No. 19-8914

IN THE

SUPREME COURT OF THE UNITED STATES

BOBBY W. FERGUSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

BOBBY W. FERGUSON
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QUESTIONS PRESENTED FOR REVIEW

A. Principle of strict statutory construction requires that term "fear" should not be construed broadly to include any non-violent acts of "economic loss" by private individual in Hobbs Act extortion, 18 U.S.C. § 1951(b)(2).

B. Even If "fear" is broadly construed, criminal liability should be based on acts or conduct of the defendant, and not on victim's state of mind.

LIST OF PARTIES

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Bobby W. Ferguson respectfully petitions for a writ of certiorari to review the judgement of the United States of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix B to the petition and is unpublished. The order denying rehearing appears at Appendix A.

JURISDICTION

The date on which the United States Court of Appeals decided my case was on July 19th, 2019. A timely petition for rehearing was denied by the United States Court of Appeals on ~~November~~ December 9th, 2019, and a copy of the order denying rehearing appears at Appendix A.. The jurisdiction this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§ 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, 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.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15 (15 USCS § 17], sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45 [45 USCS §§ 151-188].

STATEMENT OF THE CASE

Petitioner, Bobby Ferguson, was the second generation owner of construction company Ferguson Enterprises, Inc ("FEI"), established in 1968 by his mother and father in Detroit, Michigan. FEI was 100 percent minority owned and employed hundreds of minority workers in the city of Detroit, and throughout South-Eastern and Northern Michigan. FEI had worked in both private and governmental construction projects for many decades.

The bids for governmental projects in Detroit were subject to Detroit's purchasing ordinance, 1984 Detroit Code Section 18-501 et.seq, which awards the bid to the lowest responsible bidder. The City of Detroit also had a policy of promoting Detroit-Based Businesses (DBB) and Detroit-Headquartered Businesses (DHB) which established a goal of at least 30% participation of DBB and DHB in Detroit projects. To accomplish and promote job and economic opportunities to small businesses owned by Detroiters, the bid selection committee (which was the only body responsible for approving bids) would award contracts based on defined policy goals and through a carefully designed system to obtain competitive bids from competing qualified applicants.

Due to FEI's status as a DHB and DBB, all the other major construction companies in Michigan would attempt and persuade Petitioner to submit FEI as a "sub-contractor" in their bids to achieve the city's promotion regarding 30% of the total dollar amount to be sub-contracted to DHB or DBB's. FEI as a sub-contractor, did not submit bids directly to, nor received payments directly from the City of Detroit.

Petitioner and his companies was initially charged in 2010 in the Eastern District of Michigan (Case No. 10-cr-20535; E.D.MI.) for Conspiracy to Defraud the United States, in violation of 18 U.S.C. § 371, Conspiracy to Commit Mail Fraud, in violation of 18 U.S.C. §

1341 and 1349, Conspiracy to Money Launder, in violation of 18 U.S.C. § 1956, Conspiracy to Obstruct Justice, in violation of 18 U.S.C. § 1503, and Conspiracy to Structure Financial Transactions, in violation of 31 U.S.C. § 5324. These charges were premised on the governments allegation that FEI was being rewarded a number of major re-construction projects in the Detroit area. Petitioner proceeded to trial, and the trial was declared as a mistrial due to deadlocked jury. But in a subsequent trial, Petitioner and his companies were acquitted of all charges.

After failing the first attempt, the prosecution then in 2012 added Petitioner (through a Fourth Superseding Indictment) as a co-defendant to the indictment charging Detroit's ex-mayor, Mr. Kwame Kilpatrick. (Case No. 10-cr-20403; E.D. MI.). The new charges against Petitioner were RICO Conspiracy, in violation of 18 U.S.C. § 1962(d), Hobbs Act Extortion, in violation of 18 U.S.C. § 1951(b) and Bribery, in violation of 18 U.S.C. § 666(a). This new indictment now alleged that Petitioner conspired, aided and abetted a public official to "extort" City of Detroit contractors, and in return Petitioner shared the proceeds with the Mayor.

Specifically, the new indictment alleged that Petitioner extorted the construction companies by "coercing them" to include FEI in public contracts. *Id.* at ¶ 12. That Petitioner "obtained his work" through his relationship with Mayor Kilpatrick, "exploiting the fear" of friendly relationships. The extortion counts alleged that Petitioner "obtained payments consisting of contract revenues" (Count 2; Hobbs Act Extortion); "obtained millions for work" (Count 4; Hobbs Act Extortion); "pressured to consent to be a sub-contractor in a project bid" (Count 5; Hobbs Act Extortion); and "obtained payments and sub-contracts to repair water mains" (Count 9; Hobbs Act Extortion).

In a 7-month trial, the prosecution presented more than 100 witnesses and four hundred exhibits in an attempt to prove it's case. While the "victims" of alleged "extortion" were never brought as witnesses, the prosecution brought third-party witnesses to indicate that the owners of multi-billion dollar construction companies were somehow "fearful" of losing government contracts if they would not sub-contract with Petitioner's companies. The trial jury was instructed that "any economic harm to person or his business can amount to "fear" for extortion purposes" and "such fear can be established by "anxiety or concern over expected business loss, financial or job security, or ability to keep work or obtain future work..." fear may exist even if a relationship was otherwise friendly." (See, Dkt No. 406, *Jury Instructions* pg. 14423.)

