler, the Government admits that if a person commits or threatens physical violence, it must be in furtherance of an extortion plan or purpose.

In arguing on appeal that attempted extortion or threatening physical violence in furtherance of an extortion plan or purpose are distinct for Double Jeopardy purposes, the Government stated: "An indictment is multiplicitous," in the sense forbidden by the Double Jeopardy Clause, "when it charges a single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed." United States v. Walsh, 194 F.3d 37, 46 (2d Cir. 1999).

The Government only proved one crime was committed by way of the third superseding indictment. The indictment charged petitioner with committing one offense each against John Does #1, #2, and #3.

III. The Second Circuit Court Of Appeals Disregarded A Meritorious Claim Of Subordination of Perjury by Government Witnesses That Was Throughly Supported By Competent Evidence

On appeal, petitioner contended that the Government suborned perjurious testimony from its witnesses and supported his contentions with competent evidence. He demonstrated, for instance, that Government witness, George Stoupas (Stoupas) materially changed his story from when first told to the New York Police Department (NYPD), to

when it was told to federal authorities.

Stoupas's ex-employee, Denis Nikolla (Nikolla), attempted to extort him. On September 20, 2012, Stoupas reported the incident to the NYPD. In his initial report, he only names, and mentions, Nikolla as his assailant. (See EX. #3). Later that same day, he meets with a detective and, agains, only names and mentions Nikolla as the perpetrator. The following day, September 21, 2012, Stoupas spoke with police and identified only Nikolla from a DMV picture and identified him as "the person in the picture as the male that pulled the gun on him." (Read EX. #4). On September 27, 2012, Stoupas made a third visit to the Precinct to speak to Internal Affairs. At that last meeting, he made it known that he had a problem with, and filed a complaint against, Nikolla. (Read EX. #4, pg. 3). Finally, on October 12, 2012, Nikolla is arrested on the complaint and charged with Grand Larceny and attempted Grand Larceny.

Fifteen months later, on Jaurary 14, 2014, Stoupas was interviewed by federal authorities. During the interview, his story evolved to a noticeable degree. Instead of it being just him and Nikolla, now "Nikolla was with 3-4 guys." (Read EX. #5). Stoupas maintains, however, that "Nikolla pulled out a handgun, placed it into... side, by his rib, and told...you have to pay me $400.00 per week..." Id. (emphasis added) Nine days later, on January 23, 2014, Stoupas met with federal authorities, again. At that second interview, his story had evolved to a point where any vestiges of the original story were present. In the new version, Nikolla is now with a second man and, instead of Nikolla pulling a gun on Stoupas himself, he now takes the gun from a never-mentioned, second man's waist whom Stoupas identifies as petitioner. (Read EX. #6).

The new story was so materially different from the original, that the prosecutor knew, or should have known, that it was false. The Government memorialized the true account in an affidavit for a wire tap filed by FBI SA Sean Olsewski (Olsewski) on August 6, 2013. (See EX. #7). At paragraph #12, Olsewski states the following:

> "12. A review of criminal history records reveals that DERVISHAJ and NIKOLLA have both previously been arrested and convicted of crimes related to extortionate threats made to others in Queens, New York. Specifically, on or about October 12, 2012, NIKOLLA was arrested on charges of Attempted Grand Larceny in the Second Degreee: Extortion, in violation of New York Penal Law ("NYPL") § 155.40(2)(a) and (2)(b) and Menacing in the Second Degree, in violation of NYPL § 120.14(1).[2]

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[2] The NYPD Complaint report associated with this arrest indicates that the victim reported that NIKOLLA had sought payment from the victim in exchange for protection for the victim's club and that on or about September 20, 2012, Nikolla approached the victim with a gun and stated, in sum and substance, "You're going to pay. There is no place for you to hide and if you like yourself and your house, I will come into your house to get you and beat you in front of your kids and wife in front of you." (Read EX. #8).

That is the true account of what actually happened, and the footnote is the

affirmation. And from paragraph #12 above, federal jurisdiction could not attach, based on the state charges that were initially filed. Prosecutors were well aware of the markedly different story. They were fully aware that Stoupas maintained, from the beginning, that Nikolla acted alone in menacing him and pulling a gun on him from the initial police report filed with NYPD. It is important to note that prosecutors had Stoupas make the dubious identification on the morning of presentment to the Grand Jury.

A. Nikolla's Proffer Suggests Government Knew Of Perjured Testimony

On April 30, 2014, Nikolla was, again, interviewed by prosecutors. In the interview, he told them that while working at Filarakia social club in November 2012, he met a girl named Evisa who also worked there. This fact is of paramount importance because of who she was. During this proffer, Nikolla told prosecutors that while working at Filarakia one evening, he overheard Evisa mention that a stabbing had occurred and that REDI, who was involved in the stabbing, was her boyfriend. Therefore, the chain of logic would lead to the deduction that in November 2012, Nikolla had not yet even met, and did not know, petitioner. (Read EX. #9).

