No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD VALENTINI,
Petitioner,

-v-

UNITED STATES OF AMERICA,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

Mr. Seth Kretzer
440 Louisiana Street, Suite 1440
Houston TX 77002

Phone: 713-775-3050 (direct)
Fax: 713-929-2019 (fax)
seth@kretzerfirm.com

Appointed CJA Counsel of
Record for Petitioner

QUESTIONS PRESENTED

1) Does a conviction for violation of the Hobbs Act, 18 U.S.C.A. § 1951(b)(2) require not only that a victim be deprived of his or her property, but also that the perpetrator acquire it? Or may such a conviction be predicated on a victim's transfer of property to a third party even when the perpetrator derives no personal gain from the transfer?

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INTRODUCTION

Petitioner Valentini asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

The reason for this request is that the controlling opinions of this Court on the sufficiency standards for Hobbs Act prosecutions is clear: liability 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.").

The problem is that while some Circuits are adhering to this requirement, *see, e.g., United States v. Kirsch*, 903 F.3d 213, 231-232 (2d Cir. 2018) (rendering judgment of acquittal in appeal from Hobbs Act conviction), the First Circuit has vitiated a requirement that property flow from the victim to the extortionist and has instead manufactured a rule that transfers to third parties are sufficient for liability even if the putative extortionist does not receive any reciprocal benefit.

Valentini's case cries out for certiorari to address an issue that is presenting itself in numerous cases across the country.

OPINION BELOW

The December 10, 2019, opinion of the U.S. Court of Appeals for the First Circuit appears in Appendix A. *United States v. Valentini*, 944 F.3d 343 (1st Cir. 2019).

JURISDICTION

The First Circuit Court of Appeals rendered its decision December 10, 2019. This petition is timely filed; in March 2020, Justice Breyer granted a motion to extend the deadline to April 6, 2020. The Supreme Court has certiorari jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals possessed jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3771(d)(3).

STATUTORY PROVISIONS INVOLVED

18 U.S.C.A. § 1951
§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another,

> against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

A jury convicted Richard Valentini on December 18, 2017, of one count of conspiracy to commit Hobbs Act extortion and one count of aiding and abetting the same. 18 U.S.C. §§ 2, 1951.

On appeal, Valentini challenged the sufficiency of evidence undergirding his convictions at the both the macro-level of conspiracy, and also at the micro-level legal predicate for the Government's "Obtaining of Property" theory of the underlying extortionate acts.

The First Circuit disagreed: "A jury easily could have found beyond a reasonable doubt that Valentini conspired to extort Morel. Valentini's argument on

appeal is that he spoke only meaningless gibberish at the October 4 meeting. Not so." 944 F.3d, at 349.

With regards to "Obtaining of Property", the First Circuit rejected Valentini's arguments as follows:

> To satisfy the "obtaining of property" element of Hobbs Act extortion, our law is clear that the defendant need not receive any personal benefit or take personal possession of the property: directing the transfer of property to a third party is enough. *United States v. Brissette*, 919 F.3d 670, 678 (1st Cir. 2019) (applying *United States v. Green*, 350 U.S. 415, 76 S.Ct. 522, 100 L.Ed. 494 (1956), and *Sekhar*). Further, this court said in *United States v. Tkhilaishvili*, 926 F.3d 1 (1st Cir.), cert. denied, ––– U.S. ––––, 140 S.Ct. 408, 205 L.Ed.2d 237, 2019 WL 5150695 (2019):
>
> > In their view, the government had to show that the defendants sought to take possession of the extorted property for themselves or, at the very least, that they somehow sought to benefit from the extortionate transfer.
> >
> > This contention is simply wrong. As we recently explained, a defendant may "obtain" property within the meaning of the Hobbs Act by bringing about its transfer to a third party, regardless of whether the defendant received a personal benefit from the transfer.
> > *Id*. at 10. Valentini's proffered interpretations of *Green*, *Sekhar*, and *Scheidler* are simply wrong, and we refer the reader to *Brissette* and *Tkhilaishvili* for the reasons why.
>
> Valentini attempts to distinguish *Brissette* on the ground that it concerned the sufficiency of an indictment and not the sufficiency of the evidence to support a conviction. But this argument fails. *Brissette* did not cabin its holding to the sufficiency of an indictment. Instead, the *Brissette* court interpreted the phrase " 'obtain[s] ... property' within the meaning of the Hobbs Act extortion provision" and then applied that interpretation in a sufficiency of an indictment analysis. 919 F.3d at 672, 680 (alteration and omission in original). Valentini provides no argument why the interpretation

> of the Hobbs Act differs between analyses of the sufficiency of an indictment and of the evidence supporting a conviction. Moreover, in *Tkhilaishvil*i, we applied the *Brissette* rule to a sufficiency of the evidence argument. 926 F.3d at 10–11.