Petitioner was found guilty on 9 out 11 counts in the indictment. The district court sentenced petitioner to 21 years imprisonment, which included the statutory maximum for Hobbs Act violations, to an imprisonment of twenty-years (which also happens to be the longest sentence in American history given to a non-public official in a public corruption case); followed by a consecutive sentence of one-year for Bribery charge. Petitioner's direct appeal was affirmed by the U.S. Court of Appeals for the Sixth Circuit. See, *United States v. Kilpatrick*, 798 F.3d 965 (6th Cir. 2015). A writ of certiorari to the Supreme Court was denied.

Petitioner timely filed a Section 2255 motion presenting a number of arguments challenging his conviction and sentence. Petitioner argued, amongst other issues, that his Hobbs Act extortion conviction was improperly based on a erroneous, vague, and expansive definition of "fear of economic harm", and that the court erred in allowing fearful "state of mind" evidence through third party witnesses, and that the jury was erroneously instructed under Hobbs Act "official act" prong. The district court agreed that the jury was indeed incorrectly instructed on

the "official act" prong of the extortion offenses but held "although the court did not include a specific definition of "official act" in the jury instructions", Defendant's convictions stands and rest under the "fear of economic harm" theory by a "private individual" in a public corruption case, and denied all claims. See, Appendix C.

Petitioner request for a certificate of appealability to the Sixth Circuit Court of Appeals was also denied. See, Appendix B. The Sixth Circuit agreed with the district court that the "official act" prong (specifically not including a "quid pro quo" in its jury instructions) was harmless error and Petitioner's convictions now in a public corruption case solely rest and stand on a "private individual" under the "fear of economic harm". It also agreed under the "fear" instruction a victim's state of mind can be presented without the victim testifying, and be, presented through third party witnesses without having violated a defendants Sixth Amendment Confrontation rights or hearsay rules in federal rules of evidence. Petitioner moved for rehearing, but his request was denied. See, Appendix A.

REASONS FOR GRANTING THE PETITION

I. THE GENESIS OF EXTORTION BY PRIVATE INDIVIDUALS THROUGH HOBBS ACT (18 U.S.C. § 1951)

Extortion is "one of the oldest crimes in Anglo-American jurisprudence." *Sekhar v. United States*, 570 U.S. 729, 800 (2013). At common law, the phrase "extortion under color of official right" was a legal term of art that encompassed only the actions of public officials who used their office to corruptly obtain money not owed to them. See, *United States v. Evans*, 504 U.S. 255, 260 (1992). Extortion was defined as "any officer's unlawfully taking, by color of his office from any man, any money or thing of value that is not due to him, or more than is due, or before it is due." 4 W. Blackstone, Commentaries on the Laws of England 141 (4th Ed. 1770).

The word "extortion", as used in the Hobbs Act, first appeared in the Anti-Racketeering Act of 1946 ("1946 Act"). The 1946 Act expanded the common-law definition of extortion to include acts by private individuals, and broadened the description of extortion to include "threatened force or fear" along with the "under color of official right" language. The relevant portion of Hobbs Act currently provides:

> (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 to do so, ... shall be ...imprisoned not more than twenty years...
>
> (b) As used in this section -
>
> (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. 18 U.S.C. § 1951.

But, "the legislative history is sparse, and un-illuminating with respect to the offense of extortion. There is a reference to the fact that the terms 'robbery and extortion' had been construed many times by the courts and to the fact that the definitions of those terms were 'based on the New York law." See, *Evans*, 504 U.S. at 264 (citing 89 Cong. Rec. 3227(1943) (statement of Rep. Hobbs); 91 Cong. Rec. 11906 (1945) (statement of Rep. Robinson)). Also see, *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 403 (2003) (Congress borrowed, nearly verbatim, the New York's definition of extortion); *United States v. Manzo*, 636 F.3d 56, 62 (3rd Cir. 2011) ("We have grappled previously with the ambiguity of the Hobbs Act language, and, in an attempt to shed light on the language, thoroughly discussed its legislative history.").

Representative Hobbs, the father of the Statute, made it very plain that the terms 'robbery' and 'extortion' as defined in the Act were intended to prescribe public wrongs, crimes, not private ones, mere torts, and that the law of New York furnished the basis of the proscription. Representative Hobbs said, "There is nothing clearer than the definitions of robbery and extortion in this bill. They have been construed by the courts not once, but a thousand times. The definitions in this bill are copies from the New York code substantially... Everybody knows what they mean." 91 Cong. Rec. 11900-12 (1945). A paramount concern for Congress was to be clear about what conduct was prohibited: "We are explicit. That nothing is too general, and we thought it better to make this bill explicit, and leaving nothing to the imagination of the court." 91 Cong. Rec. 11904 (remarks of Rep. Hancock).

The New York Statute, at the time of the Hobbs Act enactment in 1946, provided:

> "Extortion is the obtaining of property from another, or obtaining property of cooperation from an officer, agent or employee thereof, with his consent, induced by wrongful use of force or fear, or under color of official right." Penal Law of 1909, Section 850, as amended, Laws of 1917, ch 518. reprinted in NY Penal Law, appendix Section 850 (McKinney 1967).

This Court clarified in *United States v. Evans*, that the word "induced" is a part of definition of the offense by the private individual, where "victim's consent must be 'induced by wrongful use of actual or threatened force, violence or fear'." *Evans*, 504 U.S. at 265. The *Evans* Court concluded that "when extortion is alleged by public official, the coercive element of inducement is provided by the public office itself." *Id* at 267-269 (citing *McCormick v. United States*, 500 U.S. 257 (1991) (offense of extortion is complete at the time when the public official receives a payment in return of his agreement to perform specific official acts as quid pro quo requirement)). Thus, the misuse of public office supplies the element of coercion in extortion cases. And threats, fear and duress elements are required when extortion is alleged by private individuals, who have no official power to wield over their victims. Accordingly, a private person cannot be convicted of extortion under color of official right.