As further proof, Nikolla advised prosecutors that in January 2013, he met petitioner for the first time at Filarakia because he would visit his girlfriend, Evisa, there. (Read EX. #9, pg. 2). Nikolla further advised that sometime in January 2013, he "began hanging out with Redi (aka petitioner)." Therefore, from that proffer prosecutors took from Nikolla April 30, 2014, they knew or should have known that Nikolla did not know petitioner when he accosted Stoupas in Jimbo's Bar on September 20, 2012. Later in the proffer, Nikolla describes to prosecutors, in detail, the incident between him and Stoupas at Jimbo's Bar. (Read EX. #9, pg. 4). With that, after the proffer, prosecutors knew beyond any doubt, that petitioner was not involved with the incident related to Stoupas.

During his Grand Jury testimony, Stoupas changed another siginificant fact regarding how he felt with regards to his safety and life. When he filed his initial report with NYPD, he was asked if he feared for his safety or life and he responded "No." (Read EX. #3, pg. 2). However, when questioned by prosecutors at the Grand Jury, his story was antithetical to what he told NYPD. (Read EX. #10, pg. 4).

At trial during direct, Stoupas tells the new story where Nikolla grabs him, takes him to a foyer in the bar where he and petitioner purportedly corner him and Nikolla supposedly pulls a gun from petitioner's waist. When federal investigators become involved, they had his initial complaint filed with NYPD and worksheet with Internal Affairs with which to guide them. From that point, there would have been no way investigators wouldn't have known that petitioner was not involved with the incident at Jimbo's Bar. As further proof, on 2/4/2014, the Government also interviewed Stoupas' manager, Apostolos Felonis, who recounted the incident told by stoupas.* (Also See EX. #39)

However, the following exchange took place during redirect at trial and is telling of why Stoupas changed his account of what happened initially and after speaking with federal prosecutors on the day of presentment to the Grand Jury:

By AUSA Patrick Hein:

Q. Defense counsel mentioned that you identified the defendant when you met with FBI agents. Did the FBI agents show you only one photograph or several photographs?

A. The FBI asked me to come in for questioning. They say to me, the incident at Jimbo's, we want you to point out to everyone that was there that caused you a problem that day, not just Denis Nikolla. Was there anyone else besides him that was there that day? And that's when I picked out the defendant because I remember that he was there at that point. My only problem the only people that were actually physically threatened me verbally by was Denis Nikolla. (See EX. #11)

There are some endemic facts to take from that exchange:

1. Agents Called Stoupas in for questioning the morning of the presentment to the Grand Jury.

2. Agents knew, from NYPD reports, that Stoupas said only one person menaced him.

From that, several questions become noticably apparent:

1. Why would investigators ask Stoupas "to point to everyone that was there that caused you a problem that day," when he never mentioned anyone else?

2. Why would federal investigators believe federal jurisdiction was invoked for an incident that was purely a state matter that in no way impinged on federal jurisdiction?

3. Why was petitioner's picture even shown to Stoupas when, at the time of the incident, Nikolla didn't even know him?

B. Fraud Upon The Court Committed By The Government

Despite irrefutable proof, in the Government's hands, that Nikolla didn't even know petitioner at the time of the incident, prosecutors, petitioner contends, had Stoupas give a false account regarding supposedly saving text messages in a phone he claimed he "dropped my phone and the screen cracked and I replaced the phone, they couldn't access information to transfer over my data." (Read EX. 12). A cracked screen does not prevent the access or transfer of data from one phone to the next. Since the actual phone was never entered into evidence, Stoupas was free to say he had a phone number in his "broken" phone as "Denis Friend." (GB pg. 47, n. 13).

Although Stoupas testified above that his screen was broken and investigators couldn't access or transfer his data, he testified at trial during direct that he was given the following phone number by petitioner, 347-361-0854, to contact him supposedly to make the payments which was alleged to represent "Denis Friend" in his phone. (Read EX. #13).

Exhibit #127 (EX. #14) is a picture of Stoupas's phone. it appears to be his replacement phone. However, the new phone appears to have the contact information

for the entry "Denis Friend;" the very entry Stoupas claimed could not be accessed or transferred. The phone number **did not** belong to petitioner and prosecutors knew it, thereby committing a fraud upon the court.