944 F.3d, at 349.

STATEMENT OF FACTS

On September 30, 2013, Giovanini Calabrese and Ralph Santaniello arrived unannounced at the rural property of Craig Morel. The pair told Morel that they were the "new crew" in town and were taking over for Al Bruno, the former Genovese capo who ran the Springfield crew for the Genovese family until he was gunned down outside of the Mount Carmel Society in the South End of Springfield in November 2003. Calabrese and Santiuello demanded that Victim 1 pay them $50,000 in "arrears" for payments that Morel had not made to the organization since Bruno's death in 2003 and a $4,000 monthly tribute thereafter. When Morel resisted, they lowered their demand to $20,000 in arrears and $2,000 per month. When Victim 1 still resisted, Calabrese threatened to bury him in his own woods if he (Victim 1) did not "smarten up" and pay their demand. Santaniello added that they would cut his head off first. Santaniello also hit Morel in the face.

****Valentini had nothing to do with this initial extortion of Morel****

Before he paid, Morel went to the Massachusetts State Police, who subsequently made multiple recordings of payments, meetings, and calls between

Morel and Ralph Santaniello, Giovanni Calabrese, Gerald Daniele, and Francesco Depergelo between September-November 2013. Across this expanse of recordings, a retired postal worker named Richard Valentini was along for a ride with his friends just once, on October 4, 2013. At no other time did Valentini interact with Morel.

ARGUMENT

I. EXTORTION UNDER THE HOBBS ACT REQUIRES NOT ONLY "THAT THE VICTIM PART WITH HIS PROPERTY," BUT ALSO "THAT THE EXTORTIONIST GAIN POSSESSION OF IT"

A. INTRODUCTION

The statutory phrase "obtaining property" should be interpreted in accordance with its common-law meaning. Obtaining property does not mean a mere interference with another's property rights. Rather, "[o]btaining property requires 'not only the deprivation but also the acquisition of property.'" *Sekhar v. United States*, 570 U.S. 729, 734 (2013) (*quoting Scheidler v. National Organization for Women, Inc*., 537 U.S. 393, 403 (2003)).

B. *Sekhar* and *Scheidler* Were Clear That A Completed Act of Extortion Means That The Putative Extortionist Gain Possess of the Property At Issue

This Court has recently expounded 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.").

In *Scheidler*, anti-abortion activists attempted to close abortion clinics by interfering with doctors, nurses, clinic staff, and women seeking access to the clinics. 537 U.S. at 400–01, 123 S.Ct. 1057. The National Organization of Women and two clinics brought a civil RICO action against the anti-abortion activists, alleging a pattern of extortionate racketeering acts under the Hobbs Act and state law. *Id*. at 398, 123 S.Ct. 1057. The Court characterized the property the defendants allegedly extorted as the "right to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their business." *Id*. at 399, 123 S.Ct. 1057. In holding that such conduct was not extortionate, the Court stated that "even when [the] acts of interference and disruption achieved their ultimate goal of 'shutting down' a clinic that performed abortions, such acts did not constitute extortion because [the defendants] did not 'obtain' [plaintiffs'] property." *Id*. at 404–05, 123 S.Ct. 1057. While "[the defendants] may have deprived or sought to deprive [the plaintiffs] of their alleged property right of exclusive control of their

business assets, ... they did not acquire any such property." *Id*. at 405, 123 S.Ct. 1057. The Court observed that characterizing this type of behavior as extortion would "discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion." *Id.*

The Court sought to further clarify the difference between extortion and coercion in *Sekhar*, 133 S.Ct. at 2725. In that case, the defendant was convicted of Hobbs Act extortion for attempting to force the general counsel for the New York State Comptroller to recommend investing in a fund managed by the defendant's company by threatening to expose the general counsel's alleged extramarital affair. 570 U.S. at 731, 133 S.Ct. 2720. The Court characterized the property right as "the general counsel's intangible property right to give his disinterested legal opinion ... free of improper outside interference." *Id*. at 737–38, 133 S.Ct. 2720 (internal quotation marks omitted). The Court concluded that while the defendant could deprive the general counsel of this right, he could not possibly have "obtained" it for himself. *See id.* Accordingly, the property was not transferable, and the defendant's Hobbs Act attempted extortion conviction was reversed. *See id.*

In both *Scheidler* and *Sekhar*, the conduct did not constitute extortion because the defendants could not obtain the property for themselves; rather, they

could merely "interfere" with the victims' use of it. In other words, coercion is a lower bar than extortion [as this term is operationalized under the Hobbs Act].