To distinguish the crime of robbery from extortion, the Hobbs Act necessarily prohibits robbery as "taking" of property "against the will" of the victim and extortion as "giving" of property by the victim "with his consent" which was wrongfully induced through threats of force, violence, or fear. See, *Ocasio v. United States*, 136 S.Ct. 1423, 1435 (2016) ("as used in the Hobbs Act, the phrase 'with his consent' is designed to distinguish extortion... from robbery."). It is evident that private individuals would encounter more difficulty in extorting property without threats. Usually a private individual will have to make known to his victim his intent to injure, as well as his ability to carry out his intent, unless money or other property is forthcoming. In otherwords, a "private individual" has no 'official power' to weild over a victim, therefore, the statute requires the government to prove the "victim's consent [was] induced by wrongful use of actual or threatened force, violence, or fear", the "intent" to injure the victim, not a "freindly relationship between parties" prong.

II. THE CUTTING OF "THREAT REQUIREMENT" AND GRAFTING OF "ECONOMIC HARM THEORY" UNDER EXTORTION'S UNDEFINED TERM "FEAR"

While Congress wanted the Hobbs Act to be "explicit" as its text was based on thousands of decisions, the federal courts have still grappled over its terms in the past 75 years. The term "fear" in the statute is far from explicit, and the courts have freely roamed in their interpretations, cutting and pasting different elements of the term "fear" as used in the Hobbs Act statute.

The first court decision which opposed congressional intent of explicity of the Hobbs Act was United *States v. Bianchi*, 219 F.2d 182, 198 (8th Cir. 1955). The Court stated that:

> "fear is not defined or qualified in the extortion definition. In the robbery definition in another section of the Anti-Racketeering Act, 'fear' is limited to fear of injury to person or property. Defendant's contend that 'fear' in the extortion definition should be similarly limited in restriction. Robbery and extortion are distinct offenses. If congress had intended 'fear' in the extortion statute have a restricted meaning, it could have easily made this clear by so limiting it in the extortion definition or by so defining 'fear' whenever the word was used in the statute." Id at 189.

Adding the reasoning of *Bianchi*, other federal courts further held that the term "fear" is disjunctively used in the "actual or threatened use of force, violence or fear" clause of 19551(b)(2), and thus leaves the term open to interpretation and that defendants's use of threats is not required. See, *United States, v. Gotti*, 459 F.3d 296, 333 (2nd Cir. 2006) (Hobbs Act "leaves open the cause of fear" and inducing a party to consent to part with property does not require that such fear be "created by implicit or explicit threats"); *United States v. Abelis*, 146 F.3d 73, 83 (2nd Cir. 1997) (18 U.S.C. § 1951(b)(2) does not limit the definition to those circumstances in which property is obtained through the wrongful use of fear created by implicit or explicit threats, but instead leaves open the cause of the fear) (citing *United States v. Capo*, 817 F.2d 947,

951 (2nd Cir. 1987) (en banc) ("it is not necessary that the Government prove that the fear of economic loss was the consequence of a direct threat made by the defendant")); See, *United States v. Quinn*, 514 F.2d 1250, 1266 (5th Cir. 1975) ("it is not necessary that the Government prove that the fear was the consequence of a direct threat").

Finally, with the open definition of 'fear', courts concluded that a simple, non-violent, fear of economic harm on the part of a victim alone is sufficient to prove extortion. The seminal case for this faulty reasoning is also *Bianchi v. United States*, 219 F.2d 182 (8th Cir. 1955). The *Bianchi* Court cited *Nick v. United States*, 122 F.2d 660 (8th Cir. 1941); and *United States v. Compagna*, 146 F.2d 524, 527 (2nd Cir. 1944) to conclude that since both these previous cases "involved only threats which created fear of economic loss... We conclude that 'fear' as defined in the extortion section of the Anti-Racketeering Act should be given its ordinary meaning, and consequently 'fear' would include economic loss." Id, *Bianchi*, 219 F.2d at 189.

Bianchi's reasoning was incorrect in several aspects. First, it ignored that since Congress borrowed the definition of extortion from New York Law Section 850, the definition of 'fear' should have been incorporated from New York's definition of fear in Section 851. (See Section IV *infra*). Second, *Bianchi* court presented with a defendant who was acting in a official capacity as a union official, thus the prosecution was based on "under color of office" and not as a private individual. Third, both the decisions, *Nick* and *Compagna*, upon which *Bianchi* depended upon, involved the Anti-Racketeering Act of 1934, which itself involved acts of coercion as part of extortion. Such acts of coercion were not part of the 1946 Hobbs Act. See, *Sheidler v. NOW, Inc*, 537 U.S. 393 (2003).

It was unfortunate that each and every federal court later followed *Bianchi* and allowed convictions to stand on the basis of victim's fear of "economic loss". See, *United States*

v. Hathaway, 534 F.2d 386, 394 (1st Cir. 1976); *United States v. Varlack*, 225 F.2d 665 (2nd Cir. 1955); *United States v. Sweeny*, 262 F.2d 272, 275 (3rd Cir. 1958); *United States v. Lozzi*, 420 F.2d 512, 515 (4th Cir. 1970); *United States v. Jacobs*, 451 F.2d 530, 542 (5th Cir. 1971); *United States v. Cusmano*, 659 F.2d 714, 715 (6th Cir. 1981); *United States v. Dale*, 223 F.2d 181, 183 (7th Cir. 1955); Cape v. United States, 283 F.2d 430, 434 (9th Cir. 1960); *United States v. Troutman*, 814 F.2d 1428, 1455 (10th Cir. 1987); *United States v. Haimowitz*, 725 F.2d 1561, 1572 (11th Cir. 1984). Also see, *United States v. Brecht*, 540 F.2d 45, 52 (2nd Cir. 1976) ("jury could find the element of fear if the evidence showed "a state of anxious concern, alarm, apprehension or anticipated harm to the business or a threatened loss to the business.").