At trial during direct, prosecutors qualified an individual named Darryl Valinchus (Valinchus) as an "expert in the field of cell phone data analysis including the analysis of cell phone location data." (Read EX. 15). During cross, Valinchus made an admission which proved beyond any doubt that prosecutors knew the phone number did not belong to petitioner. The following took place between defense counsel, Mr. Darrow, and Valinchus during cross:

By Mr. Darrow:

Q. So why don't we talk first about the phone number then we are going to talk about the pie slice. So in September 2012, the number 347-361-0854 was not registered to Redinel Dervishaj, correct?

A. I would like to look at the subscriber information again.

Q. You don't know one way or the other?

A. I would like to look at the information.

Q. Okay. Did you look at the subscriber information for that number before?

A. Yes.

Q. Okay. you were given that information from the Government?

A. Correct.

Q. Okay.

MR. DARROW: I would like to show the witness - actually I believe 443-A is in evidence, is that right?

MS. SHIHATA: Yes.

MR. DARROW: I would like to put on the ELMO Government's Exhibit 443-A.

Q. Now, this is 443-A you can see the subscriber information in the same format that we have been looking at today and yesterday, correct?

A. Yes.

Q. Okay. In particular, subscriber information related to the 347-361-0854 phone number, right?

A. Correct.

Q. And is this the subscriber information that you reviewed in connection with your analysis?

A. Yes.

Q. All right.

MR. DARROW: Your Honor, could I approach?

THE COURT: Certainly.

MR. DARROW: Thank you.

Q. I am going to hand you my copy of Government's Exhibit 443-A (handing). And I just ask you to look through it to refamiliarize yourself with it.

Just let me know when you have had a chance to look through it.

A. (perusing) Okay, sir.

Q. So this 347-261 number was associated with an account at Sprint in the name of Robert Martinez and Riv Lab Transportation, correct?

A. Yes.

Q. It was not associated according to that information at any time with Redinel Dervishaj, correct?

A. This was canceled on a specific date.

Q. Okay. up until 2/12 of 2013 (the date of petitioner's arrest), was that phone number subscribed to or related to in any way according to that information to the name of Redinel Dervishaj?

A. No. (Read EX. #16).

Prosecutors knowingly and intentionally presented false evidence to the Court and jury with the intent that it would contribute to Petitioner's conviction.

C. Prosecutors Presented Fabricated Evidence To Magistrate Judge

At trial, Dritan Xhuke (Tony) testified that when he first met petitioner, he supposedly told Tony, "You know who I am? I'm Redi from Dorsi. Ask around. You can look me up on the Internet." If one was to do a Google search for "Redi from Dorsi," results will not be returned for REDINEL DERVISHAJ. That Internet search falsehood was concocted by prosecutors as a doorway to put a stabbing petitioner was involved with in front of the jury to make him look violent. (Read EX. #17). At the time Tony claimed to do the Internet search, he did not know petitioner's real name. Therefore, there was no way he would have ever found a news article regarding the stabbing incident in 2012 where he had stabbed a guy in self-defense and he was never indicted. (Read EX. #18). Neither incident was relevant for trial purposes. They were elicited solely for the purpose of impugning petitioner's character.

As previously stated, a Google search for "Redi from Dorsi" does not return results for Redinel Dervishaj. Prosecutors perpetrated a fraud upon the district court, specifically, upon the Honorable Cheryl L. Pollak (USMJ) when they filed a sealed application for Historical Cell-Site Information dated July 16, 2013, which she authorized. The application was for petitioner's cell phone @ 571-337-7018. (Read EX. 19, pg. 1 of 3).

The fraudulent entry appears in paragraph 5(c) below:

> "John Doe #1 subsequently entered the dining area of the Queens Pizzeria and spoke with the man, an Albanian male, who introduced himself as 'Redinel Dervishaj' (hereinafter, "Dervishaj")." (Read EX. #19, pg. 2).

The Government memorialized the Google search results using petitioner's real name in a footnote in that application. (Read EX. #19, pg. 2). Those improper evidentiary errors collectively, and cumulatively, deprived petitioner of a fair trial. United Sates v. Forrester, 60 F.2d 52 (2d Cir. 1995)("Error going to the heart of a critical issue is less likely to be harmless."). Id., 60 F.2d at 64-65. The mention

of those incidents to the jury seriously contributed to the guilty verdict in this case.

The Second Circuit holds that "[e]ven if an appellate court is without doubt that a defendant is guilty, there must be a reversal if the error is sufficiently serious." Id., 60 F.2d at 65. (quoting United States v. Tussa, 816 F.2d 58, 67 (2d Cir. 1986). Tony also committed perjury, and prosecutors were aware of it.

