PETITIONERS' APPENDIX

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In the
United States Court of Appeals
For the Second Circuit

August Term 2021

No. 21-932(L), 21-937(CON), 21-950(CON), 21-992(CON), 21-1548(CON)

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NARDINO COLOTTI, ALEX RUDAJ, PRENKA IVEZAJ, NIKOLA DEDAJ, ANGELO DIPIETRO,

Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of New York
No. 04 Cr. 110 (DLC), 11 Civ. 1782 (DLC), 11 Civ. 1510 (DLC), 11 Civ. 1402 (DLC),
11 Civ. 1556 (DLC), 20 Civ. 4889 (DLC)
Denise L. Cote, District Judge, Presiding.
(Argued June 2, 2022; Decided June 21, 2023)

Before: LEVAL, PARKER, and MENASHI, *Circuit Judges.*

Petitioners-Appellants appeal from a judgment of the United States District Court for the Southern District of New York (Cote, *J.*) denying their petitions brought pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct their convictions under 18 U.S.C. § 924(c). The district court held that their substantive RICO convictions, on which their § 924(c) convictions were based, were valid "crimes of violence." Because we are confident that a properly instructed jury would have based the petitioners' § 924(c) convictions upon a valid predicate crime of violence, we **AFFIRM.**

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Anthony DiPietro, Law Offices of Anthony DiPietro P.C., White Plains, N.Y. *for Petitioner-Appellant Angelo DiPietro,*

ANDREW JONES (Karl Metzner, *on the brief), for* Damian Williams, United States Attorney for the Southern District of New York, New York, N.Y. *for Respondent-Appellee.*

BARRINGTON D. PARKER, Circuit Judge:

Nardino Colotti, Alex Rudaj, Nikola Dedaj, Prenka Ivezaj, and Angelo DiPietro filed successive habeas corpus petitions challenging their convictions and mandatory sentences imposed by the United States District Court for the Southern District of New York (Cote, *J.*). This appeal focuses on their convictions under Count Thirteen of the indictment, which charged them with using and carrying firearms during and in relation to a crime of violence, 18 U.S.C. § 924(c), based on an offense charged in Count One, racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c). The predicate acts underlying the RICO charge included two offenses (Racketeering Acts Four and Five) consisting of either second degree grand larceny by extortion under New York law, or conspiracy or attempt to commit that offense. The jury expressly found Racketeering Acts Four and Five to have been proven as to all defendants charged. Although there were other predicates to the RICO offense charged in Count One, these are the only predicates which the government contends can constitute a "crime of violence" within the meaning of § 924(c)(3)(A).

In January 2006 a jury convicted defendants on all but one of the fifteen counts charged in the indictment. We affirmed the convictions on direct appeal.

United States v. Ivezaj, 568 F.3d 88 (2d Cir. 2009); *United States v. Ivezaj*, 336 F. App'x 6 (2d Cir. 2009). We upheld the petitioners' § 924(c) convictions under Count Thirteen, finding that its predicates conformed to the definition of a crime of violence. *Ivezaj*, 568 F.3d at 96. Because intervening decisions of the Supreme Court have altered the test for determining whether an offense is a "crime of violence," *see United States v. Taylor*, 142 S. Ct. 2015, 2021 (2022); *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), that ruling is no longer binding on us. The issue requires a new analysis to ensure that the convictions can stand under the newly explained requirements.

In 2011, defendants petitioned pursuant to 28 U.S.C. § 2255 to vacate their convictions on the ground of ineffective assistance of counsel. Judge Cote denied the petitions and declined to issue Certificates of Appealability. In 2016, following the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015), the petitioners asked this Court for permission to file this successive petition in district court to vacate their Count Thirteen convictions for violation of 18 U.S.C. § 924(c) on the ground that substantive RICO did not qualify as a crime of violence. We allowed the filing of the successive petition. Judge Cote then denied relief, concluding that the petitioners' substantive RICO and New York extortion

offenses qualified as crimes of violence and that any instructional errors were harmless, but granted Certificates of Appealability. The petitioners then filed this appeal.

The jury was instructed that it could base the petitioners' § 924(c) convictions upon a predicate offense, which, according to the Supreme Court's subsequent interpretations of the term, was not a "crime of violence." The jury's findings rendered under those (later determined to be erroneous) instructions do not specify whether it found that the defendants committed a variation of New York larceny by extortion that necessarily requires the actual or threatened use of force. Nor did the written jury findings specify whether the predicate offense related to second degree grand larceny by extortion was the substantive offense, or conspiracy or attempt to commit the offense. Nonetheless, reviewing the jury's verdict in relation to the evidence presented at trial, we conclude with a high degree of confidence that, if properly instructed, the jury would have predicated the petitioners' § 924(c) convictions on a valid crime of violence. We therefore affirm the district court's denial of relief.

BACKGROUND

In the trial in late 2005 and early 2006, the jury convicted defendants of fourteen out of fifteen counts of crimes arising from their participation in a criminal enterprise known as the Rudaj Organization, an organized crime syndicate that, among other things, controlled illegal gambling operations in the New York City area.

The issues raised on appeal center on Count One, which charged defendants with racketeering in violation of RICO (18 U.S.C. § 1962(c)), and Count Thirteen, which charged defendants, under 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2, with possessing, using, or carrying a firearm in relation to a federal "crime of violence," namely, the racketeering charge in Count One.

Count One alleged fourteen separate racketeering acts. This appeal concerns Acts Four and Five. Act Four charged defendants (except Colotti) with three related offenses: substantive second degree grand larceny by extortion under N.Y. Penal Law §§ 155.05 & 155.40; attempted second degree grand larceny by extortion under N.Y. Penal Law §§ 110.00, 155.05, & 155.40; and conspiracy to commit second degree grand larceny by extortion under N.Y. Penal Law §§ 105.13, 155.05, & 155.40. The indictment specified that any one of these offenses "alone constitutes

the commission of Racketeering Act Four." Act Four, according to the indictment, was based on conduct "instilling [in two victims] a fear that the defendants would damage property and cause physical injury to some person in the future" and "wrongfully tak[ing] and obtain[ing], and attempt[ing] to take and obtain, the property of" those victims.

Act Five similarly charged all defendants with the same three New York criminal offenses as in Act Four and similarly alleged that any one of these offenses "alone constitutes the commission of Racketeering Act Five." It asserted as a basis conduct "instilling a fear [in the managers of an illegal gambling club called Soccer Fever] that the defendants would damage property and cause physical injury to some person in the future."

As noted, defendants' convictions were all affirmed on direct appeal and defendants' initial § 2255 petitions alleging ineffective assistance of counsel were also denied. Further, after *Johnson* struck down 18 U.S.C. § 924(e)(2)(B)(ii), the residual clause of the Armed Career Criminal Act ("ACCA") as void for vagueness, *Johnson v. United States*, 576 U.S. 591, 597 (2015), and *Davis* applied *Johnson* to 18 U.S.C. § 924(c)(3)(B)'s residual clause, *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), defendants obtained our permission to file successive § 2255

petitions challenging the validity of their convictions under Counts One and Thirteen as well as the corresponding jury instructions on those charges. The district court denied the petitions but granted Certificates of Appealability.

This appeal followed. We review legal determinations de novo. *Nunez v. United States*, 954 F.3d 465, 469 (2d Cir. 2020) (citing *Sapia v. United States*, 433 F.3d 212, 216 (2d Cir. 2005)).

DISCUSSION

I

Under 18 U.S.C. § 924(c)(1)(A), criminal defendants are subject to mandatory, consecutive, enhanced punishment for "us[ing] or carr[ying] a firearm" "during and in relation to any crime of violence." The enhanced punishment mandates a sentence of at least five years in custody, increased to seven years if the firearm is brandished. *Id.* §§ 924(c)(1)(A)(i), (c)(1)(A)(ii). For purposes of these enhancements, the statute defines "crime of violence" in two subparts—the first known as the elements clause, § 924(c)(3)(A), and the second the residual clause, § 924(c)(3)(B). According to those clauses, a crime of violence is a felony offense that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

> (B) 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). Following the Supreme Court's decision in *Davis*, which struck down Subparagraph B, the residual clause, as unconstitutionally vague, only the elements clause, Subparagraph A, remains valid. 139 S. Ct. at 2323–24.

We ordinarily apply the categorical approach in determining whether a predicate offense qualifies as a crime of violence under the elements clause. *United States v. Taylor*, 142 S. Ct. 2015, 2020 (2022). Under this approach, we ask whether "*categorically*, that is to say, in every instance by its very definition, [the offense] involves the use of force." *United States v. Martinez*, 991 F.3d 347, 353 (2d Cir. 2021).