But doubts for the prohibition of "economic harm" persisted in the minds of certain jurist. In *Brokerage Concepts v. U.S. Healthcare*, 140 F.3d 494, 523 (3rd Cir. 1998), the court stated that "unlike the use or threatened use of force or violence, the use of economic fear in business negotiations between parties is not 'inherently' wrongful. Indeed, the fear of economic reality leads us to conclude that the reach of the Hobbs Act is limited in cases... which involve the use of economic fear in a transaction between two private parties." Id at 523. See, *United States v. Burhoe*, 871 F.3d 1, 9 (1st Cir. 2017) ("fear of economic harm" - "a type of fear" is "not necessarily wrong" for Hobbs Act purposes and is part of many legitimate business transactions). In *United States v. Clemente*, 640 F.2d 1069, 1077 (2nd Cir. 1981), the court was obliged to deal with the defendant's contention that "the use of fear of economic loss is not inherently wrongful, but rather represents a device routinely used in legitimate business transactions." The court faced with this question, further grafted a "claim of right" defense to the fear of economic harm and stated that the term "wrongful" mean that the defendant in question has instilled in his victim the fear of economic loss of property to which the defendant "had no lawful right". *Id* at 1077.

III. THE BLOOMING OF "FEAR OF ECONOMIC HARM" TO FIFTY SHADES OF FEAR

Words are slippery things. Especially if they are left undefined in the criminal law. Without fear being defined in the Hobbs Act, the interpretations can encompass a mere victim's experience of "anxiety, concern, or worry", See, 3 L. Sand et al, *Modern Federal Jury Instructions* - Criminal P 50.02.

Over the last 60 years, the courts have allowed Hobbs Act extortion convictions based on a number of different meanings of fear. See, e.g., *Callanan v. United States*, 223 F.2d 171 (8th Cir. 1955) (fear based on difficulties in the way of labor strikes); *United States v. Gill*, 490 F.2d 233 (7th Cir. 1973) (fear of getting citations for liquor license or losing his license); *United States v. Crowley*, 504 F.2d 993 (7th Cir. 1974)(Fear of financial harm if adequate police service was not forthcoming); *United States v. Hathaway*, 534 F.2d 386 (1st Cir. 1976) (probability of lost business opportunities by losing contracts); *United States v. Gerald*, 624 F.2d 1291 (5th Cir. 1980) (Fear of loss arising from liquidated damages provision of a construction project); *United States v. Strum*, 870 F.3d 769 (1st Cir. 1989) (creditor's fear of non-repayment of a loan); *United States v. Mitov*, 460 F.3d 901 (7th Cir. 2006) (diminishing likelihood of success in a civil suit through witness testimony); *United States v. Shine*, 526 F.Supp. 717 (E.D. NY 1981) (fear of not being able to procure equally lucrative contract); *United States v. Tromblin*, 46 F.3d 1369 (5th Cir. 1995) (fear of losing investment).

If the above list of criminal prosecutions for extortion under Hobbs Act's through "fear" does not raise any eyebrows, then one should read the opinions in the following cases where most unique concepts of "fear" was used to convict defendants. See, e.g., *United States v. Aliaga*, 617 Fed. Appx 971 (11th Cir. 2015) (fear of being found guilty in a criminal case);

United States v. Nakaladski, 481 F.2d 289 (5th Cir. 1973) (fear of making payments to the loan); *United States v. Salvitti*, 464 F.Supp. 611 (E.D. PA 1979) (fear of mere lowering of standard of living would be enough to prove extortion).

The Hobbs Act governs serious crimes, imposing penalties of up to twenty years in prison, and represents a congressional response to acts of robbery and extortion. Its was not designed to punish all imaginable fears in human minds, without any intent to injure or other sort of relatively serious harm. Finally, a criminal jury should never be instructed that fear can exist even if there was a "friendly relationship between the parties." *Id.* 50.02, 3 L. Sand et al, as it lowers the government's burden of the elements of extortion. Representative Hobbs - the father of the statute - noted that, "we are explicit" that nothing is too general. Extortion imposes a statutory maximum penalty of twenty years to a private individual; clearly it is governing serious crimes and not friendly ones.

IV. "FEAR" SHOULD BE RESTRICTED TO FEAR DUE TO THREAT OF VIOLENT ACTS OR PHYSICAL HARM

There are three reasons for this requirement. First, the original intention of Congress was to prohibit acts of violence as part of extortion. Second, the New York law clearly defines "fear" as induced by "threats" to a person, and third, "a word is known by the company it keeps".

First, statute's history supports the more restrictive reading. "Congress enacted the Hobbs Act's predecessor in 1934. See Anti-Racketeering Act, ch. 569, 48 Stat 979 (See Appendix D). That predecessor Act prohibited coercion and extortion appropriately connected with interstate commerce, and placed these prohibitions in Sections 2(a) and 2(b) repectively. 48 Stat. 980. The Act went on in Section 2(c) to impose criminal liability on anyone, who, in connection with interstate commerce, 'commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate Section (a) or (b)." *Scheidler v. NOW, Inc*, 547 U.S. 9, 18 (2006).