The Second Circuit found that there were discrepancies between witnesses' pre-trial testimony and trial testimony..." (PD at 3). However, from the supporting evidence presented, there were more than mere discrepancies. The Court has held that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 US 97, 103; 49 1.Ed.2d 342, 96 S.Ct. 2392 (1976); see also United States v. Cromitie, 727 F.3d 194, 221(2d Cir. 2013). This Court has held that perjured testimony "is at war with justice because it can cuase a court to render a judgment nor resting on truth." In re Michael, 326 US 224, 227, 66 S.Ct. 78, 90 L.Ed. 30 (1945). Perjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system. See United States v. Dunnigan, 507 US 87, 97, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993).

"In order to be granted a new trial on the ground that a witness committed perjury, the defendant must show that (i) the witness actually committed perjury; (ii) the alleged perjury was material; (iii) the government knew or should have known of the perjury at [the] time of trial; and (iv) the perjured testimony remained undisclosed during trial. Fernandez v. Capra, 916 F.3d 215, 224 (2d Cir. 2018). Perjury requires a showing that a witness gave "false testimony concerning a material matter with the willful intent to provide false testimony,...[s]imple inaccuracies or inconsistencies in testimony do not rise to the level of perjury." United States v. Monteleon, 257 F.3d 210, 219 (2d Cir. 2001). Such perjury is "distinguished from incorrect testimony resulting from confusion, mistake, or faulty memory." Monteleon, 257 F.3d at 219.

Inaccuracy is defined as:

> Inaccuracy n. 1 the quality of being inaccurate; lack of accuracy 2 pl. -ies something inaccurate, error, mistake (Webster's New World College Dictionary Fourth Edition, pg. 719).

One may be inaccurate in attempting to guess someone's age (about 8 or 9 years old), or in a color (it may have been black or dark blue). However, adding a person to the narrative where none existed and, describing an event that never occurred, is not and error or mistake...it amounts to perjury.

IV. The Second Circuit Court Of Appeals Ignored The Strictures Regarding Federal Agents Executing A Daytime Warrant In The Nighttime

On December 2, 2013, a magistrate judge issued a warrant to seize petitioner's

car. The warrant was to be executed in the daytime between the hours of 6:00 am and 10:00 pm. (See EX. #20). On December 3, 2013, at approximately 5:47 am, federal agents executed the seizure warrant and seized petitioner's car. An inventory search was conducted and the vehicle was taken by flat bed to a FBI storage facility in Brooklyn, NY. The vehicle's contents were given to SA Sean Olsewski (Olsewski). (Read EX. 21). Since the seizure and search were conducted before 6:00 am, they were unauthorized and, therefore, unreasonable. It is important to note that agents possessed the keys to the vehicle.

There were over two (2) dozen items seized from the car. (See EX. #22, pg. 2). Inexplicably, over five (5) months later, SA Brian P. Ennesser (Ennesser) filed a "Sentinel Working Copy" which was an addendum to the original inventory list. It was filed May 13, 2014, where four (4) cell phones were alleged to have been found in petitioner's car on the day of the initial seizure. (See EX. #23, pg. 1). The justification given for not inventorying the four phones initially was: "Due to the priorities of the case, writer was unable to submit the evidence on time, thus delaying its submission." (See EX. #23, pg. 2). A doubious excuse considering petitioner was already in custody.

Petitioner contends that, not only were the phones not found, or taken, from his car, but that everything seized was done so in violation of the Fourth Amendment. On March 11, 2016, petitioner filed a pretrial motion to suppress the evidence. He contends that the seizure and search were conducted outside the purview of the strict limits of the warrant. Specifically, the search was conducted in the nighttime with a daytime warrant. Execution of a search and seizure warrant before the time the warrant authorizes is warrantless and, outside of exceptions, unreasonable. The execution of the daytime warrant in the nighttime exceeded the authority granted by the magistrate. Its validity required it to be served in the daytime. United States v. Vigo, 413 F.2d 691, 693 (2d Cir. 1969).

Petitioner's motion to suppress implicated a simple rule: a daytime warrant does not authorize a nighttime seizure or search. F.R.Cr.P. 41(e)(2)(A)(ii) requires express authorization of nighttime execution "for good cuase." In the Second Circuit, suppression for a Rule 41 violation must occur if (1) there was "prejudice," or (2) "there is evidence of intentional and deliberate disregard of a provision in the Rule." United States v. Burke, 517 F.2d 377, 386-87 (2d Cir. 1975). Both are present here. Petitioner was prejudiced in that unreasonably seized evidence was used against him at his trial. There was also "prejudice" in the relevant sense because the warrant "was limited on its face to [seizure] in the daytime and there was nothing to indicate that the justice of the peace intended or could have been persuaded to authorize a [nighttime][seizure]." Id., at 387 n. 14 (explaining that such an example "neatly illustrate[s]" the Second

Circuit meaning of "prejudice" in this context)(first and third alliterations added).