There is, however, an exception for divisible statutes. When a crime is defined with alternative elements that are divisible, we apply a modified categorical approach by consulting a limited set of documents – including the indictment, verdict form, and jury instructions – to determine which of the alternative branches of the statute's prohibitions was the basis of the defendant's conviction, then assessing whether the elements of that branch of the offense can be satisfied by conduct that would fall outside the definition of a "crime of violence" provided by § 924(c)(3)(A). *See Descamps v. United States*, 570 U.S. 254,

257 (2013); *United States v. Laurent*, 33 F.4th 63, 85 (2d Cir.), *cert. denied*, 143 S. Ct. 394, *and cert. denied sub nom. Ashburn v. United States*, 143 S. Ct. 462 (2022). With this background in mind, we address whether the petitioners' substantive RICO convictions and related predicate acts of New York larceny by extortion qualify as crimes of violence under § 924.

II

The § 924(c) offense under which the petitioners were convicted was Count Thirteen. It charged that the defendants used or carried a firearm during and in relation to a crime of violence. The crime of violence charged as the basis for the § 924(c) conviction was the RICO offense charged in Count One, a violation of 18 U.S.C. § 1962(c), predicated on Racketeering Acts 4 and 5, which in turn charged violations of N.Y. Penal Law § 155.40, the New York penal statute defining second degree grand larceny by extortion, or alternatively conspiracy or attempt to violate that statute. Because both RICO and New York larceny by extortion can be committed in various ways, some of which require force while others do not, the government cannot sustain the conviction under § 924(c) unless both the RICO offense under § 1962(c) and the New York extortion statute are divisible. Petitioners argue that both statutes are indivisible and contend that we must

conclude under the categorical approach that Count Thirteen does not charge a crime of violence.

The Supreme Court has clarified the applicability of the modified categorical approach in several decisions. Notably, in *Descamps v. United States*, 570 U.S. 254, 261–63 (2013), the Supreme Court explained that courts must apply the modified categorical approach when the defendant is convicted under a divisible statute. Sentencing courts must begin by analyzing the divisibility of a statute to determine whether to apply the modified categorical approach.

We find that these clarifications do not affect our ultimate determination that a substantive RICO offense is a crime of violence if the RICO conviction is based on an offense that itself constitutes a crime of violence. *Cf. United States v. Brown*, 945 F.3d 72, 76 (2d Cir. 2019) (finding "no persuasive reason to deviate" from *Ivezaj* after *Davis* in the context of calculating a sentence for a RICO conspiracy conviction). Though we did not conduct a divisibility analysis in *Ivezaj*, we did in effect apply the modified categorical approach in finding that the offense in question was a crime of violence. With respect to whether a RICO offense can serve as a crime of violence under § 924(c), we reaffirm for the reasons below that RICO is a divisible statute and that substantive RICO can be a crime of violence

when it is predicated on an offense that necessarily requires an actual, attempted, or threatened use of force. *See Laurent*, 33 F.4th at 88.

The text of § 1962(c) prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" from "conduct[ing] or participat[ing], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." The statute defines racketeering activity by listing a series of state or federal crimes, also known as predicate acts, some of which, like murder, involve force and some of which, like counterfeiting, do not. 18 U.S.C. § 1961(1).[1]

[1] 18 U.S.C. § 1961(1) provides:

> (1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to

financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581–1592 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), sections 175–178 (relating to biological weapons), sections 229–229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11

Defendants contend this broad language indicates that the statute criminalizes a single offense, and that § 1961 merely presents possible means of engaging in racketeering activity but does not list alternative elements, which would mean the statute was unitary and the categorical approach would apply.

The divisibility of RICO, however, is no longer an open question in this circuit. We held in *United States v. Laurent* that RICO is a divisible statute appropriate for use of the modified categorical approach. 33 F.4th at 88; *cf. also Martinez*, 991 F.3d at 359. A conviction for a substantive RICO offense will constitute a crime of violence if the conviction was based on at least one predicate act that can be committed only by use of force. *Laurent*, 33 F.4th at 88. The modified categorical approach requires us to turn to the charged predicate acts that constitute the pattern of racketeering – here, New York larceny by extortion – to

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(except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B).

determine whether that statute is divisible and, if so, whether any of the predicate offenses a defendant was found to have committed qualifies as a crime of violence.

III

The petitioners' § 924(c) convictions cannot be sustained unless the New York larceny by extortion statute is divisible. The parties dispute whether the statute is divisible. We conclude that it is. We further conclude that at least one of the offenses set forth in the statute constitutes a crime of violence.

A

We begin by laying out the structure of the New York laws defining larceny by extortion. The statutes setting forth the crime of larceny by extortion under New York law set forth alternative offenses, each of which is a form of larceny by extortion, some of which necessarily require the use of force, and some of which do not. Subdivision 1 of N.Y. Penal Law § 155.05 provides that "a person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof." Subdivision 2 then defines larceny to include "a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section,

committed in any of the following ways." Section 155.05(2)(e) defines obtaining property by extortion as follows:

> A person obtains property by extortion when he compels or induces another person to deliver property to himself or to a third person by means of instilling a fear that, if the property is not so delivered, the actor or another will:
>
> (i) Cause physical injury to some person in the future; or
> (ii) Cause damage to property; or
> (iii) Engage in other conduct constituting a crime; or
> (iv) Accuse some person of a crime or cause criminal charges to be instituted against him; or
> (v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
> (vi) Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or
> (vii) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
> (viii) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
> (ix) Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

N.Y. Penal Law § 155.05(2)(e). Section 155.40 then references several of the acts from the list in § 155.05(2)(e) to define second degree grand larceny by extortion:

> A person is guilty of grand larceny in the second degree when he steals property and when: . . . .

> 2. The property, regardless of its nature and value, is obtained by extortion committed by instilling in the victim a fear that the actor or another person will (a) cause physical injury to some person in the future, or (b) cause damage to property, or (c) use or abuse his position as a public servant by engaging in conduct within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

N.Y. Penal Law § 155.40. Clause (b) of § 155.40(2), covering threats to "cause damage to property," has been construed by the New York courts to include not only threats of physical damage to property, but also threats of economic harm, such as labor stoppages, so that this branch of § 155.40(2) can be violated without threat or use of force. *See People v. Dioguardi*, 168 N.E.2d 683, 688 (N.Y. 1960) ("It is well-settled law in this State that fear of economic loss or harm satisfies the ingredient of fear necessary to the crime."); *People v. Capparelli*, 603 N.Y.S.2d 99, 102, 105 (N.Y. Sup. Ct. 1993) (noting, where defendant made threat of labor "problems" to general contractor victim, that "[f]ear of future economic harm is sufficient to establish" extortionate larceny). The other forms of larceny by extortion set forth in § 155.05(2)(e) are defined as grand larceny in the fourth degree. N.Y. Penal Law § 155.30(6).

An aspect of grand larceny by extortion that is significant in this appeal is that the completed offense requires a jury finding that the defendant succeeded in

obtaining the property of another. *Dioguardi*, 168 N.E.2d at 68 ("The essence of the crime [of extortion] is obtaining property by a wrongful use of fear, induced by a threat to do an unlawful injury."); *cf. People v. Jennings*, 504 N.E.2d 1079, 1086 (N.Y. 1986). Defendants who plan to or endeavor to obtain the property of another (without succeeding in obtaining the property) are perhaps guilty of conspiring to commit larceny by extortion, or of attempt to do so, but not the crime of larceny by extortion. *See People v. Teal*, 89 N.E. 1086, 1092 (N.Y. 1909) (Haight, J., dissenting) (observing that "a person could be convicted of an attempt to commit larceny when there is no property to steal").

Finally, another section of the statute sets forth the pleading requirements for a charge of larceny by extortion. *See* N.Y. Penal Law § 155.45. That section provides:

> 1. Where it is an element of the crime charged that property was taken from the person or obtained by extortion, an indictment for larceny must so specify. In all other cases, an indictment, information or complaint for larceny is sufficient if it alleges that the defendant stole property of the nature or value required for the commission of the crime charged without designating the particular way or manner in which such property was stolen or the particular theory of larceny involved.
>
> 2. Proof that the defendant engaged in any conduct constituting larceny as defined in section 155.05 is sufficient to support any indictment, information or complaint for larceny other than one charging larceny by

> extortion. An indictment charging larceny by extortion must be supported by proof establishing larceny by extortion.

Id.

B

The petitioners argue that New York larceny by extortion is not divisible as between extortion committed by threat of physical injury to a person, N.Y. Penal Law §155.40(2)(a), and extortion committed by threat of damage to property, *id.* § 155.40(2)(b). We disagree.