In 1946, Congress enacted a superseding law, namely, the Hobbs Act, ch. 537, 60 Stat. 420. (See Appendix E1 and E2). This new law changed the old law in two significant respects: It added robbery while omitting coercion. "The new Act, like the old Act, was absolutely explicit in respect to the point here at issue, the necessary link between physical violence and other crimes (now extortion and robbery)." *Scheidler*, 547 U.S. at 19. Even the current Hobbs Act, 18 U.S.C. § 1951, is titled as "interference with commerce by *threats* or violence." (emphasis added).

Second, it is well settled principle of statutory interpretation that, absent other indication, "Congress intends to incorporate the well-settled meaning of the common-law

term it uses." *Nedler v. United States*, 527 U.S. 1, 23 (1999). "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263 (1952). Or as Justice Frankfurter colorfully put it, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Some reflections on the reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947).

The Hobbs Act extortion definition was borrowed from New York statute, section 850. Along with section 850, New York Penal Code section 851 set forth the six instances of what constitutes "fear" under section 850, and all of them required inducement by an explicit "oral or written threat". *Id.* Section 851 of the New york Penal Law stated:

> "Fear, such as will constitute extortion, may be induced by an oral or written threat:
> (1) to do an unlawful injury to the person or property of the individual threatened or to have any relative of his or to any member of his family; or
> (2) To accuse him, or any relative of his or any member of his family, of any crime; or
> (3) To expose, or impute to him, or any of them, any deformity or disgrace; or
> (4) To expose any secret affecting him or any of them; or
> (5) To kidnap him or any relative of his or member of his family; or
> (6) To injure his person or property or that of any relative of his or member of his family by the use of weapons or explosives."

NY Penal Law Section 851 (Laws of 1917).

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act to a particular individual or group of individuals. See, *Watts v. United States*, 394 U.S. 705, 708 (1969). Virtually all extortion statutes cover "threats" to injure (i.e., to cause bodily harm to the person or to damage the property of) the victim or some other person. 3 LaFave, *Substantive Criminal*

Law Section 20.4(a)(4). "One of the most common acts outlawed by extortion or blackmail statutes is a threat of any injury to the person or property of another for the purpose of obtaining some desired personal gain." 31A Am. Jur. 2d, *Extortion, Blackmail, and Threats* Section 25. As LaFave observes, because the common-law theory of "robbery by threat" encompasses only threats to immediate bodily harm or destruction of victim's home, states enacted extortion statutes to "fill this vacuum" and criminalizes "the acquisition of property by means of other effective threats, such as a threat to... destroy the victim's property." 3 LaFave, *supra.* The New York Penal Law this correctly defined extortion to include fear to induce by "oral or written threat".

Third, the canon of statutory construction, noscitur a sociis, counsel that "meaning of a unclear word of phrase should be determined by the words immediately surrounding it. *Washington State v. Keffeler*, 537 U.S. 371, 384-85 (2003). Of course, noscitur a sociis' is just an erudite (or some would say antiquated) way of saying what common sense tells us to be true; "[A] word is known by the company it keeps," *Jarecki v. G.D. Searle & Co.*, 637 U.S. 303, 307 (1961); that is to say, which of various possible meanings a word should be given must be determined in a manner that makes it "fit" with the words with which it is closely associated. See also, *United States v. Williams*, 553 U.S. 285, 294 (2008) ("A word is given more precise content by the neighboring words with which it is associated.") Also relevant is the cannon of ejusdem generis: "When a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed." Black's Law Dictionary 535 (7th Ed. 1999).

The words immediately preceding "fear" in 18 U.S.C. § 1951(b)(2) are 'violence" and actual or threatened use of "force". If fear is considered as including any non-violent (or friendly) acts of economic loss, that definition would sit uncomfortably amidst force and violence which are characterized by their potential for harm to individuals. A rabbit therefore, does not live together with two hyenas. "'Force' means 'power, violence, or pressure directed against a person or thing', or 'unlawful violence threatened or committed against a person or property'." *Stokeling v. United States*, 586 U.S. ____, 139 S.Ct. 544 (2019) (citing Black's Law and Random House Dictionary). "Likewise, 'violence' implies force, including and 'unjust or unwarranted use of force'." Id. It was against this background, Congress defined extortion as requiring "actual or threatened use of force, violence or fear." See, *Samantar v. Yousuf*, 560 U.S. 305, 320, n. 13 (2010) ("Congress is understood to legislate against a background of common-law ...principles.").

Just as "force' in extortion would not be said to include "intellectual force" or "emotional force", the term "fear" should not be deemed to include "fear of economic loss". The interpretation of fear as "economic loss", without any requirements of threats by the majority of Court of Appeals, of course, was based on an erroneous reasoning of Eighth Circuit in *Bianchi*. But error is not cured by repetition, and this Court cannot simply count up the number of circuits in making its decision. Ultimately, this Court's attention must focus on the background of the Hobbs Act and the New york Statute from which it was borrowed. And certainly, the New York Statute did not proscribe common law extortion without any threat or based on purely fear of economic harm as expressed by the state of mind of the victims. At common law, every victim of extortion was the object of a threat, to his person or property, if he ignores that threat, or resists it by seeking to protect his property, he may be harmed.

V. HOBBS ACT EXTORTION BASED ON UNDEFINED TERM "FEAR", LEAVING IT TO VARIABLE JUDICIAL INTERPRETATION, IS VOID FOR VAGUENESS

It is evident that criminal punishment should not be imposed unless the statute clearly explains the prohibited conduct. The United States Criminal Code provides no instance where the term fear is left without a qualifier. See Appendix F. But such is the case in Title 18 § 1951(b)(2), which leaves the term "fear" undefined.