The Third Circuit has held that unless the police had "reason for apprehension that the evidence within the house would be removed, hidden or destroyed before morning[,]" executing the daytime search warrant earlier than 6:00 a.m. would render the search "constitutionally invalid." United Sates ex rel. Boyance v. Myers, 398 F.2d 896, 899 (3d Cir. 1968).

The Second Circuit held in this case that "Although the warrant in question was to be executed between the hours of 6:00 a.m. and 10:00 p.m., the district court properly concluded that this technical violation of Federal Rules of Criminal Procedure 41 was neither intentional nor prejudicial. United States v. Lambus, 897 F.3d 368, 391 (2d Cir. 2018)". (PD at 3). That proposition does not appear in Lambus so it, therefore, is not on point. The Government may think that perhaps a 5:47 a.m. seizure is close enough to "daytime" to count, however, Congress and this Court thinks otherwise. See Yanez-Marquez v. Lynch, 789 F.3d 434, 469 (4th Cir. 2015)("The Government implies that 5:00 a.m. essentially is 'close enough' to 6:00 a.m. in the eyes of the Fourth Amendment. Notably, however, as John Adams observed in successfully defending British soldiers charged in the Boston Massacre, 'Facts are subborn things.'" David McCullough, John Adams 52 (2001)).

In sum, petitioner asks the Court to take note that not only was the car in the Government's total dominion and control, but agents had the keys to it, as well. Therefore, no credible reason exists for the seizure and search to have occurred when it did. There was no logical reason to believe evidence would be removed, hidden or destroyed. In upholding the denial of the suppression motion, the Second Circuit stated, "Dervishaj was already in custody when the vehicle was seized, it was seized from a public street in New York City, and there is no reason to believe that the seizure would have been less abrasive if conducted 15 minutes later." (PD at 3). None of which is relevant to the legality of the seizure and search.

V. The Second Circuit Court Of Appeals Permitted The Government To Use Highly Prejudicial Evidence, With No Probative Value, That Was Wholly Irrelevant And Unrelated To The Case

On April 13, 2016, the district court held a hearing regarding a Limine Motion defense counsel docketed to exclude four (4) pictures taken from Nikolla's cell phone. The pictures depicted him holding an assault rifle and various pistols sitting on targets with ammunition at a firing range. The Government admits the pictures were taken from Nikolla's phone. (Read EX. #24), and that it knew the pictures of the guns were the property of the firing range. (Read EX. #25).

This Court has held that in evaluating the admissibility of proffered evidence against a Motion in Limine, the district court was required to address whether the evidence was relevant and, if so, whether it was admissible pursuant to F.R.E. 401 &

402. "[T]he burden is on the introducing party to establish relevance," Downling v. United States, 493 US 342, 251 n.3, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). The Government failed to establish relevance of the pictures as to petitioner. Despite that, the district court found that one of the pictures was probative in stating the following:

> "So as I weigh the probative value of these exhibits and the prejudicial value, the winner as far as the Court's concerned is the exhibit which I believe is 413-B, which shows the single handgun resting on a target, and the motion is denied and granted to that extent. (See EX. #26).

First off, the picture of the gun was, in no way, related to the case. The greater weight of prejudice should have been weighed against petitioner, not Nikolla because he was not on trial. Propensity evidence refers to evidence to show that a defendant acted in accordance with a character trait (i.e. criminal propensity), which a prosecutor uses for the purpose of suggesting that "because the defendant is a person of criminal character, it is more probable that he committed the crime for which he is on trial." 1 George E. Al., McCormick On Evidence § 190 (Kenneth S. Brown & Robert P. Mosteller eds., 7th ed. 2013 & Supp.). Propensity evidence of this type may not be permissible at trial because of the danger that the jury may condemn the accused because of the evidence of guilt of the crime charged.

This Court has further held that to amount to a violation of Due Process, wrongfully admitted evidence must be "so extremely unfair that its admission violates 'fundamental concepts of justice.'" Dowling, 493 US at 352. The introduction of the picture fits that bill. The picture was not of petitioner. The cell phone did not belong to petitioner. Further, a picture of a gun is **not** a "firearm" for 924(c) purposes. There were no pictures of petitioner possessing a weapon and the admitted picture had an adverse effect on him by any proof of fact and there was no issue that justified its admission. The admitted picture could not be tied to petitioner in any way. It affected his substantial rights and subjected him to serious prejudice because it required him to defend against evidence that was not directly attributable to him. The district court's admission of the picture was an abuse of discretion. (See EX. #27).