The statute's text shows that New York extortion is divisible as between the extortion offenses set forth in § 155.05(2)(e) that are punishable as second degree grand larceny and those that are punishable as fourth degree grand larceny. The alternatives listed in §§ 155.05(2)(e) and 155.40 are set apart by the disjunctive phrase "or," in separate sections and subsections. Though such a structure is not necessarily dispositive in finding divisibility, it is at least indicative. *See United States v. Scott*, 990 F.3d 94, 99 n.1 (2d Cir. 2021) (en banc) (New York first-degree manslaughter statute, consisting of three alternative elements separated by "or," is divisible); *United States v. Jones*, 878 F.3d 10, 16–17 (2d Cir. 2017); *Flores v. Holder*, 779 F.3d 159, 166 (2d Cir. 2015) (New York first-degree sexual abuse statute, consisting of four alternative elements separated by "or," is divisible). Three of the

nine forms of extortion enumerated in § 155.05(e) are punishable as second degree grand larceny, whereas the remainder are punishable as fourth degree grand larceny. *See* N.Y. Penal Law §§ 155.30, 155.40. The government identifies New York caselaw treating the variants of extortion set out in § 155.05(e) as distinct offenses. *See People v. Caban*, 696 N.Y.S.2d 1, 2 (App. Div. 1st Dep't 1999) (holding that a grand jury was not required to have been given an affirmative defense instruction applicable to only one form of extortion, when the State charged only a variant of extortion for which the affirmative defense was unavailable, even if the evidence presented suggested that the defendant committed the extortion offense for which the defense was available).

The petitioners suggest that even if the forms of extortion in § 155.05(e) that are punishable as second degree grand larceny are divisible from those that are punished as fourth degree grand larceny, the offense of second degree grand larceny by extortion, N.Y. Penal Law § 155.40, is indivisible because it does not require the jury to find unanimously which form of extortion the defendants employed to commit the larceny. That certain extortion offenses carry greater penalties than others, they contend, "does not show that extortion by instilling fear of 'physical injury to some person,' as described in subsection (i) of § 155.05(2)(e),

and extortion by instilling fear of 'damage to property,' as described in subsection (ii) of § 155.05(2)(e), are divisible *with respect to each other*." Appellants' Br. at 46–47. To find that the defendants violated § 155.40, the jury was not required to specify whether the defendants threatened to cause physical injury, cause damage to property, or abuse a position as a public servant in committing larceny. This structure, petitioners argue, means that § 155.40 is indivisible and therefore the categorical approach applies.

We are not convinced, because § 155.40 must be read in conjunction with § 155.45, which provides:

> 1. *Where it is an element of the crime charged that property was taken from the person or obtained by extortion, an indictment for larceny must so specify.* In all other cases, an indictment, information or complaint for larceny is sufficient if it alleges that the defendant stole property of the nature or value required for the commission of the crime charged without designating the particular way or manner in which such property was stolen or the particular theory of larceny involved.
>
> 2. Proof that the defendant engaged in any conduct constituting larceny as defined in section 155.05 is sufficient to support any indictment, information or complaint for larceny other than one charging larceny by extortion. *An indictment charging larceny by extortion must be supported by proof establishing larceny by extortion.*

N.Y. Penal Law § 155.45 (emphases added). This New York pleading requirement for extortionate larceny, unlike some other forms of larceny, necessitates

identification of the theory under which the property was stolen. This showing would not be necessary if the statute were indivisible. The fair inference of the requirement that a charge of larceny by extortion "must be supported by proof establishing larceny by extortion" is that the facts establishing the particular charged form of extortion – thus, facts that would differentiate violations of subclauses (a), (b), and (c) of § 155.40(2) from one another – are an element and must be found by the jury. The facts constituting the extortion would make clear which of the alternative versions of extortion was violated and thus permit a determination whether that version can be committed otherwise than by use of force, such that the modified categorical approach properly applies. *See Taylor*, 142 S. Ct. at 2020 (considering federal felony as predicate for § 924 conviction and observing, "The only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force."); *Descamps*, 570 U.S. at 272 ("[W]hy limit the modified categorical approach only to explicitly divisible statutes? The simple answer is: Because only divisible statutes enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime."). That each subclause of

§ 155.40(2) qualifies as grand larceny in the second degree is not dispositive. *See Banks v. United States*, 773 F. App'x 814, 820 (6th Cir. 2019) ("To be sure, if statutory alternatives carry different punishments, then under *Apprendi* they must be elements. But the opposite is not true. Just because different punishments necessarily show *different* offenses does not mean that the same punishment necessarily shows the *same* offense.") (internal quotation marks, marks indicating alteration, and citation omitted). The question is whether state law requires the government to prove the conduct identified in the charged subclause, and we conclude that it does.

Because N.Y. Penal Law §§ 155.40 and 155.30(6) create distinct offenses, and we read § 155.45 to clarify that the facts establishing the particular charged form of extortion are an element and must be found by the jury, we hold that New York's extortion statute is divisible and apply the modified categorical approach.

C

Examining the divisible offenses contained in the New York larceny by extortion statute, it is clear that some forms of larceny by extortion cannot be committed without the actual or threatened use of force, whereas other forms do not require force. Larceny by extortion through threat to damage property, N.Y.

Penal Law § 155.40(2)(b), can be accomplished without the actual or threatened use of force and therefore does not constitute a crime of violence. *See Dioguardi*, 168 N.E.2d at 688; *Capparelli*, 603 N.Y.S.2d at 102, 105. The government does not argue otherwise. *See* Appellee's Br. at 26–29. However, larceny by extortion through threat to cause physical injury to a person, N.Y. Penal Law § 155.40(2)(a), cannot be accomplished without a threatened use of force and therefore qualifies as a "crime of violence" under the definition set forth in 18 U.S.C. § 924(c)(3)(A).

We now consider whether the jury found that the defendants committed a crime of violence.

IV

In applying the modified categorical approach, we look to, among other documents, the indictment, jury instructions, and verdict form to determine whether the jury convicted each defendant of a crime of violence. *See Descamps*, 570 U.S. at 257. While it is true that the jury's instructions contained two errors, the petitioners have not shown that either error resulted in prejudice that would entitle them to the relief they seek under 28 U.S.C. § 2255.

A

In charging the jury as to Count One, which charge applied also to Count Thirteen, the district court instructed the jury that it could convict a defendant of larceny by extortion if it found "that the defendant obtained property from another person . . . by instilling in the victim a fear that the defendant or a third person would *cause physical injury to some person . . ., or cause damage to property*." App'x at A147 (emphasis added). Because, as explained above, larceny by threat of damage to property can be accomplished without use of force, the court's charge erroneously allowed the jury to find the crime of violence required for the § 924(c) conviction based on an offense that could be committed without use or threat of force.

However, an erroneous jury instruction does not *per se* entitle the petitioners to relief under § 2255 if the error had no injurious effect on the verdict. "To determine whether a habeas petitioner was actually prejudiced or the error was harmless, 'a reviewing court finding such [instructional] error should ask whether the flaw in the instructions "had substantial and injurious effect or influence in determining the jury's verdict."'" *Stone v. United States*, 37 F.4th 825, 829 (2d Cir.), *cert. denied*, 143 S. Ct. 396 (2022) (alteration in original) (quoting *Hedgpeth v. Pulido*,

555 U.S. 57, 58 (2008) (per curiam)). Where we consider the appeal of a denial of a § 2255 motion, as we do here, our inquiry requires us to "review the whole record" to determine whether an error was prejudicial. *Id.* at 831. We recently observed in a similar case that,

> in the context of a § 924(c) conviction, where a jury's finding of guilt is based on two predicates, only one of which can lawfully sustain guilt, we will find the error harmless when the jury would have found "the essential elements of guilt on the alternative charged predicate that would sustain a lawful conviction" beyond a reasonable doubt.

Id. (quoting *Laurent*, 33 F.4th at 86). In *Stone*, the jury had been instructed erroneously that it could predicate the petitioner's § 924(c) conviction on either of two offenses it found proven, conspiracy to commit murder in aid of racketeering (an offense that does not qualify as a crime of violence) or murder in aid of racketeering (an offense that does qualify), and the verdict on the § 924(c) count did not specify the predicate crime upon which it was based. *Id.* at 827–28. We held, nonetheless, that Stone failed to show that this error prejudiced him, because we concluded that "a properly instructed jury would have found . . . beyond a reasonable doubt" that Stone used a firearm in relation to the valid predicate crime of substantive murder: The jury had convicted Stone of substantive murder, and "the uncontroverted evidence at trial was that Stone killed [the victim] with a gun

that he had borrowed for that purpose." *Id.* at 832. We therefore denied Stone's § 2255 petition. *Id.* at 832–33.