TITLE 18: Crimes and Criminal Procedure:

Section 43(a)(2)(B): "fear of death of, serious bodily injury to that person"
Section 43(b): "fear of serious bodily injury or death"
Section 831(a)(4)(b): "fear that any person.., will imminently be subject to bodily injury"
Section 922(d)(8) & (g)(8): "fear or bodily injury"
Section 1951(b)(1): "fear of injury, immediate or future, to his person or property..." in Hobbs Act Robbery
Section 1951(b)(2): "fear" undefined in Hobbs Act extortion
Section 2241(a)(2): "fear that any person will be subject to death, serious bodily harm, or kidnapping" for Aggravated Sexual Abuse.
Section 2242: "fear other than" that defined in Section 2241(a)(2), for sexual abuse.
Section 2261A: "fear of the death of, or serious bodily injury to..." for Stalking.
Section 3559(c)(2)(C): Extortion defined as involving "fear of injury".
Appendix to Title 18, U.S. Sentencing Guideline 4B1.2 (n.1): Extortion defined as involving "fear of physical injury".

If the term "fear is left undefined by Congress to define the classic common-law offense of extortion, and the New York definition is not taken as authoritative in defining the term, then the disjunctive term "fear" in the extortion is unconstitutionally vague. It gives no fair warning of the conduct it proscribes and is left to set adrift upon a sea of prosecutorial decision. And in our constitutional order, a vague law is no law at all.

The Supreme Court has reiterated that an "ambiguity concerning the gambit of criminal statutes should be resolved in favor of lenity." *Rewes v. United States*, 401 U.S. 808,

812 (1971); *United States v. Bass*, 404 U.S. 336, 347 (1971). This rule of narrow construction is rooted in the belief that due process requires that fair warning should be given as to what conduct may be subject to sanctions of the criminal law. *United States v. Bass*, 404 U.S. at 348. Otherwise far too much discretion will be placed in the hands of executive branch enforcement officials, and it will inevitably be abused.

Vague laws also undermine the Constitution's separation powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to "make an act of crime". *United States v. Hudson*, 11 U.S. 32, 7 Cranch 32, 34 (1812). Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide. See, *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

These decisions teach that the imposition of criminal punishment for extortion cannot be based on an estimation of the degree of "fear" imagined in the victim's mind. In petitioner's case, the prosecutor stretched the Hobbs Act to meet the occasion and further argued that such state of mind in victims can be presented through third party witnesses. This court should not allow the government to prohibit conduct that include everyday economic activities in guise of regulating interstate commerce.

I. ERRONEOUS ORIGINS OF "STATE OF MIND" OF VICTIM AS ELEMENT IN HOBBS ACT EXTORTION AND CONSEQUENTIAL EROSION OF MENS REA.

The cases leading to the erosion of mean rea from extortion offenses present an unfortunate series of erroneous decisions. First, the courts concluded the the "fear" element of extortion does not require andy "threats" to the victim. Second, the courts concluded - in absence of proof of threat - the "fear" element can be proved by the victim's "state of mind". And finally, based on rules of evidence, it was concluded that such state of mind of the victim can be proved through testimony eluded from third party witnesses. The result was not just simply erosion of mens rea from statute, but also an elimination of a defendant's Sixth Amendment right to confront his adverse witnesses.

The seminal case in this series is *Nick v. United States*, 122 F.2d 660, 771 (8th Cir. 1941). There the court stated: "The gist of the unlawful act is extortion. Extortion involves a state of mind as an element of an offense under this Act. Unless there is some form of compulsion (either physical or fear) there is no crime under this Act... It was, therefore, essential to show that such payment was under such compulsion. The existence of this compulsion might be proved in several ways but one proper way is to show the state of mind under which the [victim] acted." *Id.*

In *United States v. Compagna*, 146 F.2d 524, 519 (2nd Cir. 1944), the Second Circuit discussed the admissibility of evidence to show fear in the minds of the victims. While there was no direct threats involved in this case, the court concluded that "the victim's fear originated from acquaintance with the general disorders and violence which have accompanied other strikes. As such, it was part of what everybody knows, and I cannot see how it could have prejudiced the accused with the jury. Indeed, it was entirely proper for the jury to infer that the accused expected

to play upon precisely such fears... when accused threatened to call strikes." Id. *Compagna*, 146 F.2d at 519. Also see, *United States v. Callanan*, 223 F.2d 171, 175 (8th Cir. 1955) ("Its appears to us that the offense of extortion under the Hobbs Act has been committed if the defendants have illegally created fear in their victim, which fear has included the victim to part with his money or property.").

More decisions in the same faulty line of reasoning followed. See, *United States v. Tolub*, 309 F.2d 286, 289 (2nd Cir. 1962) (stating that extortion in 1951(b)(2) does not require a threat. "its requires only that the defendant induce his victim to part with property through the use of fear... The jury permitted to find such inducement by use of fear from the testimony as to the state of mind of the victim) (quoting *Nick v. United States*); *United States v. Hyde*, 448 F.2d 815, 845 (5th Cir. 1971) ("The victim's fearful state of mind is a crucial element in proving extortion, the testimony of victims as to what others said to them, and the testimony of others as to what they said to victims is admitted not for the truth of the information in the statements but for the fact that the victim heard them and that they would have tended to produce fear in his mind."); *United States v. Capo*, 817 F.2d 947, 951 (2nd Cir. 1987) (considering fear "from the perspective of the victim, not the extortionist"); *United States v. Garcia*, 907 F.2d 380, 385 (2nd Cir. 1990) (the existence of fear is from the perspective of the victim).