The Second Circuit in this case, has held that "We review a district court's evidentiary rulings under a deferential abuse of discretion standard, and we will disturb an evidentiary ruling only where the decision to admit or exclude evidence was 'manifestly erroneous.'" United States v. Litvak, 889 F.3d 56, 67 (2d Cir. 2018) (quoting United States v. McGinn, 787 F.3d 116, 127 (2d Cir. 2015). "[An] error [is] harmless if it is not likely that it contributed to the verdict." McGinn, 787 F.3d at 127. Not only was the admission of the picture not harmless, it absolutely contributed to petitioner being convicted of the 924(c) counts.

VI. The Second Circuit Court Of Appeals Found Brady Violation Claims To Be Without Merit Without Addressing Claims

Under Brady v. Maryland, 373 US 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963),

"The Government has a constitutional duty to disclose favorable evidence to the accused where such evidence is 'material' either to guilt or to punishment." United States v. Coppa, 267 F.3d 132, 139 (2d Cir. 2001). Nondisclosure is material only when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 US 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Brady's materiality standard thus implements the underlying purpose of Brady itself: to "ensure that a miscarriage of justice does not occur." United States v. Bagley, 473 US 667, 675, 105 S.C.t 3375, 87 L.Ed.2d 481 (1985). To establish that a Brady violation undermines a conviction, a convicted defendant must make each of three showings: (1) the evidence at issue is "favorable to the accused, either because it is exculpatory, or because it is impeaching" (2) the State suppressed the evidence, "either willfully or inadvertently" and (3) "prejudice...ensued." Strickler v. Greene, 527 US 263, 281-282, 119 S.Ct. 1963, 144 L.Ed 2d 286 (1999); see Banks v. Dretke, 540 US 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). Petitioner contends that no standards were following by the Second Circuit in evaluating his Brady violation claims.

Petitioner made two specific request for Brady material. A third piece should have been turned over as part of Discovery. On February 15, 2017, petitioner, through counsel, requested prosecutors produce the Grand Jury minutes for the 3rd superseding indictment. (See EX. #28). Petitioner had received the Grand Jury transcripts for the 1st and 2nd superseding indictments. However, as the letter indicates, the 3rd's minutes were not provided. The Government's recital to Grand Jury secrecy was a hollow excuse because it had provided the transcripts to the two previous superseding indictments.

The reason petitioner requested the transcripts for the 3rd superseding indictment was for Brady violations where perjured testimony was given and prosecutors presented a fabricated case to the district court. Petitioner also raised the issue before sentencing and he wanted the district court to address the request for appeallate purposes. The district court failed to address this issue.

On March 21, 2017, petitioner, again, through counsel, requested information as to how the Government obtained telephone records in affidavits by prosecutors and federal agents dated August 6, 2013. (See. EX. #29). The affidavits contained information related to cell phone records petitioner contends were obtained without judicial authorization because the affidavit application sought judicial approval to cover the time frame of May 1, 2013, to July 16, 2013, when the affidavits utilized cell phone records from May 1, 2013, to July 16, 2013, in the application for authorization. (See EX. #30). However, the Government, in its Appellate brief, stated the following:

> "The August 6, 2013, wiretap application and affidavit did not rely on any 'call intercepts.' The 'telephone records' referenced in the affidavit were subscriber information and toll records regarding the dates and times of relevant calls, which the government obtained using subpoenas and pen registers not any 'intercepted' content of those calls." (See EX. #31).

The Government claims there was a subpoena and authorized pen registers. If the records were seized with authorization, then the Government should have turned over the subpoena.

At pg. 6, paragraph 10 of Olsewski's affidavit, he acknowledged that "A check of the Drug Enforcement Administration, FBI, Department of Homeland Security, Immigration and Customs Enforcement wire surveillance indices as of July 26, 2013, has revealed that there have been no prior applications for wire, oral or electronic surveillance with respect to SUBJECT TELEPHONE or SUBJECT INDIVIDUALS." (See EX. #32).

Petitioner requested any subpoena or court order covering the time period in question as proof of authorization that the questioned call records were lawful. If the questioned records were unauthorized, any ensuing applicaion for cell phone records would be based on those unlawful seized records and poisoned by that seizure in violation of the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

On December 3, 2013, Nikolla's apartment was searched by FBI agents. Seized, inter alia, were several edged weapons and one BB gun. (See EX. #33). Prosecutors turned over pictures of the edged weapons. (See EX. #34). However, **no** picture of the BB gun was provided. That the picture of the edged weapons was provided is telling of the exculpatory value of the BB gun to prosecutors which, by extension, would suggest that it was intentionally withheld. Nikolla told investigators that he had purchased the BB gun in Tennessee. (See EX. #35). He further apprised them that "approximately one (1) year prior to the interview he 'pulled' a BB gun on his girlfriend's cousin." Id. In an agent's notes of the interview, it was noted that "DN (Denis Nikolla) pulled a BB gun that was metal and looked like a real pistol." (Read EX. #36).