We have applied a similar standard in reviewing jury instructions for plain error on direct appeal. In *Laurent*, the defendants-appellants were convicted of § 924(c) offenses for which, according to the trial court's erroneous jury instructions, the predicate crime of violence could have been either a conspiracy to violate RICO (which could not qualify as a crime of violence) or a substantive violation of RICO (that could so qualify). 33 F.4th at 85. We upheld two of the defendants-appellants' § 924(c) convictions because we determined that "the jury found . . . the elements necessary to convict" of a § 924(c) offense "predicated on the substantive RICO charge." *Id.* at 89. Although the jury had not found expressly that these defendants "used or carried a firearm during and in relation to the commission of the crime of violence" or "possessed a firearm in furtherance of that crime," we nevertheless observed that "the jury verdict together with the evidence gives *a very high degree of confidence* that the jury so found." *Id.* at 89–90 (emphasis added). The jury, in finding these defendants guilty of a substantive RICO offense, had found proven beyond a reasonable doubt that both defendants committed distinct murders. *Id.* Both murders were undisputedly committed using firearms,

and the jury heard testimony that each defendant used or possessed a firearm in connection with the murders they respectively committed. *Id.* Because the jury verdict and the trial evidence thus "g[ave] a very high degree of confidence that the jury . . . found" that the two defendants used or carried a firearm during and in relation to the commission of a crime of violence, or possessed a firearm in furtherance of that crime, the defendants failed to show plain error that "affect[ed] [their] substantial rights," and we affirmed their § 924(c) convictions. *Id.* at 90.

As in *Stone* and *Laurent*, the verdict and the trial evidence here give us a high degree of confidence that a properly instructed jury would have convicted the defendants on Count Thirteen based on a valid predicate crime of violence: New York larceny by extortion through threat of injury to a person, N.Y. Penal Law § 155.40(2)(a). The evidence presented to the jury overwhelmingly showed that the petitioners made threats of physical injury in connection with Racketeering Acts Four and Five. The jury heard testimony from Mikhail Hirakis, a victim of the incident at the Soccer Fever gambling club that formed the basis of Racketeering Act Five. Hirakis testified that the club was stormed by a group of "15 people . . . with guns" who shut down the gambling operation that night. That group included all the petitioners. Hirakis testified that the petitioners and their

associates "were pointing to us with their Uzi and the pistols." Hirakis further testified that, when Soccer Fever was stormed, "we were threatened by 15 guns and an Uzi" and that the petitioners beat him and bludgeoned him in the head with a gun, causing Hirakis to seek medical treatment.[2] Another witness testified that after beating Hirakis, several members of the Rudaj Organization announced to the gamblers that "[i]f they catch any one of those players at another barbut [dice game] other than [the Rudaj Organization's gambling establishment], they're going to take care of every single one of them that goes to another barbut." Rudaj stated to the club's patrons, "I don't want to see nobody here. If I see [you] one more time, I swear to God . . . I beat you . . . one by one. I eat you up . . . . It's closed." *Ivezaj*, 568 F.3d at 92 (alteration and omissions in original).

[2] Count Four of the indictment charged all petitioners with assaulting Hirakis by "str[iking] [him] in the head with a firearm." The jury acquitted the petitioners on that count. The petitioners argue that this aspect of the verdict "suggests that the jury . . . may have harbored reasonable doubt as to the substantive extortion charged in Racketeering Act Five, and that it may have found Racketeering Act Five '[p]roven' based on extortion conspiracy only." Appellants' Br. at 59. But substantive extortion requires proving that the petitioners *made* threats to "*cause physical injury to some person in the future*," N.Y. Penal Law § 155.40(2)(a) (emphasis added), not that they actually carried out the threatened future violence. Thus, insofar as the jury's acquittal on Count Four undermines confidence that the petitioners *carried out* threats of physical harm that they made during the Soccer Fever incident, it does not address the powerful evidence showing that the petitioners threatened the patrons with physical harm.

The jury also heard testimony that the petitioners beat another victim, Antonios Balampanis, the extortion of whom all but Colotti were charged with in Racketeering Act Four. That testimony included Balampanis's statement that during the beating, "it felt like somebody hit me with a pistol," at which point he lost consciousness. Balampanis was an associate of Fotios Dimopoulos, who supervised gambling operations in Astoria for the Lucchese Crime Family, and the petitioners sought to seize control of these operations. *Ivezaj*, 568 F.3d at 92. Later, Dimopoulos "told Balampanis that his beating had been intended as 'a message' for Dimopoulos, and Dimopoulos never returned to gambling clubs in Astoria following the assault." *Id.*

The jury's express findings conform to the overwhelming evidence that the petitioners threatened physical injury in connection with the acts of extortion that the jury found proven. The jury found specifically that the petitioners brandished firearms while committing an act of extortion under New York law. The court instructed the jury that "[t]o 'brandish' a firearm means to display all or part of it, or to otherwise make its presence known to another person in order to intimidate or advise that person that violence is imminently and immediately available." Although a firearm could, in theory, be brandished to threaten damage to property

alone, the evidence showing that the petitioners made threats of physical injury makes it highly unlikely that the jury would have premised the Count 13 convictions upon the brandishing of a firearm solely to threaten damage to property.

Thus, looking to the verdict and the record as a whole, we have a "high degree of confidence that the jury . . . found" that the petitioners' § 924(c) convictions were predicated upon a New York larceny by extortion offense that involves threats of physical injury, N.Y. Penal Law § 155.40(2)(a), as opposed to threats of harm to property, N.Y. Penal Law § 155.40(2)(b), and that a properly instructed jury would have so found. *See Laurent*, 33 F.4th at 90.

However, our inquiry does not end here. To evaluate whether the jury instructions prejudiced the petitioners, we must also ask whether we can be confident that a properly instructed jury would have predicated the petitioners' Count 13 convictions upon a finding that the petitioners committed *the completed offense* of larceny by extortion through threats to cause physical injury, as opposed to an inchoate variation of that offense, such as conspiracy or attempt to commit larceny by extortion.

B

A second aspect of the court's instructions to the jury proved to be erroneous in light of subsequent Supreme Court decisions. The indictment charged that Racketeering Acts Four and Five, relating to larceny by extortion, could be accomplished in any of three ways -- either by conspiracy to commit larceny by extortion, attempted larceny by extortion, or the substantive offense of larceny by extortion. The court charged the jury that it could find a defendant guilty of Racketeering Acts Four and Five under Count One, which served as predicate for the § 924(c) charge in Count Thirteen,

> by finding beyond a reasonable doubt that he committed either an extortion or an attempted extortion. If you are in unanimous agreement that the defendant committed at least an attempted extortion, you do not need to go further to consider whether the extortion was actually completed.
> . . .
> Alternatively, you may find that the defendant you are considering committed Racketeering Act Four or Five by finding that the defendant became a member of a conspiracy to commit the charged extortion.

App'x at A148–49. The court did not call upon the jury to render special verdicts specifying whether its finding of guilt was predicated on conspiracy, attempt, or the completed offense, or some combination of the three.

Our court has made clear in *United States v. Barrett*, following the Supreme Court's ruling in *Davis*, that a conspiracy offense cannot constitute a crime of violence because conspiracy can be accomplished solely by agreement without any use or threat of force. *See United States v. Barrett*, 937 F.3d 126, 128–30 (2d Cir. 2019); *accord United States v. Capers*, 20 F.4th 105, 118–19 (2d Cir. 2021) ("[T]he mere *agreement* to commit [violent] crimes does not require the use of force – or any action beyond the agreement itself – and therefore is not categorically a violent crime."). The Supreme Court later decided in *Taylor*, subsequent to oral argument in this case, that the crime of attempt to commit Hobbs Act robbery, 18 U.S.C. § 1951(a), cannot be a crime of violence because it can be accomplished without the use or threat of force. 142 S. Ct. at 2020–21. While the Supreme Court's ruling in *Taylor* related to Hobbs Act robbery and not to New York larceny by extortion, the same reasoning would bar satisfying the requirement of a crime of violence by attempted larceny by extortion. Even if the completed offense necessarily involves the use or threat of force, the offense of attempt to commit that crime can be accomplished by taking steps that do not include the use or threat of force so long as they come sufficiently close to completion of the substantive offense. *See id.*; *see also People v. Bracey*, 360 N.E.2d 1094, 1097 (N.Y.

1977) (conduct constituting attempt "must 'carry the project forward within dangerous proximity to the criminal end to be attained'" (quoting *People v. Werblow*, 148 N.E. 786, 789 (N.Y. 1925))); N.Y. Penal Law § 110.00 ("A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.").

We find "ample evidence in the record that a properly instructed jury would have found," *Stone*, 37 F.4th at 832, that the petitioners committed the completed offense of New York larceny by extortion (as the predicate for Count Thirteen), as opposed to mere conspiracy or attempt to commit larceny by extortion, neither of which, after *Davis*, *Barrett*, and *Taylor*, can be a crime of violence. *See Taylor*, 142 S. Ct. at 2020; *Davis*, 139 S. Ct. at 2336; *Barrett*, 937 F.3d at 128–30. The completed offense of New York larceny by extortion requires that the defendants succeeded in "tak[ing], obtain[ing] or withhold[ing]" property. N.Y. Penal Law § 155.05(1); *see Jennings*, 504 N.E.2d at 1086 ("[T]he 'taking' element [of larceny] . . . is separately defined in the statute and is satisfied by a showing that the thief exercised dominion and control over the property for a period of time, however temporary, in a manner wholly inconsistent with the owner's continued rights." (citations omitted)). Here, the evidence at trial

showed that the Soccer Fever incident marked "the end of Soccer Fever," and that the Rudaj Organization thereby subsequently increased the extent of its control of illegal gambling in Astoria. *Ivezaj*, 568 F.3d at 92. Shutting down a competitor through extortionate actions, and thereby strengthening one's own business, amounts to obtaining property through extortion. *See id.* ("[A]n illegal gambling business can constitute property under New York [extortion] law."). The evidence gives us a high degree of confidence that a properly instructed jury would have found that the petitioners committed the completed offense of larceny by extortion through their violent threats of physical injury.