The court decisions further travelled on this error expressway and held that in extortion cases, the defendant need not create fear, so long as the defendant uses it to extort property. See, *United States v. Gerald*, 624 F.2d 1291, 1299 (5th Cir. 1980). Moreover, courts allowed witness testimony to show state of mind of the victim through out-of-court statements in extortion cases. See, *United States v. Biondo*, 483 F.2d 635, 643 (8th Cir. 1973). This was justified based on Professor Wigmore's reasoning:

> "Whenever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned. Wigmore, Evidence Section 1780 (1940). *Id. United States v. Hyde*, 448 F.2d at 845 (5th Cir. 1971).

All the above cases which led to the erosion of mens rea and Sixth Amendment Confrontation rights were incorrect for many reasons. First, as discussed supra, the Hobbs Act extortion statute was borrowed in verbatim from N.Y. Penal Law 850. Section 851 of N.Y. Penal Law specifically required an explicit threat (oral or written) in order for the prosecution to prove "fear, that would constitute extortion." Id. Second, both *Nick* and *Compagna* cases involved indictments based on Anti-Racketeering Act of 1934, which prohibited extortion and coercion. Thus, in those cases, the prosecution was allowed to bring testimony of state of mind of the victim in order to prove whether "coercion" has induced the payments, as to which the victims would obviously have been the best source of information. Further, in some case, the state of mind of victim was allowed to make a distinction between bribery and extortion in prosecution involving "under color official right". See, *United States v. Kennedy*, 291 F.2d 457 (2nd Cir. 1961), as bribery involves the voluntary giving of something of value to influence the performance of official duty and extortion involves a taking accompanied by duress. Finally, it is always an error to admit evidence from third parties to prove victim's state of mind; for the victim's state of mind is irrelevant unless it springs from action by the accused (such as a threat, use of force or violence). The testimony from third party witnesses cannot be superimposed upon testimony as to fear caused by accused's threats to victims, if the victim themselves were not presented to testify as to the origin or source of the fear.

II. FEDERAL CRIMINAL LAW IS ALWAYS BASED ON THE CONDUCT OF ACCUSED AND NOT ON THE VICTIM'S STATE OF MIND

To summarize the current legal principles in the extortion:

(a) Extortion can be committed by private individuals through disjunctive "fear" prong;
(b) Since "fear" is undefined by Congress, it could include fear of "economic harm";
(c) Such "economic harm" could range from loss of any future desirable monetary gain;
(d) The "fear" does not require to be accompanied by any threats;
(c) The "fear" can be simple anxiety, concern or apprehension and can even arise from friendly conduct;
(f) The accused need not perform any act to instill fear, it is the victim's perception of fear;
(g) Thus, "fear' can be proven through victim's state of mind;
(h) The victim's state of mind could be proven from out-of-court statements made to third-party witnesses;
(i) The defendant has no Sixth Amendment challenge to these third-party witnesses as the testimony falls under hearsay exceptions.

Under one theory of remote causation, the "butterfly effect", a flapping of a butterfly's wings creates a minor air current in China that adds to the accumulative effect in global wind systems, that ends with a hurricane in the Caribbean. See, James Gleick, Chaos: Making a New Science 8 (1987). However bizarre it sounds, it still required butterfly to at least flap its wings to be held liable for causing hurricanes. But under the current extortion laws, an accused can be convicted without any proof by the prosecution about his personal conduct or acts. Thus, a private individual can be convicted of extortion if his friend gives him some money or business contracts because his friend fears of future economic loss, and such fear of economic loss can be presented in trial by third-party testimony. A criminal defendant can be convicted based on the government's facts of induced consent of victim, through victim's own state of mind, without the defendant knowing of those facts "that make his conduct fit the definition of the offense." *Staples, v. United States*, 511 U.S. 600, 608 n.3 (1994).

In examining the statutory language, it is axiomatic that the word of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them. And the most natural reading of the Hobbs Act extortion's "force, violence or fear" requirement requires proof that the victim was "caused to be in fear." And the government, in order to obtain a conviction, should be required to prove that a person was put in actual fear by the defendant's conduct. The government must establish some menacing conduct of the accused and his purposeful design to engender fear in the victim.

Therefore, the test could not be whether the victim experienced actual fear or had a "subjective perception" of fear, but whether the extortionist acted in such a manner as would under the circumstances portend a threat of danger to a person of reasonable sensibility. Thus, fear must arise from the conduct of the accused rather than the mere temperamental timidity of the victim. The jury may infer fear from a extortionist's action s or from the words spoken by the defendant. The evil being attacked in the extortion offenses is the extortionist's conduct which is directed to instill fear in the person to whom they are directed. It is therefore the conduct of the defendant, not the victim's individual state of mind, to which the trust of the statute is directed. There is no doubt that Congress meant to protect only the weak and timid from extortionate takings, but the strong and intrepid as well. See, e.g., *United States v. Alsop*, 479 F.2d 65, 67 (9th Cir. 1973) (applying federal bank robbery statute and explaining that "the determination of whether there has been an intimidation should be guided by an objective test [that] focus[es] of the accused's actions" and that "requires the application of the standard of the ordinary man").

Finally, the Hobbs Act extortion - in cases involving private individuals extorting through fear (of economic harm) based on victim's state of mind - does not specify any required mental state of the accused, it does not mean that none exists. See, *Elonis v. United States*, 575

U.S. ___, 135 S.Ct. 2001 (2015). The Supreme Court has repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." *Morissette v. United States*, 342 U.S. 246, 250 (1952). The rule of construction reflects the basic principle that "wrong doing must be conscious to be criminal." *Id.* at 252. The "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty, a concept courts have expressed over time through various terms such as mens rea, scienter, malice aforethought, guilty knowledge, and the like. *Id.* at 252. The Supreme Court therefore generally "interprets criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *United States v. X-citement Video, Inc*, 513 U.S. 64, 70 (1994).