C. The First Circuit's Opinion Rewrote *Sekhar* and *Scheidler* To A Reading That Fit The Needs of A Liability Finding Against Valentini

The First Circuit conclusorily rejected Valentini's argument as follows:

> Valentini's proffered interpretations of *Green, Sekhar,* and *Scheidler* are simply wrong, and we refer the reader to *Brissette* and *Tkhilaishvili* for the reasons why.

944 F.3d, at 350.

With all due respect, Valentini contends that this logic is solipsistic. The First Circuit took as a given that its own recent precedents were in accord with Supreme Court caselaw, ignored its own contrary opinion in *Burhoe*, and then referred future reads to this infinite regress.

II. THE FIRST CIRCUIT'S RECENT DOCTRINE CONCERNING THE SUFFICIENCY STANDARDS REGARDING HOBBS ACT LIABILITY IS IN A STATE OF INTERNAL STRIFE THAT WILL SPREAD ACROSS THE COUNTRY IF NOT ADDRESSED ON CERTIORARI

A. The Lacunae Between *Burhoe* and *Brisette*

The First Circuit's opinion is somewhat striking in that it never once mentions its own fairly recent opinion in *United States v. Burhoe*, 871 F.3d 1 (1st Cir. 2017) (reversing certain convictions because [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"). One thing that makes this omission so striking is that Valentini specifically drew attention to the *Burhoe* opinion in his request for oral argument:

> oral argument could aid the decisional process because this case falls into the lacunae between this Court's most recent cases on Hobbs Act extortion doctrine, *United States v. Burhoe*, 871 F.3d 1 (1st Cir. 2017) (reversing certain convictions because [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" and this Court's very recent opinion in *United States v. Brisette*, 919 F.3d 670, 680 (1st Cir. March 29, 2019) (vacating and remanding dismissal of Hobbs Act indictment: "In sum, we reject the contention that a defendant "obtain[s] ... property" within the meaning of the Hobbs Act extortion provision by "bring[ing] about [its] transfer ... to another.".
>
> Valentini's Opening Brief, at 1.

Valentini's reason for highlighting *Burhoe* was straightforward: "*Burhoe* opinion's logic is fatal to Valentini's conviction(s) because the Government did not place any money in his hands, nor is there any evidence of an in direct benefit." In other words, Valentini's appeal would have resulted in a judgment of acquittal had *Burhoe*'s logic been applied. In at least one other court filing in a different case, the United States Attorney's Office seem to agree. One month after the *Burhoe* opinion issued in September 2017, the defendants in *United States v. Brisette* filed motions to dismiss their indictment. No. 16-cr-10137-LTS (Doc. Nos. 121 and

123). In response, the government conceded that it believed *Burhoe* had "significantly changed the legal landscape of Hobbs Act extortion" and that a new indictment was required. Doc. No. 130 at 1.

A casual legal observer might assume that an opinion described by the Government as having "significantly changed the legal landscape of Hobbs Act" would be cited often. However, the only time that the First Circuit appears to have cited *Burhoe* in the three years since its issuance is in its *Brisette* opinion:

> [I]nsofar as *Burhoe* addressed the distinction between the exaction of wages for fictitious and for real work, it did so only in connection with deciding whether the defendants' alleged conduct was "wrongful" within the meaning of the Hobbs Act extortion provision, see 18 U.S.C. § 1951(b)(2), and then only in connection with the specific jury instructions that had been given in that case. *See Burhoe*, 871 F.3d at 17, 19. *Burhoe* did not purport to resolve the separate question, and the only one that we decide here, whether evidence of the forced payment of wages for actual -- rather than for merely fictitious -- work can satisfy the "obtaining of property" element.

919 F.3d, at 682-683.

B. This Confusion In The State of the Law Keeps Reappearing In The District of Massachusetts

It must be remembered that in *Brisette*, District Judge Leo Sorokin followed the logic of *Burhoe* and 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.

No. 16-cr-10137-LTS, 2018 U.S. Dist. LEXIS 55526 (D. Mass. Mar. 19, 2018).