Prosecutors already knew that Nikolla never carried a firearm while in New York. (Read EX. #9, pg. 2), and that if they gave petitioner the picture of the BB gun, the 924(c) counts would either be dismissed by the district court, or he would have been found "Not Guilty" by the jury of all the counts.

The transcripts of the 3rd superseding indictment were favorable to petitioner because of the content of the testimony and its ability to exonerate him. The authorization, or lack thereof, was favorable to petitioner because, if authorization was lacking for the questioned cell record information, then petitioner could have

moved to suppress it as being unreasonably seized. The picture of the BB gun was favorable to petitioner because, had it been provided before trial, he could have used it in his defense to prove there was never a firearm involved in this case. All of the above evidence was suppressed by the Government, and, as a result, petitioner was greatly prejudice in that his defense was impacted and hampered by the Government's withholding of the evidence.

This was not a case of overwhelming evidence. Witnesses testified that petitioner never threatened them nor asked for money. Petitioner was primarily implicated in the charged offenses through hearsay and double-hearsay. Which, essentially exacerbated the Brady violations.

VII. The Second Circuit Court Of Appeals Permitted Petitioner To Be Tried For A Firearms Related Offense When No Firearm Was Involved Nor Proven At Trial

Title 18 U.S.C. § 921(a)(3) defines "firearm" as:

> "(A) Any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device."

The Second Circuit has decided that "not all guns are firearms" because for instance, a BB gun is not a "firearm." United States v. Rosa, 507 F.3d 142, 145 n.1 (2d Cir. 2007). The Government was well aware of this fact. It was their burden to prove every element of the charged crimes. Petitioner contends that the Government's only evidence of a gun, not a "firearm", was fabricated testimony which was insufficent to prove the essential element of 924(c) because it never met its burden of satisfying the definition of firearm pursuant to 921(a)(3).

The Government never proved that any weapon was "designed to...expel a projectile by the action of an explosion," or that any weapon "may readily be converted to expel a projectile by the action of an explosive." The Second Circuit has held that "The Government need only show that the weapon was either "designed to" or "may readily be converted." 921(a)(3); see also United States v. Rivera, 415 F.3d 284, 287 (2d Cir. 2005). The Circuit Court further held that "Some nexus with commerce must be shown, although that need not be 'any more than the minimal nexus that the firearm [has] been, at some time, in interstate commerce.'" United States v. Travisano, 724 F2d 341, 347 (2d Cir. 1983)(quoting Scarborough v. United States, 431 US 563, 575, 52 L.Ed.2d 582, 97 S.Ct. 1963 (1977)). Since there was never a weapon, the Government has failed to prove this element.

Lastly, despite the Government's claim that "guns" were involved, the following will cast doubt on that belief. On December 4, 2013, the day after petitioner's arrest, the Hon. Joan M. Azrack issued a search warrant for his apartment (See EX. #36). The

only items agents were looking for were cell phones. (See EX. #37, pg. 1). They were not looking for any "firearms". Ultimately, the Government admitted "No firearms or ammunition were seized from any of the defendants in this case." (See EX. #38).

VIII. The Second Circuit Court Of Appeals Erred In Accepting, And Ultimately Granting, The Government's Untimely Filed Brief Where Tolling Did Not Apply

On December 17, 2018, petitioner filed a Motion to Strike the Government's response to his appeal as untimely filed. (See Dkt. #151)(Dkt. refers to the Docket Entry in the Circuit Court). On December 18, 2018, the motion was submitted to a merits panel that would hear the appeal. (Dkt. #154). On August 31, 2018, the Court ordered the Government to file its response "on or before November 29, 2018.) On November 15, 2018, the Government filed a Motion for "Oversized brief and Unconsolidate Appeal" two weeks before its response was due. (Dkt. #131). It did not file its oversized brief nor file a motion for extension of time before the deadline. The next day, November 16, 2018, the Government filed a "Dissmal of Appeal; alternatively stay of appeal pending resolution in U.S. v. Lin, 14-4133" regarding Nikolla.

For clarity's sake, Nikolla was not tried with petitioner. Instead, he pled guilty. His plea was to two counts of Hobbs Act extortion conspiracy involving two of the victims, in violation of 18 U.S.C. § 1951(a), one count of threatening physical violence in furtherance of an extortionate plan, in violation of 18 U.S.C. § 1951(a), and one count of brandishing a firearm in furtherance of a crime of violence to that victim, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). He was sentenced to 216 month's imprisonment.

The facts of Nikolla's plea and sentence, and issues arising from them, are quite different from the facts and issues concerning petitioner. Moreover, because Nikolla executed a waiver of his appellate rights under his plea agreement, the government moved to dismiss the appeal he filed. Therefore, Nikolla's appeal, in no way, had any effect on petitioner's appeal.