This Court has also held that when interpreting criminal statutes that are silent on the required mental state, the Court read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 Us 255, 269 (2000). For example, in *Carter*, this Court considered whether a conviction under 18 U.S.C. § 2113(a), for taking "by force or violence" items of value belonging to or in the care of a bank, requires that a defendant have the intent to steal. 530 U.S. at 261. This Court held that once the government proves the defendant forcibly took the money, "the concerns underlying the presumption of favor of scienter are fully satisfied, for a forceful taking - even by a defendant who takes under a good-faith claim of right - falls outside the realm of ...'otherwise innocent'" conduct. *Id* at 269-70. A statute similar to § 2113(a) that did not require a forcible taking or intent to steal "would run the risk of punishing seemingly innocent conduct in the case of a defendant who peaceably takes money believing it to be his." *Ibid.*

The Hobbs Act extortion, as defined in 18 U.S.C. § 1951(b)(2), requires that "consent" from the victim is "induced" "wrongfully." The "presumption of favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 513 U.S. at 71. But just "inducing" a "consent" is not what makes the conduct "wrongful." Here, "the crucial element separating legal innocence from wrongful conduct" is the conduct of the defendant which was "wrongful" enough to instill "fear" in the victim. The mental state requirement must therefor apply to the fact that defendant's actions resulted in the imposition of fear, and just the temperamental timidity of the victim himself.

Petitioner's conviction was premised solely on the state of mind of alleged victims - the multi-billion dollar companies - argued by the government to have feared economic harm, and therefore hired Petitioner to perform sub-contract work. Such a standard is inconsistent with "conventional requirement for criminal conduct-awareness of some wrongdoing." *Staples v. United States*, 511 U.S. at 606-607. Having liability turn on whether a victim's state of mind induced the giving of property - without any action by the defendant - reduces culpability to the elements which are not dependant on the defendant's conduct. See, *Cochran v. United States*, 157 U.S. 286, 294 (1895) (defendant "could only be held criminally liable for an evil intent actually existing in his mind"). Under these principle, it is what Petitioner did which matters, and not what the victim thinks of Petitioner.

In light of the foregoing, Petitioner's jury was incorrectly instructed that the government need prove only that the victim's state of mind was fearful for economic loss, without any threatening actions or conduct by the Petitioner. Mens rea requires the government to prove defendants "conduct and status". *Rehaif*, 139 S.Ct. 2191, 2194 (2019). In the instant case the government was not required to prove either. Federal criminal liability does not turn solely on the results of an act without considering the defendant's mental state. That understanding "took deep and early root in American soil" and under Hobbs Act extortion, wrongdoing on part of defendant, "must be conscious to be criminal." Morissette, 342 U.S. at 252. Therefore, the mental state requirement in Hobbs Act extortion cases based on "fear' is only satisfied if the defendant transmits a communication (either oral or written as prohibited in the N.Y. Penal Law) for the purposes of issuing a threat, or with knowledge that the communication will be viewed as a threat. See, *Elonis* 575 U.S. at ___, (interpreting a similar extortion statute, 18 U.S.C. § 875(c)).

CONCLUSION

I. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING AND SHOULD BE DECIDED BY THIS COURT

Fear must arise from the conduct of the accused rather than the mere temperamental timidity of the "victim's state of mind." The evil being attacked in the Hobbs Act imposing penalties up to twenty-years, are the Extortionist Actions, "actual or threatened force, violence." Thus the Conduct of the Extortinists is what the trust of the Statute is directed. If the New York definition is not taken as authoritative and the term "fear" is left undefined, then the disjuntive term "fear" would be considered unconstitutionally vague. The law is clear, criminal punishment can not be imposed unless the statute clearly explains the prohibited conduct.

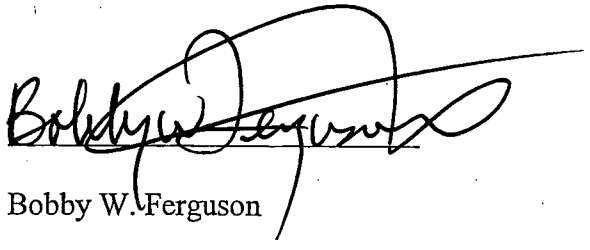
The Hobbs Act was not designed to punish all imaginable fears of human minds, for the government to present it to a jury as illegal, absent any intent to injure, such as the expansive vague *Modern Fed. Jury Instr.,* where a victim's state of mind having "anxiety, concern, or worry," is used as an element of conviction. Fear's are a reality in all legitimate business negotiations and transactions, merely being in business causes "fear of economic harm" e.g., fear of investment loss is a normal cause of "anxiety"; the fear of losing a bid is a legitimate "concern"; and the loss of a contract to a *competitor* is the risk of being in business that all business owners "worry" about. These are normal and legitimate business "fears".

Futhermore, the Districts Courts restitution was based upon 10 percent of the Petitioner's gross income of the completion of his subcontract work, and none of the Petitioner's extortion convictions are baed upon contracts or proceeds directly from the City of Detroit. The proceeds alleged by the government as extortionist proceeds were generated fromt he Petitioner's company performing sub-contract work with private companies.

Therefore, it is also necessary for this Court to decide whether a private individual *obtaining work* and payments received from *performing that work* is a federal violation under the Hobbs Act statute. The government should be required to explain how third party witness testimony would prove the element of "fear" for a non-testifying victim, would not offend the defendant's Sixth Amendment's confrontational rights. The government should also explain how the "right to calim" defense to economic harm impermissibly shifts burden to proof upon a criminal defendant to prove his conduct was not wrongful.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



Bobby W. Ferguson

Date: March 6, 2020.