Rejecting the argument that a "personal benefit" was a *sine qua non* of Hobbs Act extortion, the First Circuit Court reversed Judge Sorokin's finding that the indictment was insufficient as follows:

> In sum, we reject the contention that a defendant "obtain[s] ... property" within the meaning of the Hobbs Act extortion provision by "bring[ing] about [its] transfer ... to another," Scheidler, 537 U.S. at 408 n.13, 123 S.Ct. 1057 (quoting Model Penal Code § 223.3, cmt. 2, at 182), only if the defendant receives a personal benefit in consequence. In doing so, we align ourselves with the only other circuits to have resolved that same question. *See, e.g., Provenzano*, 334 F.2d at 686 (holding that "it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom"); *United States v. Hyde*, 448 F.2d 815, 843 (5th Cir. 1971) ("One need receive no personal benefit to be guilty of extortion; the gravamen of the offense is loss to the victim." (citing *Provenzano*, 334 F.2d at 686)); *Panaro,* 266 F.3d at 943 (quoting *Provenzano*, 334 F.2d at 686; Hyde, 448 F.2d at 843).

919 F.3d, at 681.

Judge Sorokin presided over a 10-day trial in the late summer of 2019 with a jury charge as to "obtain" calibrated according to the . On August 7, 2019, the jury convicted Brissette of both conspiracy and extortion, and convicted Sullivan of conspiracy but acquitted him of extortion. Doc. No. 357. However, on February 12, 2020, Judge Sorokin granted directed verdicts of acquittal under FED. R. CRIM. P. 29, and, alternatively, granted new trials under Rule 33.

C. Conclusion

Valentini submits that the issue presented is ideal for *certiorari* because it is an issue that is being litigated in ongoing litigation in the Circuit where his conviction rests.

III. THIS WRINKLE IN *SEKHAR* HAS NOT BEEN THOROUGHLY PRESSED OUT IN THE SECOND CIRCUIT

If *Sekhar* is to be read such that its holding does not limit the reach of the "obtaining of property" element to first-party transfers [as contra-distinguished from third-party transfers], certiorari should be granted in Valentini's case so that this wrinkle in the doctrine can be officially ironed out.

The doctrine in the Second Circuit is muddled in a manner similar to that in the First Circuit. *See, e.g., United States v. Kirsch*, 903 F.3d 213, 231-232 (2d Cir. 2018) ("[W]e conclude that the Government presented insufficient evidence at trial

of Kirsch's involvement in a conspiracy to extort wages for "unwanted, unnecessary, and superfluous" labor to support his conviction under Count 2, and that therefore a judgment of acquittal must be entered with respect to that count.").

However, the first-party/third-party distinction is percolating. For example, in its order denying a Rule 29 motion brought by the former New York Assembly Speaker Sheldon Silver, Judge Caprioni of the Southern District of New York explained, "this Court reads the Supreme Court's language in *Sekhar* merely to underscore the requirement that the victim must transfer the extorted property to the perpetrator **(or to a third party as directed by the perpetrator)**." *United States v. Silver*, 184 F.Supp.3d 33, 47 (S.D.N.Y. 2016) (emphasis added). Simply put, the language in this parenthetical is not found in the text of *Sekhar*.

The Second Circuit's opinion in *United States v. Coppolla* is even further off the mark. "The extortion element of the Hobbs Act serves the same limiting function as the bribe-kickback element of § 1346, serving notice that a crime depends on a **third party** obtaining property through the wrongful use of threats or fear to achieve the property's surrender." 671 F.3d 220, 236 (2d. Cir. 2012) (emphasis added). To the contrary, under *Sekhar* and *Scheidler*, only deprivations by a first-party are sufficient for Hobbs Act liability.

CONCLUSION

Valentini respectfully asks the Court to grant a writ of certiorari.

Respectfully submitted this 6th day of April 2020.

By: _____

Seth Kretzer
Texas BN: 24043764
Member, Supreme Court Bar

LAW OFFICE OF SETH KRETZER
440 Louisiana Street, Suite 1440
Houston TX 77002
Phone: 713-775-3050
Fax: 713-929-2019
seth@kretzerfirm.com

Appointed CJA Counsel of Record for
Petitioner Valentini

CERTIFICATE OF MAILING

I hereby certify that, on the 6th day of April 2020, this pleading was served on the Court via mail courier.

_____

Seth Kretzer

CERTIFICATE OF SERVICE

I hereby certify that, on the 6th day of April 2020, a true and correct copy of this petition and appendices was mailed by first-class U.S. mail to:

Solicitor General of the United States
Department of Justice
950 Pennsylvania Ave., N.W.; Room 5616
Washington, DC 20530-0001

Seth Kretzer