C

To recapitulate, a § 2255 petitioner cannot obtain relief from an instructional error of the sort challenged here when the court, on the basis of the amplitude of the evidence, combined with the jury's findings, concludes with a high degree of confidence "that a properly instructed jury would have found" that he committed a § 924(c) offense predicated upon a valid crime of violence. *Stone*, 37 F.4th at 832. The record before us precludes § 2255 relief. On the basis of the ample trial evidence combined with the jury's actual findings, we conclude with high confidence that, as to each of the petitioners, a properly instructed jury

would have rendered guilty verdicts on Count Thirteen's charge of brandishing a firearm, in furtherance of a crime of violence, predicated on (a) brandishing a firearm in furtherance of (b) a substantive RICO offense in turn predicated on (c) a completed offense of New York larceny by extortion that was (d) divisible from other forms of New York larceny by extortion, and (e) required proof of actual or threatened physical injury to a person. The petitioners therefore fail to demonstrate that the error was prejudicial, and thus, relief under § 2255 is unwarranted.

CONCLUSION

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of June, two thousand twenty-three,

Before: Pierre N. Level,
Barrington D. Parker,
Steven J. Menashi,
Circuit Judges.

Nardino Colotti, Alex Rudaj, Prenka Ivezaj, Nikola Dedaj, Angelo Dipietro,

Petitioners - Appellants,

v.

United States of America,

Respondent - Appellee.

JUDGMENT

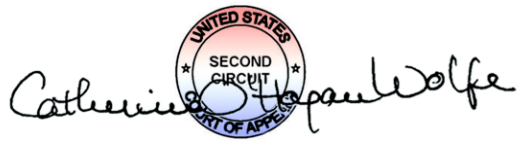
Docket Nos. 21-932(L),
21-937(CON),
21-950(CON),
21-992(CON),
21-1548(CON)

The appeals in the above captioned case from a judgment of the United States District Court for the Southern District of New York were argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the District Court is AFFIRMED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALEX RUDAJ, NIKOLA DEDAJ, NARDINO COLOTTI, PRENKA IVEZAJ, and ANGELO DIPIETRO,	:	04cr1110 (DLC)
	:	11cv1782 (DLC)
	:	11cv1510 (DLC)
Petitioners,	:	11cv1402 (DLC)
	:	11cv1556 (DLC)
-v-	:	20cv4889 (DLC)
	:	
UNITED STATES OF AMERICA,	:	OPINION AND ORDER
	:	
Respondent.	:	
	:	

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DENISE COTE, District Judge:

Alex Rudaj, Nikola Dedaj, Nardino Colotti, Prenka Ivezaj, and Angelo DiPietro ("Petitioners") seek a writ of habeas corpus pursuant to Title 28, United States Code, Section 2255. Petitioners were convicted at trial on multiple counts, including of participating in a RICO enterprise. In this petition, they seek to vacate their convictions on the count that charged them with using and carrying a firearm during and in relation to a crime of violence, in violation of Title 18, United States Code, Section 924(c). They contend principally that their convictions for that crime are no longer valid in the wake of the Supreme Court's decisions in United States v. Davis, 139 S.Ct. 2319 (2019), and Johnson v. United States, 576 U.S. 591 (2015). For the following reasons, the petition is denied.

Background

Following a fifteen-week jury trial, Petitioners were each convicted on multiple counts of crimes arising from their involvement in the Rudaj Organization, an organized crime syndicate that, among other things, controlled illegal gambling operations in the New York City area. The evidence at trial included multiple acts of violence and threatened violence committed in the operation of the Rudaj Organization and to expand the territory the Rudaj Organization controlled.

Fifteen counts were submitted to the jury and the jury convicted each Petitioner of all but one of those counts.[1] Of relevance to this petition, Petitioners were charged in Count One of the indictment with racketeering in violation of 18 U.S.C. § 1962(c),[2] and in Count Thirteen of the indictment with

[1] While the final superseding indictment returned by the grand jury contained twenty-one counts, only fifteen were submitted to the jury. No Petitioner was charged with all fifteen counts. Rudaj was charged with thirteen counts and convicted of twelve; DiPietro and Colotti were both charged with ten counts and convicted of nine; and Dedaj and Ivezaj were both charged with nine counts and convicted of eight. All Petitioners were charged in Count Four of the indictment with assaulting Mikhail Hirakis in aid of racketeering, in violation of Title 18, United States Code, Sections 1959(a)(3) and 2, but the jury did not convict them on that count.

[2] Count One of the indictment, in relevant part, charges that the Rudaj Organization "was an organized criminal group . . . that operated in the Southern District of New York and elsewhere and constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the

using, carrying, and brandishing firearms during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c).[3] An indictment charging a violation of § 924(c) must state a predicate crime of violence giving rise to the § 924(c) charge, and the sole predicate crime of violence charged in Count Thirteen was the RICO offense charged in Count One of the indictment.

In order to secure a RICO conviction, the Government must prove beyond a reasonable doubt that the defendant engaged in a pattern of racketeering activity by committing two or more underlying racketeering acts. In this case, the indictment charged fourteen distinct racketeering acts,[4] and the jury

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objectives of the enterprise" and that Petitioners "were members and associates of the enterprise, the Rudaj Organization, and participated in the operation and management of the enterprise." The indictment further charges that Petitioners "unlawfully, willfully and knowingly conducted and participated, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity, as that term is defined in Title 18, United States Code, Sections 1961(1) and 1961(5)" through the commission of fourteen distinct racketeering acts.

[3] Count Thirteen, in relevant part, charges that the Petitioners "unlawfully, willfully and knowingly did use and carry firearms, which firearms were brandished, during and in relation to crimes of violence for which they may be prosecuted in a court of the United States, and did possess firearms in furtherance of such crimes, to wit, the racketeering charge contained in Count One of this Indictment."

[4] While the indictment charged fourteen racketeering acts, no Petitioner was charged with all fourteen acts. Rudaj was

convicted each Petitioner of either each of the racketeering acts in which he was named or all but one of those acts.[5]

Relevantly here, each Petitioner was charged with one or two acts of extortion in violation of N.Y. Penal Law §§ 155.05 and 155.40 ("state law extortion"). All Petitioners were charged with state law extortion based on an assault on patrons and managers of an illegal gambling club called Soccer Fever (the "Soccer Fever incident"), and Petitioners Rudaj, Dedaj, Ivezaj, and DiPietro (but not Petitioner Colotti) were charged with state law extortion based on an assault on Antonios Balampanis (the "Dimopoulos-Balampanis incident").

In connection with these two predicate acts of extortion, the jury was instructed that:

> In order for you to find the defendant you are considering guilty of extortion, as charged in [the Dimopoulos-Balampanis incident and the Soccer Fever Incident], the government must prove beyond a reasonable doubt each of the following elements:
>
> First, that the defendant obtained property from another person with that victim's consent; second, that the defendant knowingly and willfully induced

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charged with ten acts, Colotti and Dedaj were each charged with six acts, and Ivezaj and DiPietro were each charged with five acts.

[5] The jury found that Rudaj had committed nine of the ten racketeering acts with which he was charged and found that Colotti had committed five of the six racketeering acts with which he was charged. The other Petitioners were found to have committed all racketeering acts with which they were charged.

> such consent by instilling in the victim a fear that the defendant or a third person would cause physical injury to some person in the future, or cause damage to property.

The jury convicted each Petitioner of the Count One RICO charge. In a special verdict regarding the indictment's racketeering acts for Count One, the jury also found that all Petitioners had committed state law extortion in the Soccer Fever incident, and that four of the five Petitioners (all except for Colotti, who was not charged with this racketeering act) had committed state law extortion in the Dimopoulos-Balampanis incident.

The jury was also instructed that it could convict each Petitioner of violating § 924(c) if the Government proved that:

> First, the [Petitioner] committed the [Count One RICO offense].
>
> Second, that the [Petitioner] you are considering knowingly used or carried a firearm during and relation to the [Count One RICO offense], or possessed a firearm in furtherance of the [Count One RICO offense] on one of the following occasions. You must be in unanimous agreement about the occasion on which the defendant acted in this way in order to convict that defendant.
>
> Here are the various occasions:
>
> In June 2001, the [Petitioners] Rudaj, Dedaj, Ivezaj, . . . and DiPietro are charged with using or carrying a firearm in connection with the victims Fotios Dimopoulos and Antonios Balampanis.
>
> In August 2001 the [Petitioners] Rudaj, Colotti, Dedaj, Ivezaj . . . and DiPietro are charged with the

> same offense in connection with the Soccer Fever victims.