On November 30, 2018, the Circuit Court granted the Government's motion. On December 12, 2018, the Government filed its brief. Appellant timely filed a reply in opposition to that response.

A. Second Circuit's Local Rules Merited Striking Government's Brief

Second Circuit Local Rule 31.2(a)(1)(D) sets the criteria for what needs to happen in order for a party to request a later deadline. According to the Rule, the request must occur before the expiration of any Court Ordered deadline. The Government did not file its brief before the deadline.

In its response, the Government claimed in its letter motion dated December 19, 2018, that, once it filed its motion to dismiss "Nikolla's" appeal, petitioner's

appeal was tolled. (Dkt. #156). The Circuit Court did not grant the Government an extension of time, nor did it toll the deadline, either implicitly or explicitly.

In response to the Government's untimely filing, petitioner contended that the dispositive motion filed against "Denis Nikolla" had no bearing on the merits of **his** motion. The motion that the Government filed to unconsolidate petitioner's appeal from Nikolla's was outside the scope of 31.2(a)(3) and is not a dispositive motion. On December 18, 2018, an order was issued referring the Motion to Strike to a merits panel which read:

> "IT IS HEREBY ORDERED that the motion is REFERRED to the panel that will determine the merits of the appeal." (Dkt. #154).

On July 12, 2019, an Order was entered denying the Motion to Strike. (Dkt. #180). The denial order was unorthodox in that it did not list the members of the panel who decided it, did not list who authored it, and there was no opinion as to the determination of the merits. The denial did not express why there was no merit to petitioner's argument that the Government's brief was untimely filed; which left him with no way to address the reason for denial. On En Banc, he requested review of the denial.

In closing, the lesser included offense of threatening physical violence in furtherance of a plan to extort, categorically does not qualify as a crime of violence under the force clause of 924(c). There is no Supreme Court, nor Second Circuit, law to support such a finding. Under Supreme Court and Second Circuit law, the forfeited multiplicity claim should have been reviewed under the plain error standard of Rule 52(b). This issue was not waived. The overall view of the Government's presentation of perjurious testimony by its supposed witness victims was throughly supported by competent evidence. Evidence that went unaddressed by the Circuit Court.

The seizure and search of petitioner's car in the nighttime with a daytime warrant was unauthorized and unreasonable. It was explicitly authorized for daytime execution only. The Governemnt's use, and the district court's admission, of the picture of a gun from a cell phone that did not belong to petitioner, was not only extremely prejudical and an abuse of discretion by the district court, but it detrimentally deprived him of a fair trial. The Brady violations complained of were probative of petitioner's innocence. Especially the intentional withholding, by the Government, of the picture of the "real looking" BB gun. The 924(c) counts never should have been allowed to go to the jury. The Government never proved there was a firearm involved in this case.

Lastly, the Circuit Court accepted the filing of the Government's appellate brief after the time for filing had expired. The Government never filed for, nor was granted, an extension of time to file its brief. Accepting an untimely filed brief, and then ruling in favor of said brief, is not only unfair, it is anathem to modern American Jurisprudence.

Dated: January 29, 2020

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioner respectfully requests from this Honorable Court that...

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Rodinel Dervishaj

Date: FEBRUARY 12, 2020

FOOTNOTES

* On February 4, 2014, Stoupas' manager, Apostolos Felonis, was interviewed by the FBI. Exhibit #39 is a FBI 302 Report prepared by SA's Violet Syku and Joseph H. Rudnick detailing the content and context of the interview at Flo Lounge Restaurant located at 37-20 30th Avenue, Astoria, NY 11103. In the report, Felonis, identified as John Doe #6, and Stoupas is identified as John Doe #1. The report details Felonis' account as told to him by Stoupas as follows:

> "In the Fall of 2012, John Doe #6 went to JIMBO'S BAR with his friend/owner of HEAVEN BAR, JD#1, and two unidentified females. John Doe #6 left around 3:15 a.m. and learned of the following incident, as recounted by JD#1:
>
> NIKOLLA angrily approached JD#1, shaking tables and asking what JD#1 was doing at the bar. JD#1 approached the lobby, where NIKOLLA threatened JD#1 while holding a handgun to his midsection. JD#1 left without further harm and reported the incident to police" (See EX. #39).

That interview took place twelve (12) days after Stoupas' interview with prosecutors on January 23, 2014. Therefore, there is no plausible way prosecutors didn't know petitioner wasn't involved with the incident at Jimbo's Bar. The above excerpt from Felonis' interview serves as further proof that prosecutors suborned the perjury attendant to Stoupas' Grand Jury and trial testimony.