The jury was further instructed that, if it concluded that a Petitioner was guilty of violating § 924(c), it must also consider whether the Petitioner brandished a firearm during that violation. The jury was told that

> if you find that the [Petitioner] you are considering is guilty of the crime charged in Count 13, you must also determine if on that occasion the [Petitioner] brandished a firearm.
>
> To 'brandish' a firearm means to display all or part of it, or to otherwise make its presence known to another person in order to intimidate or advise that person that violence is imminently and immediately available, regardless of whether the firearm is directly visible. You must be in unanimous agreement as to the occasion on which the [Petitioner] brandished the firearm.

The jury convicted each Petitioner of violating § 924(c) and found that each Petitioner brandished a firearm during his violation.

With the exception of Petitioner DiPietro, each Petitioner was sentenced to 84 months of imprisonment on the § 924(c) conviction, to be served consecutively to their other terms of imprisonment.[6] DiPietro was sentenced to serve 300 months of

[6] A sentence of 84 months is the mandatory minimum sentence for a conviction for violating § 924(c) that involves brandishing a firearm. 18 U.S.C. § 924(c)(1)(A)(ii). The sentences imposed on the other counts of conviction were imposed to run concurrently. The Petitioners' sentences on those counts ranged in length from 180 to 240 months' imprisonment to reflect the

imprisonment on his § 924(c) conviction, to be served consecutively to a term of imprisonment imposed in another criminal case.[7] Petitioners then appealed their convictions and sentences. The United States Court of Appeals for the Second Circuit affirmed. United States v. Ivezaj, 568 F.3d 88 (2d Cir. 2009); United States v. Ivezaj, 336 F.Appx. 6 (2d Cir. 2009).

In 2011, Petitioners moved for writs of habeas corpus pursuant to 28 U.S.C. § 2255. This Court largely denied their petitions, except for an ineffective assistance of counsel claim by Petitioners Colotti, Dedaj, and Ivezaj, and declined to issue a certificate of appealability. Colotti v. United States, 2011 WL 6778475 (S.D.N.Y. Dec. 21, 2011). After an evidentiary hearing, the remaining ineffective assistance of counsel claim

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Court's evaluation of their role in the Rudaj Organization's crimes and other pertinent information.

[7] DiPietro had been previously convicted of violating § 924(c), so he was subject to a mandatory minimum sentence of 300 months on his second § 924(c) conviction. 18 U.S.C. § 924(c)(1)(C). That earlier § 924(c) conviction has been vacated, with the Government's consent, pursuant to Davis. As a result, the Government and DiPietro agree that even if the Government prevails in this petition, DiPietro must be resentenced here to a consecutive term of imprisonment of 84 months rather than 300 months. DiPietro is still serving an underlying sentence of 324 months' imprisonment imposed for that prior conviction. This Court's underlying sentence of DiPietro of 210 months' imprisonment was imposed to run concurrently with that sentence of 324 months.

was denied, as well. Id., 2012 WL 1122972 (S.D.N.Y. Apr. 4, 2012).

In 2016, Petitioners moved in the Second Circuit for permission to bring second or successive motions for writs of habeas corpus under § 2255. Petitioners reasoned that their § 924(c) convictions must be vacated because the § 924(c) convictions were predicated on the RICO convictions. The Petitioners contended that their RICO convictions no longer qualified as valid predicate "crime[s] of violence" because they only qualified as crimes of violence under the so-called "residual clause" of 18 U.S.C. § 924(c)(3)(B), and that the residual clause was unconstitutionally vague following the United States Supreme Court's decision in Johnson v. United States, 576 U.S. 591 (2015).

The Second Circuit granted the Government's motion to stay decision on the Petitioners' motions pending the Second Circuit's decisions in United States v. Hill, No. 14-3872 or United States v. Barrett, No. 14-2641. In 2018, the Second Circuit issued its decision in Barrett, holding that the residual clause was not unconstitutionally vague. United States v. Barrett, 903 F.3d 166, 184 (2d Cir. 2018). But in 2019, the Supreme Court held the residual clause unconstitutionally vague in United States v. Davis, 139 S.Ct. 2319 (2019).

Following Davis, the Second Circuit granted the Petitioners' motions to file second or successive § 2255 petitions challenging their § 924(c) convictions. On October 19, 2020, Petitioners moved to vacate their § 924(c) convictions in this Court. Their motions became fully submitted on January 29, 2021.

Discussion

Petitioners have moved for post-conviction relief under Title 28, United States Code, Section 2255. In order to secure relief via a motion under § 2255, a petitioner must show that there was "constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in complete miscarriage of justice." Graziano v. United States, 83 F.3d 587, 590 (2d Cir. 1996) (citation omitted). "[T]he burden of proof is on the party seeking relief." Galviz Zapata v. United States, 431 F.3d 395, 399 (2d Cir. 2005) (citation omitted). Section 2255 review is "narrowly limited in order to preserve the finality of criminal sentences and to effect the efficient allocation of judicial resources." United States v. Hoskins, 905 F.3d 97, 102 (2d Cir. 2018) (citation omitted).

Title 18, United States Code, Section 924(c)(1)(A) prohibits "during and in relation to any crime of violence . . .

us[ing] or carr[ying] . . . or . . . possess[ing] a firearm."

Title 18, United States Code, Section 924(c)(3) defines a "crime of violence" as "an offense that is a felony" and:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (B) 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.

The first subpart of § 924(c)(3) is commonly called the "elements clause," and the second subpart is commonly called the "residual clause." United States v. Davis, 139 S.Ct. 2319, 2324 (2019).[8]

The constitutionality of the residual clause of § 924(c)(3) has been extensively litigated. In 2015, the Supreme Court struck down a similar residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), reasoning that the residual clause was unconstitutionally vague. Johnson v. United States, 576 U.S. 591 (2015). Subsequently, the Supreme Court applied Johnson to strike down the similarly worded residual clause of § 924(c)(3) as unconstitutionally vague, as well. Davis, 139 S.Ct. at 2323-24.

[8] Some courts have also referred to the elements clause as the "force clause." See, e.g., United States v. Moore, 916 F.3d 231, 236 (2d Cir. 2019).

Since the residual clause has been invalidated, the predicate crime of violence required to sustain a conviction under § 924(c) must be a crime of violence as defined by the elements clause, § 924(c)(3)(A). In order to determine whether a potential predicate offense is a crime of violence under the elements clause, courts are instructed to use a categorical approach. United States v. Barrett, 937 F.3d 126, 128 (2d Cir. 2019). "Under the categorical approach, courts identify the minimum criminal conduct necessary for conviction under a particular statute. In so doing, they look only to the statutory definitions -- i.e., the elements -- of the offense, and not to the particular underlying facts." United States v. Thrower, 914 F.3d 770, 774 (2d Cir. 2019) (citation omitted). A state criminal offense may serve as a predicate crime of violence only if it categorically requires proof of the elements listed in the elements clause.

While the categorical approach is sufficient in many contexts, some statutes "have a more complicated (sometimes called 'divisible') structure, making the comparison of elements harder." Mathis v. United States, 136 S.Ct. 2243, 2249 (2016). Divisible statutes are defined as those that "list elements in

the alternative, and thereby define multiple crimes." Id.[9] To address so-called divisible statutes, the Supreme Court "approved the 'modified categorical approach.'" Id. Under the modified categorical approach, "a [district] court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of. The court can then compare that crime, as the categorical approach commands, with the relevant generic offense." Id. (citation omitted). This modified categorical approach is used only for divisible statutes: use of the modified categorical approach is inappropriate for statutes that merely list "alternative means of fulfilling" an element of the crime. Id. at 2253.

With this background in mind, this Opinion now addresses the four principal disputes between the parties. These disputes are whether a substantive RICO count may constitute a crime of violence, whether the modified categorical approach may be applied to New York's extortion statute, whether at least one of the RICO predicate acts of extortion at issue here constitutes a crime of violence, and whether a single predicate act that is a

[9] In Mathis, the Supreme Court provided, as an example of a divisible statute, one that "prohibited 'the lawful entry or the unlawful entry' of a premises with intent to steal, so as to create two different offenses, one more serious than the other." 136 S.Ct. at 2249.

crime of violence renders a substantive RICO count a crime of violence. Each of these questions is answered in the affirmative.

I. A Substantive RICO Charge May Constitute a Crime of Violence.

In this case, Petitioners' substantive RICO convictions on Count One, for violations of Title 18, United States Code, Section 1962(c), serve as the predicate for Petitioners' § 924(c) convictions. Section 1962(c) prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" from "conduct[ing] or participat[ing], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." A "racketeering activity" is defined as one of a number of enumerated state or federal crimes, 18 U.S.C. § 1961(1), and a "pattern of racketeering activity" is defined as "at least two acts of racketeering activity," 18 U.S.C. § 1961(5).

The Second Circuit has previously held, on Petitioners' direct appeal from their convictions at trial, that "[b]ecause racketeering offenses hinge on the predicate offenses comprising the pattern of racketeering activity," a court must "look to the predicate offenses to determine whether a crime of violence is charged" for the purpose of determining whether a RICO

conviction can serve as a predicate offense for a § 924(c) conviction. United States v. Ivezaj, 568 F.3d 88, 96 (2d Cir. 2009). Thus, "where the government proves (1) the commission of at least two acts of racketeering and (2) at least two of those acts qualify as crimes of violence under § 924(c), a § 1962 conviction serves as a predicate for a conviction under § 924(c)." Id. (citation omitted).

Petitioners argue that, after Davis, a conviction for a substantive violation of the RICO statute may not serve as a predicate crime of violence under the elements clause because RICO is not categorically a crime of violence. This argument is unavailing. In Ivezaj, the Second Circuit essentially applied a variant of the modified categorical approach to conclude that § 1962(c) could qualify as a predicate for a § 924(c) conviction. The Second Circuit held that, to determine whether a RICO violation could qualify as a predicate, courts should look through the elements of § 1962(c) itself to the underlying racketeering acts and determine whether those predicate racketeering acts qualify as crimes of violence. In the years since Ivezaj, the Supreme Court has reaffirmed the use of the modified categorical approach in certain circumstances. See, e.g., Mathis, 136 S.Ct. at 2249.

Davis does not provide a basis to deviate from the Ivezaj variant of the modified categorical approach here. After Davis, a predicate racketeering act to a RICO conviction must be a "crime of violence" pursuant to the elements clause of § 924(c)(3)(A) for that RICO conviction to sustain a § 924(c) conviction. Even after Davis, the "clear message" of Ivezaj is "that whether a substantive RICO offense is or is not a crime of violence is determined by the nature of the predicate offenses constituting the charged pattern of racketeering." United States v. Martinez, ___ F.3d ___, 2021 WL 968815, at *8 (2d Cir. Mar. 16, 2021).[10] See also United States v. Brown, 945 F.3d 72, 76 (2d Cir. 2019) (concluding that there is "no persuasive reason to deviate" from Ivezaj after Davis in the related context of calculating a Guidelines sentence for a RICO conspiracy conviction).

Since Petitioners' RICO convictions can properly serve as predicate crimes of violence for their § 924(c) convictions if a predicate racketeering act for their RICO conviction on Count

[10] In its recent decision in Martinez, the Second Circuit noted that the question of whether Ivezaj was "wrongly decided based on current Supreme Court case law" is "by no means clear or obvious." 2021 WL 968815, at *8 (citation omitted). But neither the Second Circuit nor the Supreme Court has overturned or abrogated Ivezaj, and this Court is therefore bound to follow it.

One is a crime of violence, the relevant question becomes whether any of the racketeering acts underlying Petitioners' RICO convictions qualify as crimes of violence.

The parties agree that most of the racketeering acts that the jury found proven at trial no longer qualify as "crime[s] of violence" in the wake of Davis, meaning that those predicate acts cannot support the Petitioners' § 924(c) convictions.[11] The Government contends, however, that two predicate acts -- which charged Petitioners with state law extortion for the Dimopoulos-Balampanis incident and the Soccer Fever incident -- can continue to support the conclusion that the RICO convictions are for crimes of violence, and by extension support the § 924(c) convictions.

II. New York's Extortion Statute is Analyzed under the Modified Categorical Approach.

The Petitioners argue that the special verdict on the racketeering acts finding state law extortion violations cannot support a § 924(c) conviction. The parties principally dispute in this portion of their argument whether New York's extortion statute may be analyzed under the modified categorical approach.

[11] Those racketeering acts were charged as federal extortion, in violation of 18 U.S.C. § 1951; federal extortionate debt collection, in violation of 18 U.S.C. § 894; and federal extortionate extension of credit, in violation of 18 U.S.C. § 892.

New York law defines extortion as a form of larceny that occurs when a person

> compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will:
>
> > (i) Cause physical injury to some person in the future; or
> >
> > (ii) Cause damage to property; or
> >
> > (iii) Engage in other conduct constituting a crime; or
> >
> > (iv) Accuse some person of a crime or cause criminal charges to be instituted against him; or
> >
> > (v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
> >
> > (vi) Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or
> >
> > (vii) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
> >
> > (viii) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

> (ix) Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

N.Y. Penal Law § 155.05(2)(e).

Under New York law, extortion committed by "instilling in the victim a fear that the actor or another person will (a) cause physical injury to some person in the future, or (b) cause damage to property, or (c) use or abuse his position as a public servant" is defined as grand larceny in the second degree. N.Y. Penal Law § 155.40(2). The other forms of extortion described in § 155.05(2)(e) are defined as grand larceny in the fourth degree. N.Y. Penal Law § 155.30(6).

The Government acknowledges that some of the means of committing extortion under § 155.05(2)(e) do not qualify as crimes of violence under the elements clause, but argues that the statute is divisible, allowing for the application of the modified categorical approach to determine the elements of the offense of conviction. If the modified categorical approach applies, and the relevant documents indicate that the Petitioners were convicted of extortion because they used or threatened the use of physical force to instill fear in their victims that they would cause physical injury or property

damage, the RICO convictions on Count One can serve as predicates for the § 924(c) convictions, because the New York extortion offense would qualify as a crime of violence.

The Petitioners contend that the New York extortion statute is not divisible under the Supreme Court's approach to divisibility in Mathis, requiring the application of the categorical approach to assess whether the New York extortion offenses qualify as a crime of violence. If the categorical approach applies, the New York extortion offenses necessarily cannot qualify as crimes of violence for the purposes of the elements clause, because New York extortion can be committed either by threats to use physical force or by other means that do not qualify as a crime of violence, such as accusing a person of a crime.

The New York extortion statute is divisible. Section 155.05(2)(e) describes multiple elements in the alternative, each separated by the conjunction "or". The Second Circuit has held that New York criminal statutes with this structure are divisible. See, e.g., United States v. Scott, ___ F.3d ___, 2021 WL 786632, at *1 n.1 (2d Cir. Mar 2, 2021) (en banc) (New York first-degree manslaughter statute, consisting of three alternative elements separated by "or", is divisible); United States v. Jones, 878 F.3d 10, 16-17 (2d Cir. 2017) (New York

first-degree robbery statute with a similar structure is divisible); Flores v. Holder, 779 F.3d 159, 166 (2d Cir. 2015) (New York first-degree sexual abuse statute with a similar structure is divisible). The same result is compelled here.

Moreover, the relationship between the definitions of the prohibited acts in § 155.05(2)(e) and the definitions of second- and fourth-degree grand larceny in §§ 155.30(6) and 155.40(2) confirms that § 155.05(2)(e) is divisible. Some of the defined acts in § 155.05(2)(e) create liability for second-degree grand larceny, while others create liability for fourth-degree grand larceny. If the defined acts in § 155.05(2)(e) were merely alternative means of fulfilling the elements of extortion, rather than elements of multiple distinct crimes, it would not be the case that some of the defined acts give rise to criminal liability under § 155.30(6), while others give rise to criminal liability under § 155.40(2). Accordingly, the New York extortion statute is divisible.

Since the New York extortion statute is divisible, it is appropriate to use the modified categorical approach and look to a limited set of documents to "determine what crime, with what elements, a defendant was convicted of." Mathis, 136 S.Ct. at 2249. Here, the Court will look to the indictment, the jury instructions, and the jury's verdict form, all of which are

documents that the Supreme Court or the Second Circuit has held appropriate for consideration in applying the modified categorical approach. See id.; Flores, 779 F.3d at 163 n.2.

III. Each Petitioner Committed at Least One RICO Predicate Act that Qualifies as a Crime of Violence.

In this case, viewing the indictment, jury instructions and the jury's verdict form holistically, the modified categorical approach indicates that the jury necessarily convicted each Petitioner of a crime of violence, that is, through finding that on at least one occasion he committed extortion through the use, attempted use, or threatened use of physical force. The indictment charged that each of the two predicate acts of state law extortion was a violation of New York Penal Law Sections 155.05 and 155.40 and was committed by the Petitioners wrongfully taking or attempting to take the property of another "by means of extortion, by instilling in [the victims] a fear that the defendants would damage property and cause physical injury to some person in the future."

The jury instructions on the two predicate acts charging state law extortion informed the jury that it could only convict a Petitioner if it found that the Petitioner had committed extortion by "instilling in the victim a fear that the defendant or a third person would cause physical injury to some person in the future, or cause damage to property." The instructions on

both racketeering acts, therefore, required the jury to determine whether the Government had proven that the Petitioner acted to instill fear of physical injury or property damage.

Count 13 of the indictment confirms that the jury found that at least one of these two predicate acts involved the use or threatened use of physical force. Count 13 charged Petitioners Rudaj, Dedaj, Ivezaj, and DiPietro with brandishing a firearm during the Dimopoulos-Balampanis incident, and charged Petitioners Rudaj, Dedaj, Ivezaj, Colotti, and DiPietro with brandishing a firearm during the Soccer Fever incident.[12] The jury was instructed that "brandishing" is defined as "display[ing]" a firearm "in order to intimidate or advise [a]

[12] The jury was charged that in order to find the Petitioner it was considering guilty of the crime charged in Count 13, the Government had to prove that the Petitioner knowingly used or carried a firearm during and in relation to the crime charged in Count 1, or possessed a firearm in furtherance of the crime charged in Count 1 on one of the occasions listed in the indictment. Those occasions included the Dimopoulos-Balampanis and Soccer Fever incidents, which were each identified in the jury charge. The jury was instructed that it had to be unanimous with respect to the occasion on which it believed the person used, carried or possessed the firearm. Only if the jury found a Petitioner guilty did it next have to determine whether the Government had proven that the Petitioner brandished a firearm on that specific occasion. The jury was again instructed that it had to be unanimous. There was no special verdict taken on the brandishing charge, so the jury was not required to find on which occasion the brandishing occurred, or whether the brandishing occurred during one or both of the charged acts of state law extortion.

person that violence is imminently and immediately available." The jury convicted each Petitioner on the brandishing charge, thereby finding unanimously that each Petitioner had brandished a firearm during at least one of the incidents of state law extortion.

Viewing the indictment, jury instructions and the jury's verdict as a whole, then, the documents indicate that Petitioners' RICO convictions were predicated on findings that they had, on at least one occasion, committed state law extortion by instilling fear through the threatened use of physical force against either the victim's person or against their property, indeed by instilling fear that that use of physical force was imminently and immediately available.[13]

[13] The Petitioners note that New York courts have held that a defendant can commit state law extortion by instilling "[f]ear of future economic harm" to property, rather than by instilling fear of physical force against property. See People v. Capparelli, 603 N.Y.S.2d 99, 105 (Sup. Ct. N.Y. Co. 1993) (citing People v. Diogardi, 8 N.Y.2d 260, 269 (1960)). Under the categorical approach, a state law extortion conviction premised on instilling fear of damage to property would not qualify as a crime of violence under the elements clause, because a hypothetical defendant could instill fear of future economic harm without "the use, attempted use, or threatened use of physical force against the . . . property of another." But because the extortion statute is divisible, the modified categorical approach applies. Applying the modified categorical approach, the brandishing finding on Count 13 allows for a conclusion that the jury found that any threat of damage to property involved a threatened use of physical force against the victims' property, rather than a threat of economic harm to

Therefore, Petitioners' RICO convictions on Count One are predicated on findings that they each committed at least one predicate act that itself qualifies as a crime of violence.

This conclusion also defeats Petitioners' contention that the § 924(c) convictions cannot stand because the jury instructions allowed the jury to find that a Petitioner committed the RICO predicate acts of state law extortion if it found either that the Petitioner committed a completed extortion, that the Petitioner attempted to commit extortion, or that the Petitioner conspired to commit extortion. As an initial matter, any distinction in the jury instructions between extortion and attempted extortion is irrelevant. The jury instructions on attempt also stated that the Government was required to prove that the petitioner "attempted to instill fear in the victim," and given the jury's verdict on the brandishing charge, the jury found that any such attempt involved the display of a firearm to intimidate or advise a person that violence is imminently and immediately available. Under the elements clause of § 924(c), a crime involving either the "attempted use [or] threatened use of physical force"

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their property. A threat to use physical force against property constitutes a crime of violence under the elements clause.

constitutes a crime of violence. 18 U.S.C. § 924(c)(3)(A). A completed instance of state law extortion is not necessary.

In any event, allowing the jury to find a Petitioner guilty of a predicate act of state law extortion if it unanimously found any one of three modes of liability -- that the Petitioner was guilty of conspiracy to extort, an attempt to extort, or the substantive act of extortion -- is not an impediment to upholding the Petitioners' § 924(c) conviction. This is true even though a conspiracy to commit an act of violence is not a crime of violence for purposes of § 924(c). See Barrett, 937 F.3d at 127-29. The jury was properly instructed on a substantive extortion theory of liability, and here "the jury would have necessarily found the defendants guilty on one of the properly instructed theories of liability." United States v. Ferguson, 676 F.3d 260, 277 (2d Cir. 2011); see also Vilar v. United States, 2020 WL 85505, at *3 (S.D.N.Y. Jan. 3, 2020) (concluding that a court need not "assume that the jury based its § 924(c) conviction on [an invalid] conspiracy predicate" where the jury was properly instructed on another, valid predicate). Because of its convictions of Petitioners on Count Thirteen for brandishing a firearm, the jury necessarily found them guilty of the substantive crime of extortion.

IV. A Single Predicate Act is Sufficient to Render the Substantive RICO Count a Crime of Violence.

For the reasons just explained, the jury found that each Petitioner committed at least one predicate act of state law extortion qualifying as a crime of violence. Because a general verdict was taken on the brandishing count, it is not possible to know whether the jury found that the Petitioners other than Colotti were each convicted of two distinct acts of extortion qualifying as crimes of violence or only one.[14] Relying on the Second Circuit's statement in Ivezaj that at least two underlying racketeering acts must qualify as crimes of violence under § 924(c) for a RICO conviction to serve as a valid § 924(c) predicate, Petitioners argue that a § 924(c) conviction premised on a RICO conviction based on only a single predicate crime of violence must be vacated.

This contention may be rejected. The Second Circuit wrote in Ivezaj that the substantive crime of RICO is a crime of violence only where at least two RICO predicates qualify as crimes of violence. 568 F.3d 88 at 96. But the Second Circuit recently held that its pronouncement in Ivezaj was dicta because Ivezaj was not a case in which the Second Circuit "had to decide

[14] Because Colotti was not charged with participating in the Dimopoulos-Balampanis incident, he was necessarily convicted of only one act of state law extortion qualifying as a crime of violence for his role in the Soccer Fever incident.

whether a RICO pattern in which the jury found . . . only one predicate that was a violent crime would be properly considered a crime of violence for purposes of § 924(c)." Martinez, 2021 WL 968815, at *6. Thus, it is an "open issue" in the Second Circuit "whether a RICO charge," such as Petitioners' RICO charge in Count One, "that is based on one violent predicate and one or more non-violent predicates" is a crime of violence. Id. Indeed, the Second Circuit noted in Martinez that Ivezaj "arguably supports a conclusion that a RICO offense predicated on a pattern of racketeering that included one crime of violence would be a crime of violence" because, under the elements clause, only one element of the offense need involve violence for the offense to qualify as a crime of violence under § 924(c). Id. Accordingly, Petitioners have not shown that they are entitled to relief under § 2255.

Conclusion

The October 19, 2020 petition for § 2255 relief is denied. But since the issues raised by Petitioners are those "that reasonable jurists could debate," Miller-El v. Cockrell, 537 U.S. 322, 336 (2003), a certificate of appealability is granted. The Clerk of Court is directed to enter judgment and close this case.

Dated: New York, New York
March 29, 2021

DENISE COTE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of September, two thousand twenty-three.

Nardino Colotti, Alex Rudaj, Prenka Ivezaj, Nikola Dedaj, Angelo Dipietro,

Petitioner - Appellants,

v.

United States of America,

Respondent - Appellee.

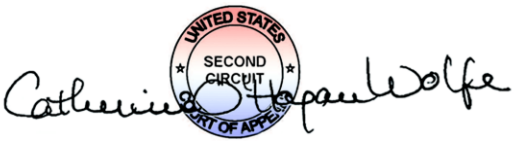
ORDER

Docket Nos: 21-932 (L)
21-937 (Con)
21-950 (Con)
21-992 (Con)
21-1548 (Con)

Appellant, Nardino Colotti, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



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United States of America,

Respondent - Appellee.

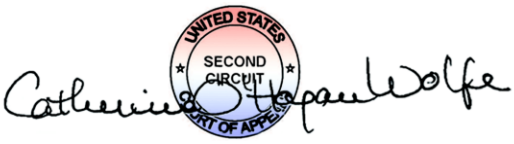
ORDER

Docket Nos: 21-932 (L)
21-937 (Con)
21-950 (Con)
21-992 (Con)
21-1548 (Con)

Appellant, Nikola Dedaj, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



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Petitioner - Appellants,

v.

United States of America,

Respondent - Appellee.

ORDER

Docket Nos: 21-932 (L)
21-937 (Con)
21-950 (Con)
21-992 (Con)
21-1548 (Con)

Appellant, Alex Rudaj, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk